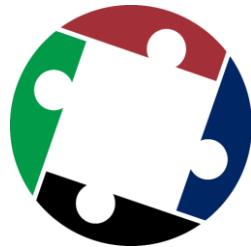


OMBUDSMAN TASMANIA
DECISION



Right to Information Act Review

Case Reference: R2202-049

Names of Parties: Alison Sandy and Department of Police, Fire and Emergency Management

Reasons for decision: s48(3)

Provisions considered: s30

Background

- 1 On 20 October 2020, Ms Alison Sandy, FOI Editor of Seven Network (Operations) Limited, made an application for assessed disclosure and paid the applicable fee under the *Right to Information Act 2009* (the Act) to the Department of Police, Fire and Emergency Management (the Department).
- 2 The request was as follows:

I am specifically seeking access to police interviews, including the video footage, audio and transcripts, with Martin Bryant in relation to the Port Arthur Massacre of 1996.

Excerpts of many of these interviews have already been released and next year is the 25th anniversary of the massacre in which our network will be running a tribute on the victims.

Public access is very much in the public interest and we're advised that victims of the families do not object to their release.

- 3 At a later date the scope of the request was expanded to include:

- a. *police interviews, including the video footage and transcripts;*
- b. *the audio recording between Martin Bryant and Terry McCarthy, Tasmania police's former lead negotiator; and*
- c. *the raw police interview with Martin Bryant.*

- 4 The information identified by the Department as being responsive to the request is as follows:

Category one – negotiations 28 April 1996

- a. AF 758-I-70, 71 and 72 – Three consecutive recordings
- b. AF 758-I-73 – Transcription of recordings

Category two – police interviews of the accused various dates

- c. AF 758-1-33 and 34 – Two video recordings of 29 April 1996
 - d. AF 758-1-61, 62 and 63 – Three video recordings of 4 July 1996
 - e. AF 758-1-54 and 53 – Two video recordings of 25 September 1996
- 5 On 2 November 2020, Sergeant Lee Taylor, a delegate under the Act, released the assessed disclosure decision. Sergeant Taylor found that all of the information was exempt from release pursuant to s30 (information relating to enforcement of the law) and s36 (personal information of person other than the applicant).
- 6 On 10 November 2020, the applicant requested internal review of the decision. The basis for the request was:

Much of the information I'm seeking has already been released publicly and therefore the argument provided as to why it can't be released is irrelevant.

I also note that this is an event in history which can't be ignored and has very much been in the public arena already. It has shaped decisions and changes in laws, most notably gun laws and so argument favouring disclosure outweigh arguments favouring non-disclosure.

Public access is very much in the public interest and we're advised that victims of the families [sic] do not object to their release. I note, the Department has not even contacted the victims to qualify the justification for its decision.

- 7 On 1 December 2020, the internal review decision was released by Inspector D A Wiss, a delegate under the Act. The review decision affirmed the original decision.
- 8 On 15 December 2020, Ms Sandy applied for external review. The grounds of review were:

I contended that the exemptions applied were done so incorrectly and that arguments favouring disclosure outweigh arguments favouring non-disclosure. Also, much of what I'm seeking access to has already been disclosed in part. Police refuses [sic] to comply with the Act in its arguments against disclosure.

Issues for Determination

- 9 The issue I must determine is whether any of the requested information is eligible for exemption under ss30, 36 or another section of the Act.

Relevant legislation

- I0 The relevant sections of the Act to be considered are ss30 and 36. A copy of both sections is attached.

Submissions

Applicant's submissions

- II The applicant did not provide submissions to this external review, except for her position as set out in the application for assessed disclosure, the request for internal review, and the application for external review (see Background above for those submissions).

Department's submissions

- I2 I had regard to the Department's statement of reasons for both the original and internal review decisions, and the further submissions it provided on 23 January 2024 in relation to this external review.
- I3 The 2 November 2020 decision of Sergeant Lee relevantly provided:

You have also indicated that your intention is to release the information publicly as part of a tribute to the victims of the Port Arthur Massacre.

Enquiries and searches of the Department of Police, Fire and Emergency Management (DPFEM) information systems has located information relevant to your application.

...

Exemptions

In accordance with the Act, I have applied the following exemptions to the assessed information:

- Section 30 being law enforcement information; and
- Section 36 being personal information.

Section 30(1)(d) Exemption

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

—

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

The nature of the police interview with the offender is such that, if disclosed would be reasonably likely to endanger the emotional or psychological safety of persons affected by the incident.

This interview outlines in graphic and intimate detail a personally disturbing account of the crimes committed. If the information is released in a public forum, nationally, it is reasonably likely to identify victims, eyewitnesses, family members and persons involved in the emergency management of the incident. Consequently, an exemption pursuant to Section 30(1)(d) of the Act has been applied to the information.

Exemptions applied pursuant to Section 30 of the Act are not subject to the public interest test at Schedule 1. Notwithstanding that, I am satisfied that disclosure of information that could endanger the emotional or psychological safety of persons affected by the incident, would be contrary to the public interest.

Section 36 Exemption

36. Personal information of person

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

The interview takes the form of personal information of and provided by people other than you, the applicant. It is information that is reasonably likely to identify the personal information of third parties which has been provided to Tasmania Police by the perpetrator of particularly serious crimes. Consequently, an exemption pursuant to Section 36(1) of the Act has been considered in relation to this information.

Ordinarily, this office would consult with a third party pursuant to section 36(2) of the Act if his or her personal information is sought as part of a right to information application. On this occasion, this would take the form of contacting the senior next of kin of the many deceased, the injured, the witnesses, first responders and the numerous others affected by this tragic event.

Given the circumstances, it would be impracticable for me to consult with the third parties given their information is also exempt pursuant to section 30(1)(d) of the Act and may cause a continuation or the onset of emotional trauma and or psychological harm.

I am satisfied that third parties affected by this incident would reasonably expect this information not to be released as it may cause those parties' serious concern.

Public Interest Test

Section 33 of the Act provides that the information described in sections 34 to 42 is only exempt information if it is considered, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.

In the decision K and the Department of Infrastructure, Energy and Resources, the Ombudsman specifically addressed the matter of public interest. In his decision, the public interest is distinguished from the interest of an individual or group of individuals, and from what is simply of interest to the public.

The public interest test requires consideration of the information in light of all relevant matters including those specified in Schedule 1 of the Act but is not restricted to just those matters. Matters specified in Schedule 2 of the Act are irrelevant.

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

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

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

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

I am satisfied that the disclosure of the police interview with Martin Bryant concerning the crimes committed at Port Arthur in a national, public forum would affect the collective health of the Tasmanian community and may irreparably damage those individuals directly involved in the incident.

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

I am satisfied that it would be contrary to the public interest to disclose information that has been provided by a person with known mental illnesses, concerning particularly serious crimes which has affected the Tasmanian community at large.

The affected third parties would reasonably expect Tasmania Police not to disclose this information as its release would likely affect the physical, emotional and or psychological safety and wellbeing of those parties.

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

I am satisfied that it would be contrary to the public interest to disclose third parties' personal information that is private and provided to Tasmania Police about particularly serious crimes.

There is a reasonable public expectation that this information would not be disclosed, and its release would be likely to harm the ability to obtain similar information in the future and therefore hinder the investigation process and decrease confidence in Tasmania Police.

(u) whether the information is wrong or inaccurate.

Some of the information provided in the interview by the offender is inaccurate and or untrue and is provided by a person with known mental illnesses.

I am satisfied that it would be contrary to the public interest to disclose the aforementioned information as it may be misinterpreted and taken out of context.

If this information were disclosed, it may cause serious concern to the community and continue the likelihood of emotional harm and trauma through the irrational beliefs of the offender.

Disclosure

In assessing the information for disclosure, I am exercising powers delegated to me by the Principal Officer of DPFEM under Section 21 and 24 of the Right to Information Act 2009.

Many persons have suffered, and continue to suffer, emotionally, psychologically and/or physically because of the incident at Port Arthur, Tasmania. I am satisfied that disclosure of the information would be reasonably likely to adversely affect those persons' health and welfare and hence, exemptions have been applied.

Justice W Cox, while passing sentence in the Supreme Court in 1996, commented:

"The learned Director of Public Prosecutions has mentioned the impact these crimes have had on individuals immediately affected by the loss of a family member or members, or who suffered physical injury in the course of this shooting rampage. He has also mentioned the effect it had on eye witnesses who experienced the nightmare as it ran its course, or who came upon the scene or otherwise had to cope with the injured and dead...there were many, many people

who were severely affected by their distressing experiences and who will continue to be affected for many years to come.”

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

On balance, therefore, and having considered the sentencing comments of Justice Cox, I am satisfied that it would be contrary to the public interest to disclose the exempt information. I therefore disclose no information relevant to your application.

- 14 The 1 December 2020 internal review decision of Inspector Wiss set out, verbatim:

In your Application for Assessed Disclosure dated 20 October 2020, you sought access to police interviews, including video footage, audio and transcripts with Martin Bryant in relation to the 1996 Port Arthur Massacre. You subsequently added a specific request to include the audio recording between Bryant and then police negotiator Terry McCarthy, and the raw police interview with Bryant.

I note your intention is to release the information publicly in 2021 as part of a tribute to the victims of the incident marks the 25th anniversary of the event. It comes as no surprise that DPFEM has substantial holdings of information relevant to your application.

In correspondence dated 2 November 2020, Sergeant L Taylor of the Right To Information Office denied access to the information stating the information was exempted as both law enforcement information (Section 30) and personal information (Section 36). In respect to law enforcement, Sergeant Taylor's contention was that the information would be reasonably likely to endanger the emotional or psychological safety of the people affected by the incident. Further that the graphic and intimate details of the interview is of such a nature, if disclosed, would be reasonably likely to endanger the emotional or psychological safety of persons affected by the incident.

It is also apparent that the release of the information is reasonably likely to identify victims, witnesses and first responders. Consequently, an exemption pursuant to Section 30(1)(d) was applied by the Sergeant. It is noted this Section is not subject to the public interest test at Schedule 1.

As you are aware, I am required to conduct a fresh assessment of the information subject to your requests. I believe that, due to the scale of the event, it is impractical and more than likely impossible,

to contact the injured and senior next of kin of deceased, witnesses and first responders. I note your contention that victims and families do not object to the release of the information, however with respect, I do not believe this is an accurate representation of the views of many of the people involved. Similarly, your position seems to be that DPFEM should contact the victims. I am confident such contact would further endanger the emotional and psychological safety of a significant number of persons affected by the incident.

The Sergeant further exempted the information under Section 36 in respect to personal information which would disclose information of a person other than the person making an application under Section 13. Furthermore, he contends the information is reasonably likely to identify the personal information of third parties which has been provided to Tasmania Police by the perpetrator of particularly serious crimes. Consequently, an exemption pursuant to Section 36(1) was applied.

The public interest test needs to be applied to the personal information exemption under section 36. Whilst there is a general requirement for information to be released to the public, I have concluded the information should be excluded based on (i) of Schedule 1 in that such disclosure would harm the public health or safety and, more so, section (m) where the interests of highly traumatised groups of individuals, in the form of victims and witnesses, would be harmed. Similarly, these parties would reasonably expect Tasmania Police not to disclose this information under (n) (which) would prejudice the ability to obtain similar information in the future.

I agree with you that this is an event in history that cannot be ignored. However, whilst many of the injured victims and the deceased victims family members remain alive, their emotional and psychological safety will be greatly endangered if the information is released.

Accordingly, having conducted a fresh assessment of the information subject to your initial requests I am satisfied that the exemptions applied by Sergeant Taylor was both appropriate and in accordance with the legislation.

15 The Department's 23 January 2024 further submissions relevantly set out:

In addition to the previous exemptions and with specific regard to the recordings of negotiations conducted with Martin Bryant, I submit that an additional exemption under section 30(1)(c) is also applicable to this information in full.

30. Information relating to enforcement of the law

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

(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;

To be exempt, the subject information must first relate to methods or procedures used by Police to prevent, detect and investigate breaches of the law. These terms lack specific definitions in the legislation and, therefore, are to be given their ordinary meanings. According to the Macquarie Dictionary, “Method” is described as a way of doing something, especially in accordance with a definite plan, while “procedure” is defined as a particular course of mode or action.

Police negotiators utilise nationally agreed, documented and trained methods and procedures to perform their function. The assessed information, which includes a transcript and audio recording of the negotiations carried out between trained negotiators and Martin Bryant, when examined in detail, does in fact identify nationally recognised methods and procedures with regards to Police negotiations...

The second matter to consider is whether the disclosure of these methods and procedures prejudice their effectiveness. The specific prejudice envisaged under section 30(1)(c) revolves around the possibility that individuals aiming to breach or elude the relevant law would gain insight into the methods or procedures employed by law enforcement bodies for prevention, detection, or investigation. This awareness could lead to the anticipation and employment of countermeasures to police actions, compromising the effectiveness of, in this instance, law enforcement negotiation methods and procedures.

Negotiation tactics and techniques, crucial for controlling and resolving incidents, are not readily available to the public and are heavily relied upon by law enforcement bodies to safely resolve incidents. If an individual(s) involved in an incident were privy to these tactics, they may be able to counteract negotiations, impeding the Police’s ability to safely resolve situations with minimal risk, thereby prejudicing the effectiveness of those methods and procedures in the future.

Therefore, in addition to the exemptions already applied, I submit that section 30(1)(c) also be applied to the assessed information, being the

negotiation tapes and transcripts. Exemptions applied pursuant to Section 30 of the Act are not subject to the public interest test at Schedule 1.

Analysis

Assessment of the information

- 16 The tragic events to which the information relates are well documented and it is therefore not necessary for me to revisit them in any detail. For the purposes of this decision I am assisted by the summary of offences set out in the Comments on Passing Sentence made by his Honour, then Chief Justice Cox of the Tasmanian Supreme Court. I consider this is sufficient to capture the gravity of the events that occurred in 1996 and for context about the subject information:¹

In consequence of the tragic events at Port Arthur on 28 and 29 April of this year and of his plea of guilty to the unprecedented list of crimes contained in the indictment before me, the prisoner stands for sentence in respect of:

**the murder of no less than thirty-five persons;*

**of twenty attempts to murder others;*

**of the infliction of grievous bodily harm on yet three more; and*

**of the infliction of wounds upon a further eight persons.*

In addition, he is to be sentenced for:

**four counts of aggravated assault;*

**one count of unlawfully setting fire to property, namely a motor vehicle which he seized at gun point from its rightful occupants, all of whom he murdered;*

**and for the arson of a building known as “Seascape”, the owners of which he had likewise murdered the previous day.*

- 17 Given the necessary security restrictions that are in place for the subject information, I made arrangements with Tasmania Police for inspection of the information on two separate occasions:
- a. on 4 October 2021 I was assisted by Sergeant Ben Harris, and
 - b. on 23 January 2024 I was assisted by Sergeant Jessica Walshe.
- 18 I had access to unredacted and unedited versions of the information identified in categories one and two. I listened to recordings, read the transcripts, and watched video footage for the purposes of making my assessment under the Act.

¹ Comments on Passing Sentence, Cox CJ, State of Tasmania v Martin Bryant, 22 November 1996.

Applicant's position

- 19 Before turning to my assessment of the information, I provide the following in response to the arguments advanced by the applicant.
- 20 Ms Sandy claimed that *much of the information has already been released publicly and therefore the argument provided as to why it can't be released is irrelevant*. While it is true that there is considerable information already in the public domain, I cannot accept that this assertion is accurate. Any previous release of the information in question was unauthorised and the assessment under the Act required to be undertaken is not materially altered by the 'leaking' of information.
- 21 I had full access to the information in both categories and apart from confirming that it contains considerable information which is not already in the public domain, I do not find it necessary nor appropriate to particularise the information further.
- 22 The information held by the Department was appropriately subject to review under the Act.
- 23 The applicant wrote:

Public access is very much in the public interest and we're advised that victims of the families [sic] do not object to their release. I note, the Department has not even contacted the victims to qualify the justification for its decision.
- 24 First, it is unclear who Ms Sandy contemplates by the phrase *victims of the families do not object*. I read this as being intended to mean *families of the victims*. It appears that the applicant limited her considerations to families of those people wounded or killed at Port Arthur. I consider that this does not adequately reflect the class of people directly affected by what occurred.
- 25 The gravity of the events was wide reaching in Tasmania. It was a mass casualty incident and I find that while consideration must, of course, include families of victims, there are other people not contemplated in the applicant's submissions. The class of people I find most directly affected, and must be considered, includes wounded victims, witnesses, first responders, emergency and after care service providers, and the families and loved ones of those various people.
- 26 Second, no particulars are provided by Ms Sandy to support the assertion that *we're advised that the families do not object*. I am unable to assess the accuracy of her statement, in the absence of particulars or any evidence supporting the truthfulness of it.
- 27 I do accept the Department's position that the *contention that victims and families do not object to the release of the information may not be an accurate representation of the views of many of the people involved*.

- 28 In any event, even if there was positive support or consensus favouring release of the information from among families of victims, or others in the class of affected persons, that would not displace the requirements under the Act. As with the ‘leaked’ information, this would not materially alter the assessment which must be made and reasoning which must be provided.
- 29 The Department has primarily relied upon s30 of the Act, which does not mandate consultation with third parties. I do not agree with the applicant that the Department’s decision is defective due to consultation not having occurred. The consultation provision in s36(2) also has a clear caveat that this is only required *if practicable*, but I am not required to initially assess whether this is applicable due to the Department’s primary reliance on s30.

Section 30 - Information relating to the enforcement of the law

- 30 Section s30(1) of the Act allows for exemption of *information relating to enforcement of law*. The public interest test, under s33, does not apply and so there is a high threshold for the application of this provision in order to comply with the pro-disclosure object of the Act in s3.
- 31 The Department initially relied on s30(1)(d), that the release of the information would be reasonably likely to *endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person*, in relation to both the category one and two information. In its further submissions, the Department argued that under s30(1)(c), the release of the information *would, or would be reasonable likely to, disclose the methods or procedures for ... dealing with matters arising out of breaches or evasions of the law, the disclosure of which would, or would be reasonable likely to, prejudice the effectiveness of those procedures*, also applied to category one.

Section 30(1)(d)

- 32 I am satisfied that s30(1)(d) is relevant to the information in both categories one and two. I must therefore determine whether disclosure of the information, in part or in full, would be reasonably likely to *endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person*.
- 33 The threshold, in this regard is a high one. Given its ordinary meaning *endanger* means *expose to danger; imperil*.²
- 34 I accept that there may be people who fall within the class of affected people identified above who would support the release of information. Such support, even by a majority of affected people, does not negate the assessment required under the Act. Consideration must be given to whether the disclosure of the information *would be reasonably likely to...endanger the life or physical, emotional or psychological safety of a person*.

² Definition of *endanger*, Macquarie Dictionary, available at www.macquariedictionary.com.au, accessed 21 November 2023.

- 35 Ordinarily the assessment under s30(1)(d) would include the identification of a particular person who may be endangered but the circumstances here do not so allow. I therefore turned my mind to who such persons might be.
- 36 I accept the Department's characterisation, in the internal review decision, that it is a person or *persons affected by the incident* who are to be considered.
- 37 Having regard to the far reaching effect of the events I am satisfied that there is, at a minimum, one person in the community, from the class identified above, who would be reasonably likely to have their life or physical, emotional or psychological safety endangered from release of the information. These are highly traumatic events and there is a clear risk to the psychological safety of those directly impacted.
- 38 I find therefore that, in the unusual circumstances that arise here as a consequence of the mass casualty incident, it is not necessary for me to identify a particular person in order to apply s30(1)(d).
- 39 Having assessed the information and taking into account the requirements of s30(1)(d) I am satisfied that disclosure of category one or category two would be reasonably likely to *endanger the life or physical, emotional or psychological safety of a person* within the class of affected people.
- 40 I acknowledge that not everyone in the identified class of people affected would be reasonably likely to be adversely affected to the extent required by s30(1)(d). I do find, however, that given the subject matter there is a high probability of harm to at least one person if the information was released.
- 41 For the avoidance of doubt, I did consider whether any part of the information might be released. On balance, I am not satisfied that is appropriate due to the consistent nature of its content.
- 42 My finding is that, pursuant to s30(1)(d), the information responsive to Ms Sandy's request is exempt and no information in category one or two can be disclosed.

Section 30(1)(c)

- 43 As I was satisfied that the information in category one is exempt pursuant to s30(1)(d), it is not necessary for me to determine whether alternative exemptions claimed by the Department are applicable. For completeness, however, I confirm that in assessing this application as a whole I agree that s30(1)(c) is relevant to category one and furthermore that I am satisfied that the s30(1)(c) exemption is met.
- 44 I accept the Department's position about the sensitivity and specialisation of negotiation tactics and techniques. Despite the passage of time, I find that disclosure of the information in category one *would, or would be reasonable likely to, disclose the methods or procedures for ... dealing with matters arising out of breaches or evasions of the law, the disclosure of which would, or would be*

reasonable likely to, prejudice the effectiveness of those procedures, as those procedures are still employed.

- 45 Category one would therefore also be exempt under s30(1)(c).

Section 36

- 46 The Department also proposed an alternative exemption under s36, however, due to the determinations I have made with respect to s30(1)(d) and (c), it is not necessary for me to have regard to the applicability of this exemption for either category of information.

Other matters

- 47 The objects of the Act and the s7 legally enforceable right to information support pro-disclosure of the maximum information held by public authorities in Tasmania. That right to information is not unfettered and the exemption provisions address the narrow circumstances when information is not to be disclosed. I did have regard to the submission made by Ms Sandy that:

this is an event in history which can't be ignored and has very much been in the public arena already. It has shaped decisions and changes in laws, most notably gun laws and so argument favouring disclosure outweigh arguments favouring non-disclosure.

- 48 I acknowledge that the media and members of the community have a continuing interest in the events that occurred and this may be heightened on each anniversary marking it. That broader community or public interest, in part relied on by Ms Sandy, cannot displace the statutory requirements when information is validly exempt under Division 1 of the Act. Parliament specifically decided not to make such exemptions subject to the public interest test, so I am not able to consider arguments for or against release based on the public interest.
- 49 Lastly, for the avoidance of doubt, this decision does not establish that police records, of the kind in category one and category two, attract automatic exemption. Such information will always be required to be assessed and any exemption justified in the particular circumstances, in accordance with the provisions of the Act.

Preliminary Conclusion

- 50 I affirm the decision of the Department. I determine that the information in:
- category one is exempt in full pursuant to s30(1)(c) and (d); and
 - category two is exempt in full pursuant to s30(1)(d).

Conclusion

- 51 I decided, consistent with s48(1)(b), to make the above preliminary decision available to the applicant and the Department to seek their input, prior to it being finalised.
- 52 The preliminary decision was released to the parties for this purpose on 15 February.
- 53 On 28 February 2024, both Ms Sandy and the Department confirmed no further input was to be provided.
- 54 As there were no matters requiring my further consideration in relation to this external review, my preliminary conclusion remains unchanged.
- 55 Accordingly, I determine, for the reasons set out above, that the Department's decision is affirmed and:
 - a. category one is exempt in full pursuant to s30(1)(c) and (d); and
 - b. category two is exempt in full pursuant to s30(1)(d).
- 56 I apologise to the parties for the inordinate delay in finalising this decision.

Dated: 28 February 2024

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

Richard Connock
OMBUDSMAN

Attachment I
Relevant legislation

30. Information relating to enforcement of the law

- (1) Information is exempt information if its disclosure under this Act would, or would be reasonably likely to –
- (a) prejudice –
 - (i) the investigation of a breach or possible breach of the law; or
 - (ii) the enforcement or proper administration of the law in a particular instance; or
 - (iii) the fair trial of a person; or
 - (iv) the impartial adjudication of a particular case; or
 - (b) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law; or
 - (c) disclose methods or procedures for preventing, detecting or investigating, or dealing with matters arising out of, breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
 - (d) endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person; or
 - (e) disclose information gathered, collated or created for intelligence, including but not limited to databases of criminal intelligence, forensic testing or anonymous information from the public; or
 - (f) hinder, delay or prejudice an investigation of a breach or possible breach of the law which is not yet complete.
- (2) Subsection (1) includes information that –
- (a) reveals that the scope of a law enforcement investigation has exceeded a limit imposed by law; or
 - (b) reveals the use of an illegal method or procedure for preventing, detecting or investigating, or dealing with a matter arising out of, a breach or evasion of the law; or
 - (c) contains a general outline of the structure of a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or
 - (d) is a report on the degree of success achieved in a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or
 - (e) is a report prepared in the course of a routine law enforcement inspection or investigation by a public authority with the function of enforcing and regulating compliance with a particular law other than the criminal law if the inspection or investigation is complete; or
 - (f) is a report on a law enforcement investigation, if the substance of the report has been disclosed to the person or the body that is the subject of the investigation –

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

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

36. Personal information of person

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

(2) If –

- (a) an application is made for information under this Act; and
- (b) the information was provided to a public authority or Minister by a third party; and
- (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party – the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –
- (d) notify that person that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information that has been applied for; and
- (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
- (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.

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

- (a) until 10 working days have elapsed after the date of notification of that person; or
- (b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or
- (c) until 20 working days after notification of an adverse decision under section 43; or
- (d) if during those 20 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or

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



Right to Information Act Review Case Reference: R2307-011

Names of Parties: Andrew Hunter and Department of Natural Resources and Environment Tasmania

Reasons for decision: s48(3)

Provisions considered: s26, s35

Background

- 1 Mr Andrew Hunter (the Applicant) is Campaigns Manager for Birdlife Australia, a bird conservation not-for-profit organisation.
- 2 On 14 April 2023, Mr Hunter made an application for assessed disclosure to the then Department of Primary Industries, Parks, Water and Environment, now the Department of Natural Resources and Environment Tasmania (the Department). He sought:

For the period between 8 April 2020 and the present day:

1. *a copy of all correspondence (including emails, letters, text messages, records of phone conversations, records of any meetings (including handwritten notes) and briefing notes) between Forestry Tasmania/Sustainable Timber Tasmania and the Department of Primary Industries, Parks, Water and Environment/Department of Natural Resources and Environment regarding conversion or exchange orders of future potential production forest land (FPPF land) to permanent timber production zone land (PTPZ land);*
2. *a copy of all correspondence (including emails, letters, text messages, records of phone conversations, records of any meetings (including handwritten notes) and briefing notes) between the Forest Practices Authority and the Department of Primary Industries, Parks, Water and Environment/Department of natural Resources and Environment regarding conversion or exchange orders of FPPF land to PTPZ land.*
3. *a copy of all correspondence (including emails, letters, text messages, records of phone conversations, records of any meetings (including handwritten notes) and briefing notes) between the Tasmanian Forest*

Product Association or the Australian Forest Products Association and the Department of Primary Industries, Parks, Water and Environment/Department of Natural Resources and Environment regarding conversion or exchange orders of FPPF to PTPZ land.

- 3 On 14 June 2023, a decision was issued to Mr Hunter by the Principal Officer and Secretary of the Department, Mr Jason Jacobi. Mr Jacobi determined:

NRE Tas has found 88 pages of information relevant to your request. I have assessed the information against Part 3 of the Act to determine whether any of it is exempt information. I have decided that all the information is exempt under section 26, Cabinet information.

- 4 On 12 July 2023, Mr Hunter sought external review.

Issues for Determination

- 5 I must determine whether information not released by the Department is eligible for exemption under s26 of the Act. I also consider it appropriate to assess whether s35 applies to exempt from disclosure information identified as responsive to Mr Hunter's application.
- 6 As s35 is contained in Division 2 of Part 3 of the Act, my assessment of this exemption is subject to the public interest test contained in s33. This means that should I determine that information is *prima facie* exempt from disclosure under s35, I am then required to determine whether it would be contrary to the public interest to release it, having regard to, at least, the matters contained in Schedule 1.

Relevant legislation

- 7 Copies of ss26 and 35 are Attachment A.
- 8 Copies of s33 and Schedule 1 are also attached.

Submissions

Department

- 9 The Department made no specific submissions apart from the reasoning of the decision, which included the following:

The information you have requested includes an exchange of letters between the Secretary of the Department of State Growth (responsible at that time for forestry policy) and the Chief Executive Officer of Sustainable Timber Tasmania. This exchange of letters was brought into existence for the purpose of providing advice through a submission to the Cabinet for consideration. This information has accordingly been exempted in full, pursuant to section 26(1)(b).

Section 26 is contained within Part 3, Division 1 of the Act, Exemptions not subject to the public interest test.

Applicant

10 When making his application for external review, Mr Hunter submitted:

The principal officer has not provided adequate reasons for their decision; and has not applied the test in section 26 correctly because the correspondence itself between the Secretary and Sustainable Timber Tasmania was not “information contained in a record proposed by a Minister for the purpose of being submitted to the Cabinet for consideration.”

Analysis

11 The Department identified the documents it considers exempt from disclosure under s26. They are:

- a Cabinet minute;
- a letter from the Secretary of the Department of State Growth to the Chief Executive Officer of Sustainable Timber Tasmania (STT); and
- a response from the Chief Executive Officer to the Department of State Growth.

12 The Department supplied the documents to my office in one single file of 88 pages. For ease of reference, I will use the page numbering from this file when referring to the relevant information.

Section 26 – Cabinet information

13 Under s26, information is exempt if it is contained in:

- (a) *the official record of a deliberation or decision of the Cabinet; or*
- (b) *a record proposed by a Minister for the purpose of being submitted to the Cabinet for consideration; or*
- (c) *a record that is a copy of, or a copy of part of, a record referred to in paragraph (a) or (b); or*
- (d) *a record, the disclosure of which would involve the disclosure of a deliberation or decision of the Cabinet, other than a record by which a decision of the Cabinet was officially published.*

14 This exemption is subject to some qualifications. The exemption does not apply if 10 years have elapsed since the information was first considered by Cabinet.

15 In addition, the exemption does not apply solely because the information was submitted, or proposed by a Minister to be submitted, to Cabinet for consideration. The information must have been brought into existence for the purpose of submitting it to the Cabinet for consideration.

- 16 The exemption also does not apply if the information is purely factual, unless its disclosure would disclose a deliberation or decision of Cabinet which has not been officially published.
- 17 The meaning of purely factual information was considered by the Commonwealth Administrative Appeals Tribunal (AAT) in *Re Waterford and the Treasurer of the Commonwealth of Australia*¹, where the AAT observed that the word 'purely' has the sense of 'simply' or 'merely'. The material must be 'factual' in fairly unambiguous terms, and not be inextricably bound up with a decision-maker's deliberative process.
- 18 The Department correctly pointed out that s26 is contained in Part 3, Division 1 of the Act and thus not subject to the public interest test. It is crucial that information only be considered exempt under provisions not subject to the public interest test where this is genuinely necessary. This is to ensure that the object of the Act can be fulfilled.

Cabinet Minute

- 19 This minute is on pages 1 - 12 on the Department's document. It is clear that this document was proposed by a Minister for the purpose of being submitted to Cabinet for consideration and it is not more than 10 years old.
- 20 The Department has not specifically explained its decision to exempt the entire minute. Having considered the document, however, I do not agree that it is exempt in full. This is because there is information contained within it which can be classified as purely factual and which would not, on its own, disclose a deliberation or decision of the Cabinet which has not been officially published.
- 21 Accordingly, I determine the following information should be released to Mr Hunter:
 - on pages 4 – 6, the information from 3. *Background* to paragraph 3.22 (inclusive);
 - on page 11, the signature block of the Minister.

- 22 I agree that the remainder of the document is exempt under s26 and should not be released.

Letter from Department of State Growth

- 23 This letter requests information from STT to enable departments to brief Ministers regarding options for future policy. The Department has applied s26(1)(b) to fully exempt the information.
- 24 I disagree with this approach. The letter does not constitute a record proposed by a Minister for the purpose of being submitted to the Cabinet for consideration. It is written by the Secretary of the Department of State Growth seeking information and advice from STT.

¹ [1984] AATA 518 at [14].

- 25 Notwithstanding this, I have considered whether the letter may fall within s26(1)(d) of the Act, in that the contents may disclose a deliberation or decision of the Cabinet, other than a record by which a decision of the Cabinet was officially published.
- 26 I have determined that on page 13, the fifth paragraph of this letter (including the three bullet points) would indeed disclose a deliberation or decision of the Cabinet, as set out in the Cabinet minute. The paragraph is therefore exempt information pursuant to s26(1)(d) of the Act.
- 27 Further, on page 14, the second bullet point in the first paragraph on that page would also disclose a deliberation or decision of the Cabinet as set out in the Cabinet minute and is similarly exempt information.
- 28 The Department has not discharged its onus pursuant to s47(4) of the Act to show that the remainder of the letter should not be disclosed, however, I am not persuaded that it is exempt information. It should be released to Mr Hunter, subject to my assessment under s35 of the Act.

Letter from Sustainable Timber Tasmania

- 29 This letter from STT provides information to the Department of State Growth and the Department has again applied s26(1)(b) to fully exempt the information.
- 30 As with the previous letter, I disagree with the Department's approach. This letter itself is not a record proposed by a Minister for the purpose of being submitted to the Cabinet for consideration. It is information supplied to a Department in response to a request from the Secretary of that Department.
- 31 It is, of course, possible that the information, or at least some of it, may eventually be submitted to the Cabinet by a Minister. However, before that were to occur, the information would need to be assessed for relevance by Department staff and perhaps incorporated into a record to be submitted to the Cabinet for consideration on some hypothetical future occasion. I do not accept that this constitutes a sufficiently close nexus between the Minister, the information, and the Cabinet, as at the time of the writing of the letter there was no Cabinet submission specifically envisaged.
- 32 I do note, however, that paragraph five on page 16 does contain information that, if released, 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. This paragraph is exempt under s26(1)(d).
- 33 I determine that the Department has not discharged its onus to show why the remainder of the information should not be disclosed. The rest of the letter therefore is not exempt, subject to my assessment under s35 of the Act.

Section 35 – Internal deliberative information

- 34 As set out above, I determined that parts of the letter from the Department of State Growth and all of the letter in reply from STT are not exempt information

under s26 of the Act. However, I am prepared to consider whether that information is exempt information under s35 of the Act.

35 For information to be exempt under this section, I must be satisfied that it consists of:

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

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

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

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.

36 The exemption does not apply to the following (relevantly):

- purely factual information;
- information that is older than 10 years.

37 I am satisfied that the exchange of letters between the Secretary of the Department of State Growth and the CEO of STT is a consultation between officers of public authorities. I am further satisfied the letter and attached information provided by STT is an opinion, advice or recommendation prepared by an officer of a public authority. I am further satisfied that both communications were prepared as part of the official business of the public authorities.

38 Accordingly, the information contained with those letters is *prima facie* exempt under s35(1)(a) and (b) of the Act.

39 As s35 is subject to the public interest test in s33, it is necessary to assess whether it would be contrary to the public interest to disclose the information, after taking into account all relevant matters, including those listed in Schedule 1.

Section 33 – Public interest test

40 The Department did not consider the matters in Schedule 1, instead finding the entirety of the information to be exempt under s26.

41 I consider matter (a) – the general need for government information to be accessible – is always relevant and weighs in favour of disclosure.

42 Matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant. Forestry policy in Tasmania is a matter of significant public interest, controversy, protest and debate. Information which reveals the thought processes and reasoning behind the development of that policy can only inform the community and contribute to that debate. This matter

weighs in favour of disclosure, particularly as much of the substance of the letter from STT was declared government policy and taken to the 2024 state election.²

- 43 Matter (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions – is relevant. Understanding the Department's priorities and the development of advice and recommendations may assist in understanding the decisions that governed the final policy development. This matter weighs in favour of disclosure.
- 44 Matter (f) – whether disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation – is relevant and weighs in favour of disclosure. Information regarding the facts and statistics considered by government before a decision could enable the community to ascertain whether all relevant matters had been considered prior to the adoption of a particular policy position.
- 45 Matter (k) - whether the disclosure would promote or harm the economic development of the State, and matter (l) – whether the disclosure would promote or harm the environment and or ecology of the State – are both relevant, given the subject of the information is the forestry industry and associated policy considerations, and weigh in favour of disclosure.
- 46 Notwithstanding the above, I recognise the inherent reasons for the inclusion of s35 in the Act. It allows for the early ‘thinking processes’ of public authorities to be explored and options tested internally prior to reaching a final policy position. The effectiveness of these thinking processes would be undermined if initial ideas for policy direction, even if later abandoned, were routinely disclosed. Options may have been considered based upon forecasts which later proved erroneous. However, this must always be balanced against the objects of the Act to promote transparency regarding government operations, particularly where much of the information is objectively factual.
- 47 I recognise too that circumstances may change with the passage of time and information that may have been considered exempt at the time of the Department's determination can enter the public domain in other ways. In this case, much information from STT's letter, including the number of parcels and total area of land, is reflected in a media release by the Tasmanian Liberal Party, with contributions from Premier Rockliff and Minister Ellis, on 29 February 2024.³ Also, *yet to be published* predictions referred to on page 18 are now in the public domain.⁴

² Media release dated 29 February 2024, *Keeping Tasmania’s forestry industry strong*, available at <https://tas.liberal.org.au/news/2024/02/29/keeping-tasmanias-forestry-industry-strong>, accessed on 6 August 2024.

³ See Note 2.

⁴ Gibson, J., *Tasmanian timber industry wants greater access to native forests. Conservationists are resisting that push* (27 May 2023), ABC News Online, www.abc.net.au/news/2023-05-27/tasmanian-timber-industry-greater-access-native-forests/102386256, accessed on 6 August 2024.

- 48 The assessment of the public interest test involves a consideration of competing priorities. On balance, I do not believe that the Department has discharged its onus under s47(4) to demonstrate that the release of much of the information in the relevant letters is contrary to the public interest.
- 49 I accept, however, that the release of information which identifies the specific land parcels which were recommended for conversion from future potential production forest land (FPPF land) to permanent timber production zone land (PTPZ land) would be contrary to the public interest. This is because this is not a finalised position of the government but part of an internal deliberative process which is ongoing and relates to changes which are not certain to occur prior to further cabinet deliberations.
- 50 Accordingly, I have determined the following information is exempt under s35(1)(a) of the Act:
- on page 17, the lot numbers in the first column, the area in hectares in the third column (but not the total area) and the comments in the fourth column of the table;
 - on page 23, the second paragraph;
 - on page 24, paragraphs one and two;
 - on pages 25 – 82, for each identified lot, the lot number, any reference to size (ha), location, STT forest block, STT supply area and map; and
 - on pages 83 – 88, the rankings in the fourth column of the table.
- 51 All other information, which reveals the type of flora and fauna on the relevant land parcels, the reasons they are proposed for inclusion and the assessment process, is not exempt and should be released to Mr Hunter.

Preliminary Conclusion

- 52 For the reasons set out above, I determine the following:
- exemptions claimed pursuant to s26 are varied; and
 - information is exempt under s35.

Response to the Preliminary Conclusion

- 53 As the above preliminary decision was adverse to the Department, it was made available to it on 7 November 2024 to seek its input prior to finalisation, in accordance with s48(1)(a) of the Act.
- 54 On 26 November 2024, Mr Jason Jacobi, Secretary of the Department, provided a response. He set out that he had *no concerns with [my] decision*, but sought clarification of the decision and raised some *apparent inconsistencies in the way information has been treated throughout the preliminary decision*.

- 55 The information of concern related to the treatment of the lot numbers, area in hectares, location, Sustainable Timber Tasmania forest block reference, STT supply area and maps on pages 17 and 25-88 in the information.
- 56 The Department set out its view that *when taken together, the applicant will be able to cross match the details released throughout the information package and decipher which specific lots are being considered for conversion to production*. The Department also requested additional detail regarding the reasoning for information found to be exempt, to aid its future decision making.
- 57 I have carefully reviewed my draft decision and accept that, in some instances, the Department is correct and there are inconsistencies, some of which may lead to relevant lots remaining identifiable. In order to rectify this issue, I have altered my list of information which is exempt under s35(1)(a) in paragraph 50 above and expanded upon my reasoning to ensure this is clear.
- 58 I consider that the appropriate balance has been struck in my assessment of the public interest test, with the provision of the maximum amount of relevant information about this proposal without actually revealing the specific land parcels which are in the early stages of being recommended for conversion to production forest.

Conclusion

- 59 Accordingly, for the reasons given above, I determine that:
 - exemptions claimed pursuant to s26 are varied; and
 - information is exempt under s35.
- 60 I apologise to the parties for the delay in finalising this matter.

Dated: 28 November 2024



Richard Connock
OMBUDSMAN

Attachment A

Relevant Legislation

Section 26 – Cabinet information

- (1) Information is exempt information if it is contained in –
 - (a) the official record of a deliberation or decision of the Cabinet; or
 - (b) a record proposed by a Minister for the purpose of being submitted to the Cabinet for consideration; or
 - (c) a record that is a 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 (1) ceases to apply after the end of the period of 10 years commencing on the date on which the information referred to in that subsection was first considered by the Cabinet at a meeting of the Cabinet.
- (3) Subsection (1) does not include information solely because it –
 - (a) was submitted to the Cabinet for consideration; or
 - (b) is proposed by a Minister to be submitted to the Cabinet for consideration –
if the information was not brought into existence for submission to the Cabinet for consideration.
- (4) Subsection (1) does not include purely factual information unless its disclosure would disclose a deliberation or decision of the Cabinet which has not been officially published.
- (5) Nothing in this section prevents the Premier from voluntarily disclosing information that is otherwise exempt information.
- (6) In this section –
the Cabinet includes a committee of the Cabinet.

Section 35 – Internal deliberative information

- (1) Information is exempt information if it consists of –
 - (a) an opinion, advice or recommendation prepared by an officer of a public authority; or
 - (b) a record of consultations or deliberations between officers of public authorities; or
 - (c) a record of consultations or deliberations between officers of public authorities and Ministers –
in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.
- (2) Subsection (1) does not include purely factual information.
- (3) Subsection (1) does not include –
 - (a) a final decision, order or ruling given in the exercise of an adjudicative function; or
 - (b) a reason which explains such a decision, order or ruling.
- (4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 33 – Public interest test

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

Schedule 1 – Matters Relevant to Assessment of Public Interest

1. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:
 - (a) the general public need for government information to be accessible;
 - (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
 - (c) whether the disclosure would inform a person about the reasons for a decision;
 - (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
 - (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
 - (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
 - (g) whether the disclosure would enhance scrutiny of government administrative processes;
 - (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
 - (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
 - (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
 - (k) whether the disclosure would promote or harm the economic development of the State;
 - (l) whether the disclosure would promote or harm the environment and or ecology of the State;
 - (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
 - (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
 - (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
 - (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
 - (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA
DECISION



Right to Information Act Review

Case Reference R2202-088 O2102-123

Names of Parties: Bob Burton and the Premier of Tasmania

Reasons for decision: s48(3)

Provisions considered: s35, s36

Background

- 1 On 15 December 2020, the Commonwealth and Tasmanian Governments signed a Commonwealth-Tasmania Bilateral Energy and Emissions Reduction Agreement Memorandum of Understanding (the MOU). A joint media release from then Prime Minister Scott Morrison, then Tasmanian Premier Peter Gutwein and then Tasmanian Minister for Energy Guy Barnett set out that the MOU aimed to *deliver Battery of the Nation and Marinus Link projects to better connect Tasmania with mainland Australia and the NEM [National Electricity Market]*¹.
- 2 On 18 December 2020, Mr Bob Burton applied in his capacity as a journalist under the *Right to Information Act 2009* (the Act) to the Tasmanian Premier for:
 - *the MOU/State Energy and Emissions Reduction Deal; and*
 - *DPAC [Department of Premier and Cabinet] records/Communication Plan relating to the announcement of the MOU/State Energy and Emissions Reduction Deal.*
- 3 The usual fee was waived.
- 4 On 29 January 2021, Ms Bridget Hutton, a delegate under the Act for the Premier, issued the original decision to the applicant.
- 5 Ms Hutton advised, in relation to the first part of Mr Burton's request, that the Commonwealth-Tasmania Bilateral Energy and Emissions Reduction Agreement was publicly available and attached an electronic link to the document.
- 6 In relation to second part of Mr Burton's request, Ms Hutton advised that six documents were located and assessed as being relevant. She provided a

¹ Media release dated 15 December 2020, *Energy and emissions reduction deal with Tasmania*, available at www.minister.industry.gov.au/ministers/taylor/media-releases/energy-and-emissions-reduction-deal-tasmania, accessed 5 April 2024.

Schedule of Documents with the decision. In respect of these documents, Ms Hutton determined as follows:

- 4 documents are exempt in full from disclosure as they are *internal deliberative information* (section 35 of the Act).
 - 2 documents are released in full, with only *irrelevant/out of scope information, or alternatively, personal information* (section 36 of the Act), specifically certain personal contract details, redacted.
- 7 On 22 February 2021, Mr Burton applied to the Ombudsman for an external review of the original decision. The application was accepted under s45(1)(ab) of the Act as the application was made to the Premier and the original decision was made by his delegate, with the review request being received within 20 working days of that decision.

Issues for Determination

- 8 I must determine whether the relevant information is eligible for exemption under ss35 or 36 or any other relevant section of the Act.
- 9 As these sections are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33, including consideration of the matters in Schedule 1. This means that, should I determine that the information is *prima facie* exempt under this section, I must then determine whether it is contrary to the public interest to disclose it.

Relevant legislation

- 10 I attach copies of ss35 and 36 to this decision at Attachment 1.
- 11 Copies of s33 and Schedule 1 of the Act are also attached.

Submissions

Applicant

- 12 Mr Burton's submissions detail his unsuccessful attempts to access the MOU from the Premier's office in requests commencing on 15 December 2020. After then unsuccessfully pursuing the information through Commonwealth sources, he submitted his request for information under the Act to the Premier on 18 December 2020.
- 13 Unbeknownst to Mr Burton, the MOU was released online on 24 December 2020 and he advanced that he only became aware of this when he received Ms Hutton's decision of 29 January 2021.

14 Mr Burton submitted firstly, as to why he sought a review of the exemptions claimed by the Premier's delegate under s35 and referencing past external review decisions under the Act, that:

- *The decision maker needs to provide specific reasons for the exemption of information in the specific documents (see White, par 5 and par 17);*
- *s35 does not exempt purely factual information;*

In response to my request I have been provided with no detailed evidence to indicate that any attempt has been made to separate the factual information from any 'deliberative' content; (see White, par 47).

For example, the documents could have been marked up to illustrate the different categories of information to prove the point;

- *the claim that disclosure of internal information would preclude future frank discussion has previously been dealt with by the Ombudsman (ie Wisby & Crawford, pars 48-62; Sharma pars 53-54);*
- *the disclosure of the names of officials in the records can be in the public interest unless there is evidence to the contrary (eg White, pars 66-70);*
- *agencies haven't properly assessed the relevant elements of the public interest test (eg Sharma pars 48-55);*
- *in some instances government agencies have claimed information is exempt under section 35 as it is deliberative but has been found to be otherwise (eg Webb, par 17).*

15 He submitted secondly that:

...the DPAC decision maker failed to properly assess the content of each document and provide specific arguments as to the grounds for exemption of each of the elements of the documents.

Instead the decision maker relied on a sweeping claim that the entirety of all four documents is exempt under section 35 "as they are internal deliberative information".

She further argued the "factual and deliberative information is inextricably linked and it would not be practicable to differentiate pure 'factual' information from that which is 'deliberative'.

As a result, not a single part of any of the four documents has been released.

I question whether the material in the four documents claimed to be exempt is actually 'deliberative'. The records relate not to the

decision of the contents of the MOU, as that decision had already been made and the two governments had decided to sign it. The records relate solely to government officials canvassing what and how to communicate with the media and, through them, to the public.

Even if sections of the documents are deemed to be ‘deliberative’, they are only exempt if the material fails the public interest test.

- 16 Mr Burton submitted thirdly, regarding the Premier’s delegate’s assessment of the elements of the public interest test in Schedule I of the Act, that:

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

Clearly the MOU and the desire of the state and commonwealth government to communicate it are matters of public interest. The records sought are likely to shed light on what the governments wanted to emphasise in their announcement. The records may also illustrate points they were keen to downplay and which points weren’t flagged at all.

For example, a document referred to as 1 “about draft MOU Questions and Answers for Ministers” seems to be a reference to a document setting out a list of possible questions which could be expected from journalists and suggested answers. Clearly this relates to information the government considered they were willing to publicly disclose if asked.

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

The impetus for filing this RTI was not being provided with a copy of the actual MOU which was being publicly announced at a signing ceremony. My request for records relating to the communications plan was, in part, to ascertain whether this failure to provide a copy when requested was a spur of the moment decision by one official or part of a more considered plan.

Even if failure to provide a copy of the MOU wasn’t pre-planned, the records may help explain some of the other elements of the event such as who was invited. For example, Hobart-based members of the Tasmanian Press Gallery, of which I am one, were not given prior notification of the event. These records may provide some insight into why only media outlets based in the north of the state were alerted to the signing ceremony, even though it was one of the rare occasions when the Prime Minister visited the state.

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

The records relating to the communications plan could shed light on how the state and commonwealth governments were hoping to ‘spin’ the

announcement of the MOU. The records clearly provide relevant contextual information on what was publicly announced.

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

This request has been made by a journalist working for an established Tasmania media outlet seeking to explain Tasmania's energy policy to the public. Disclosure of the records will assist readers in better understanding the Tasmanian Government's position on the MOU and how the government uses its communications staff.

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

The records sought go to how government officials seeks [sic] to communicate decisions to the media and the public. Disclosure would shed light on the factors government officials take into account when making announcements and how they seek to maximise favourable publicity.

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

It is important to acknowledge the Marinus link alone is a \$3.5 billion project and a better understanding of the proposal is in the public interest.

The state and the federal government seek to emphasise the benefits of the Marinus Link and related projects. There are also substantial costs and potential risks which deserve public scrutiny before major financial commitments are made. If projects requiring major financial commitments experience major cost overruns this has the potential to have significant long-term impact on the Tasmanian economy.

I submit disclosure of the documents is consistent with enabling Tasmanians being able to participate in a balanced debate on the merits or otherwise of the MOU and the respective projects it caters for.

17 Mr Burton submitted fourthly, that:

...the narrow range of factors considered unreasonably skewed the DPAC decision maker's assessment of the public interest in favour of secrecy.

In particular, the decision maker failed to consider the following elements which I believe favour disclosure.

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

Clearly, disclosure of records relating to the communications plan for the MOU announcement would shed light on how government officials deal with the public, including journalists.

I find the exclusion of this element from consideration inexplicable.

...

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

I submit the records sought go to how government officials seek to deal with journalists. Disclosure is likely to shed light on what government officials seek to include in their communications plans, potentially how they seek to handle issues they are worried about and whether they favoured some journalists or media outlets over others.

- 18 Mr Burton submitted fifthly and, in relation to s36 concerns, that there is inappropriate exclusion of the names in released documents. He seeks the names at the head and foot of emails but is not interested in phone numbers or email addresses. He specifically requested the disclosure of the name of the Acting Production Manager identified on the “Running Sheet” (Document 6).

The Premier's delegate

- 19 The Premier's delegate did not make submissions to the external review, beyond the reasoning of her decision from which I set out excerpts below:

I have determined that Items 1-3 and item 5 in the attached schedule are within scope of your Right to Information request, but are exempt under section 35 of the Act as those draft documents are opinion, advice or recommendations prepared by officers in a public authority and Ministerial offices in the course of internal consultations and deliberations relating to the official business of the public authority and Ministers, and are not purely factual.

While it may be considered that some of the information contained in the draft documents is factual, the process by which the information is prepared and presented is consultative and deliberative. Material of a factual nature] is not information of a pure factual nature if that material would reveal the consultation and deliberation that has taken place in the course of the deliberative process involved in the functions of a public authority. The factual and deliberative information is inextricably linked and it would not be practicable to differentiate purely ‘factual’ information from that which is ‘deliberative’.

- 20 Ms Hutton applied Schedule 1, factor (a) – the general public need for government information to be accessible – to weigh in favour of disclosure, saying:

The object of the Act is to disclose information where possible and in particular to give members of the public the right to obtain information about the operations of Government and increase the accountability of

the executive to the people of Tasmania. As a general rule, disclosure is to be favoured over non-disclosure unless there are valid reasons for deciding that disclosure would be contrary to the public interest.

There is likely to be public interest in the Commonwealth-Tasmania Bilateral Energy and Emissions Reduction Agreement (the Agreement) particularly in its component parts, the Marinus Link and Battery of the Nation projects. This is evidenced by the number of media articles and media comment relating to the announcement of the Agreement and subsequently, [sic]

I consider that the release of the exempted information would promote the general object of the Act.

- 21 Ms Hutton considered that factors (b), (c), (d), (f), (g), (k) and (l) were of neutral weight because;

Disclosure of the exempted information would not contribute to the debate on a matter of public interest; inform a person about the reasons for a decision; provide contextual information to aid in the understanding of government decisions; or enhance the scrutiny of government decision-making or administrative processes. I also do not consider that the disclosure would promote or harm the economic development of the State, or that of the environment and or the ecology of the State.

- 22 Ms Hutton considered that factor (n) weighed against disclosure of the information as follows:

In terms of the documents listed in items 1-3 and item 5 that I have determined are exempt from release under section 35 of the Act, I have determined that releasing this information would prohibit the frank exchange of views and consultative and deliberative processes between officers of public authorities and Ministerial staff when deliberating on official business.

While I acknowledge the likely public interest in the Agreement and its component projects, Marinus Link and Battery of the Nation, I do not consider that the exempted information would contribute to the public interest or discussion in this matter or further the public interest in any material way. In my view, the overriding public interest consideration is that there is a need to ensure a frank exchange of views between officers when consulting and deliberating on official business. The disclosure of consultations or deliberations between officers would likely prevent such exchanges from occurring, with a consequent detrimental impact on good decision-making. Such documents also provide the basis for corporate knowledge management and information sharing. I note that the final version of the joint media release was publicly released on 15 December 2020.

- 23 In relation to s36, personal information of a person, the delegate redacted names and contact details of staff in the Office of the Prime Minister,

determining that the information is irrelevant and/or out of scope of Mr Burton's request, finding that:

In making this decision, I have considered the matters relevant to the assessment of the public interest provided under Schedule 1 of the Act and have consulted with the Department of Prime Minister and Cabinet. I have determined that there are no matters relevant to assessment of public interest that weigh positively in favour of release of the information, other than the general public need for government information to be accessible (Schedule 1(1)(a)). On balance, I consider that disclosing these personal details of individuals who are third parties to your request would harm the interests of those individuals (Schedule 1(1)(m)) and it is contrary to the public interest to release that information. I note that the redacted information is not material to your request.

Analysis

- 24 The Schedule lists six 'documents', which are actually six groups of documents. Each document tranche contains, respectively: 69 pages, 37 pages, 8 pages, 19 pages, 22 pages and 1 page.
- 25 Some of the information is repeated in the form of email trails. My assessment refers to the first email in a sequence but the assessment also applies to the repeated emails and I will not restate my reasoning in relation to duplicate documents.

Section 35 - Internal deliberative information

- 26 The Premier's delegate relies on s35 to exempt the information in Documents 1, 2, 3 and 5. For information to be exempt under this section, I must first be satisfied that it consists of an opinion, advice or recommendations prepared by an officer of a public authority or is a record of consultations or deliberations between officers of a public authority or Ministers.
- 27 If I find that this is the case, I must then determine whether the information was prepared in the course of, or for the purpose of, the deliberative processes related to the official business of the Premier or a relevant public authority.
- 28 According to the Act, the exemption does not apply to the following:
 - purely factual information;²
 - a final decision, order or ruling given in the exercise of an adjudicative function;³ or
 - information that is older than 10 years.⁴

² Section 35(2)

³ Section 35(3)

⁴ Section 35(4)

- 29 The concept of 'purely factual information' in s35(2), was considered in *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*.⁵ The Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' in this context has the sense of 'simply' or 'merely' and that the material must be 'factual' in fairly unambiguous terms, and not bound up with a decision-maker's deliberative process. In other words, the 'purely factual information' must be capable of standing alone.
- 30 The meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has also been considered by the AAT. In *Re Waterford and Department of Treasury (No 2)* it adopted the view that these are an agency's 'thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.⁶
- 31 The Premier's delegate relies on s35(1)(a), (b) and (c) and considers that the *factual and deliberative information is inextricably linked* to support a conclusion that there is no purely factual information which could be released in the relevant documents.
- 32 It appears that the Premier's delegate took the approach of considering the material holistically, rather than taking a line-by-line assessment process, as entire documents were claimed to be exempt. That there would be no purely factual information or information which was not contrary to the public interest to release in 136 pages would be rare and I urge the Premier's delegate to consider the information more closely in future. I have clearly expressed my view in previous decisions that a line-by-line approach is essential to comply with the objects of the Act and release *the maximum amount of official information*⁷, though I acknowledge that these decisions were released after Ms Hutton's decision in this matter.

Document 1

- 33 Document 1 comprises emails dated 13 and 14 December 2020 between Ministerial advisers and Tasmanian Government Communications Office officers about draft MOU Questions and Answers for Ministers. The information includes emails back and forth between officers and advisers and lengthy drafts of questions and answers on the topic.
- 34 I assess the contents of the emails separately from email headings, salutations and subject lines. I determine the email headings, salutations and subject lines to be purely factual in character and consequently cannot be exempt under s35.

⁵ *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at [14]

⁶ *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588

⁷ See Alexandra Humphries and Department of Health (29 June 2023), *Q and Northern Midlands Council* (27 September 2023), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

- 35 While there is some factual information within the questions and answers, I am of the view that, in this instance, the factual information cannot stand on its own. Any factual information is inextricable from the remainder of the content and cannot be considered ‘purely’ factual but integral to the questions and answers draft being developed for public events and/or publication.
- 36 Apart from the purely factual matter contained in the email headings, salutations and subject matter lines, in my view, this information clearly comprises internal deliberative information as described in s35(1)(a) and (c) as it is opinion, advice or recommendations prepared by an officer of a public authority, or a record of consultations or deliberations between officers of public authorities and Ministers. I am satisfied that all of this information is *prima facie* exempt.
- 37 Mr Burton raised concerns that, as much of this information does not relate to the development of the MOU, it could not be deliberative in nature. I do not agree, as deliberations regarding a communications strategy can also be part of a government ‘thinking process’ and eligible for exemption under s35. Whether it is justifiable that the information should actually be withheld, however, will be further considered in my later assessment of the public interest test.

Document 2

- 38 Document 2 comprises a series of emails dated 14 December 2020 between Ministerial advisers and the Tasmanian Government Communications Office officers about the MOU launch event and the draft joint Media Release.
- 39 As in relation to Document 1, I determine the email headings, salutations and subject lines to be purely factual in character and are not exempt under s35.
- 40 I determine that the remainder of this information is internal deliberative information as described in s35(1)(c) of the Act, being a record of consultations or deliberations between Ministerial and public officers relating to the MOU communications strategy. Accordingly, I am satisfied that this part of the information is *prima facie* exempt.

Document 3

- 41 Document 3 comprises emails dated 14 December 2020 between TasNetworks officers, the Tasmanian Government Communications Office and Ministerial advisers about the draft TasNetworks Media Plan for the MOU announcement.
- 42 Again, I determine the email headings, salutations and subject lines to be purely factual in character and are not exempt under s35. I also consider the email from Rachel Johnson on page 5 and the first email from Chris Medhurst on page 7 to be purely factual and these should be released to Mr Burton.
- 43 I determine that the remainder of this information is internal deliberative information as described in s35(1)(c) of the Act, being a record of

consultations or deliberations between Ministerial and public officers relating to the MOU communications strategy. Accordingly, I am satisfied that this part of the information is *prima facie* exempt.

Document 5

- 44 Document 5 comprises emails dated 14 December 2020 between TasNetworks officers, the Tasmanian Government Communications Office officers and Ministerial advisers about the draft TasNetworks Media Release.
- 45 I determine that the email headings, salutations and subject lines, as well as the parts of following pages are purely factual in character and are not exempt under s35:
 - Page 1 – all of this information (emails from Dan Sinkovits (except for the sentence beginning with *please*), Chris Medhurst and Rachel Johnson);
 - Page 2 – the email from Adam Foster; and
 - Page 13 – the first email from Dan Sinkovits.

- 46 I determine that the remainder of this information is internal deliberative information as described in s35(1)(c) of the Act, as a record of consultations or deliberations between Ministerial and public officers regarding the MOU communications strategy. Accordingly, I am satisfied that this part of the information is *prima facie* exempt.

Public interest test

- 47 It now falls to assess whether it would be contrary to the public interest to release the information that I have found to be *prima facie* exempt. In making this assessment under s33, I am required to have regard to, at least, the matters in Schedule 1 of the Act.
- 48 The Premier's delegate found the following matters in Schedule 1 of the Act to apply in the circumstances:
 - (a) *the general need for government information to be accessible [favouring release];*
 - (b) *whether the disclosure would contribute to or hinder debate on a matter of public interest [neutral];*
 - (c) *whether the disclosure would inform a person about the reasons for a decision [neutral];*
 - (d) *whether the disclosure would provide the contextual information to aid in the understanding of government decisions [neutral];*
 - (f) *whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation [neutral];*

- (g) whether the disclosure would enhance scrutiny of government administrative processes [neutral];
- (k) whether the disclosure would promote or harm the economic development of the State [neutral];
- (l) whether the disclosure would promote or harm the environment and or the ecology of the State [neutral]; and
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future [favouring exemption].

- 49 I agree that the matters identified by the Premier's delegate as weighing in favour of release or being neutral considerations are relevant, but consider all of these matters to weigh in favour of disclosure. This is a major project with environmental and economic implications which has attracted a significant degree of interest and scrutiny, including from Mr Burton as a journalist. Disclosure of further information regarding the relevant decision making and administrative processes regarding the project would add to the debate and critical analysis surrounding it.
- 50 In relation to matter (n), Ms Hutton argued that *releasing this information would prohibit the frank exchange of views and consultative and deliberative processes between officers of public authorities and Ministerial staff when deliberating on official business*. I reject this proposition, for the same reasons as in many past decisions, such as *R and Department of Health* in which included the following:
- The question is whether the disclosure of the information under assessment, if disclosed, would prejudice the ability to obtain similar information in future. There is no basis for the assertion that public officers, in performing their duties consistent with their professional obligations would become less frank or diligent and to suggest otherwise, without a cogent claim, is contrary to the Act and to the requirements of the Department's staff as public officers.⁸*
- 51 Mr Burton also argued that matters (e) – whether the disclosure would inform the public about the rules and practices of government in dealing with the public – and (h) – whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government – were relevant. I accept his submissions regarding these matters and agree that they weigh in favour of release, as the information relates to communication with journalists.
- 52 There are effectively two categories of information in Documents 1, 2, 3 and 5. These are draft content for media releases and talking points for Ministers, and discussion of the practicalities of the MOU launch and the process of settling the content of the aforementioned documents.

⁸ *R and Department of Health* (12 May 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

- 53 Given the passage of time since the MOU launch and the innocuous content of the consultations regarding practicalities, I am not satisfied that the Premier's delegate has discharged her onus under s47(4) to show why it would be contrary to the public interest to release this information.
- 54 Different considerations apply regarding the draft versions of the media release and talking points, and some references to edits to the drafts, however. As I have found previously, unless there are reasons to justify their release, it has been my practice to find that early working drafts of documents are usually exempt under s35. Various versions of the media release and talking points are present in the information and I consider it would be contrary to the public interest to release all of these early iterations and some references to the changes to the content.
- 55 Accordingly, I find that the following information is exempt from release under s35(1)(c):
- Pages 2-22 of Document 1;
 - Pages 24-43 of Document 1;
 - Pages 47-69 of Document 1;
 - The suggested Ministerial quotes in Document 2:
 - On lines 5-16 of Chris Medhurst's email on page 4;
 - which commence on line 3 of Rebecca Ellston's email on page 16;
 - which commence on line 3 of Chris Medhurst's email on page 17;
 - in the edited version of Chris Medhurst's email on page 18;
 - in the edited version of Chris Medhurst's email on page 35;
 - in the edited version of Chris Medhurst's email on page 36;
 - the second and third words of Barbara McGregor's email on page 22 in Document 2;
 - dollar figures on Rachel Johnson's email on page 26 in Document 2;
 - the dollar figure in Barbara McGregor's email on page 30 in Document 2;
 - pages 4-6 of Document 5; and
 - the dot points in Rachel Johnson's email on pages 2-3 of Document 5.
- 56 The remainder of the information in Documents 1, 2, 3 and 5 is not exempt and should be released to Mr Burton.

Section 36 – personal information

- 57 Information contained within documents 4 and 6 is claimed to be exempt pursuant to s36. These two document tranches amount to 19 pages and 1 page respectively, taking duplicates into account.
- 58 For information to be exempt under s36, I must be satisfied that it is the personal information of a person other than the applicant. Personal information is defined as *any information about an individual whose identity is apparent or reasonably ascertainable from that information, and who is alive or has not been dead for more than 25 years*.
- 59 Section 36 is subject to the public interest test in s33.
- 60 The personal information claimed as exempt is *the personal names and contact details of staff in the Office of the Prime Minister* in Documents 4 and 5. This consists of the name and email address of one officer in Document 4 and the name, job title and contact details of another such officer in Document 6. Another name of the *Acting Production Manager* on the *Power Station Tour* has also been redacted, but this is not a staff member of the Office of the Prime Minister but a Hydro Tasmania employee.
- 61 Mr Burton indicated in his application for this external review that he seeks the *names at the head and foot of the emails but am not interested in the specific phone numbers or email address[es]. I also request the disclosure of the name of the Acting Production Manager identified on the “Running Sheet”*.
- 62 As telephone numbers and email addresses are not sought by Mr Burton, I will not further consider these aspects of the redacted information.
- 63 In relation to the names of these public servants, it is clear that this information is personal information about would be *prima facie* exempt under s36. However, in applying the public interest test, I have been consistent in my approach and my previously expressed view that the names of public officers or officers of public authorities, performing their regular duties are not usually exempt under s36.⁹
- 64 This information will only be exempt when there are specific and unusual circumstances identified which justify it. I can see no such circumstances here in relation to the Hydro Tasmania employee and Ms Hutton has not discharged her onus under s47(4) to show why this information should be exempt. It should be released to Mr Burton.
- 65 In relation to the Commonwealth public servants, there are slightly different considerations, as these are not officers of public authorities under the Act. However, all other Australian jurisdictions have similar positions regarding such information only being exempt in specific and unusual circumstances,

⁹ See Suzanne Pattinson and Department of Education (August 2022), Simon Cameron and the Department of Primary Industries, Parks, Water and the Environment (January 2002), Camille Bianchi and Department of Health (November 2021) and Clive Stott and Hydro Tasmania (February 2021), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

most notably the Office of the Australian Information Commissioner which would usually rule in relation to the release of information of the Department of Prime Minister and Cabinet or Office of the Prime Minister.¹⁰

66 In assessing the public interest test, Ms Hutton considered that:

...there are no matters relevant to assessment of the public interest that weigh positively in favour of release of the information, other than the general public need for government information to be accessible (Schedule 1(1)(a)). On balance, I consider that disclosing these personal details of individuals who are third parties to your request would harm the interests of those individuals (Schedule 1(1)(m)) and it is contrary to the public interest to release that information.

67 Ms Hutton has raised matter (m) in support of her view that disclosing the personal details of individuals other than the applicant would harm the interests of those individuals and it would be contrary to the public interest to release that information.

68 As mentioned above, I do not agree with this argument. It is the consistent Australian position that names of public officers, in connection with the performance of their regular duties, are normally not exempt from disclosure under the Act and that harm is not likely to result in the release of their names in these circumstances.

69 Ms Hutton has provided no indication of any unusual circumstances which would justify the exemption of this information and it is not otherwise apparent why the release of this information would be contrary to the public interest. It is to be released to Mr Burton.

Preliminary Conclusion

70 For the reasons given above, I determine the following:

- that exemptions claimed under s35 are varied; and
- that exemptions claimed under s36 are not made out.

Conclusion

71 As the above preliminary decision was adverse to the Premier, it was made available to him on 19 April 2024 to seek his input prior to finalisation in accordance with s48(1)(a) of the Act.

72 Ms Kelly, a delegate of the Premier, responded on 13 May 2024 and advised that no submissions would be made in response to my draft decision. She noted, however, that *a significant number of years has followed since the original decision was made, and there have been relevant Ombudsman decisions published*

¹⁰ See www.oaic.gov.au, Freedom of Information Guidance for Government Agencies – Conditional Exemptions, citing *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606; and *Maurice Blackburn Lawyers and Department of Immigration and Border Protection* [2015] AICmr 85 [3].

since that time. Our current practice concerning the release of the personal information of federal and state public servants has altered accordingly.

73 As no submissions were received in response to my decision, I have not altered my proposed findings. Accordingly, for the reasons set out above, I determine that:

- exemptions claimed pursuant to s35 are varied; and
- exemptions claimed pursuant to s36 are not made out.

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

Dated: 15 May 2024



Richard Connock
OMBUDSMAN

Attachment I - Relevant legislative provisions

Section 35 – Internal Deliberative Information

- (1) Information is exempt information if it consists of –
 - (a) an opinion, advice or recommendation prepared by an officer of a public authority; or
 - (b) a record of consultations or deliberations between officers of public authorities; or
 - (c) a record of consultations or deliberations between officers of public authorities and Ministers –
in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.
- (2) Subsection (1) does not include purely factual information.
- (3) Subsection (1) does not include –
 - (a) a final decision, order or ruling given in the exercise of an adjudicative function; or
 - (b) a reason which explains such a decision, order or ruling.
- (4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 36 – Personal information of a person

- (1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13.
- (2) If –
 - (a) an application is made for information under this Act; and
 - (b) the information was provided to a public authority or Minister by a third party; and
 - (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party –
the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –

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

- (e) state the nature of the information that has been applied for; and
 - (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.
- (3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f), decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.
- (4) A notice under subsection (3) is to –
- (a) state the nature of the information to be provided; and
 - (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
 - (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.
- (5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) –
- (a) until 10 working days have elapsed after the date of notification of that person; or
 - (b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or
 - (c) until 20 working days after notification of an adverse decision under section 43; or
 - (d) if during those 20 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided, or
 - (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

33. Public interest test

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

SCHEDULE I - Matters Relevant to Assessment of Public Interest

Sections 30(3) and 33(2)

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

- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.



Right to Information Act Review Case Reference: R2305-019

Names of Parties: Brett Maryniak and Derwent Valley Council

Reasons for decision: s48(3)

Provisions considered: s19

Background

- 1 Mr Brett Maryniak (the Applicant) is a resident of the Derwent Valley local government area.
- 2 *Derwent Valley Arts describes itself as a community-based, volunteer-run organisation established to enhance Tasmania's Derwent Valley as a place to live by promoting arts in our region.*¹
- 3 On 2 May 2023, Mr Maryniak made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to Derwent Valley Council (Council) in the following terms:

I am seeking any information, documents and communications related to Derwent Valley Arts (DVA) since 2020.

- 4 On 22 May 2023, Ms Amanda McCall, a delegate for Council under the Act, responded to the Applicant, relevantly:

The request, as it is currently written is generally expressed and is very broad in nature. I therefore ask that you review or amend your [sic] request under Section 19(2) of the Act to alleviate the grounds for refusal under Section 19(1) of the Act; as I am satisfied that dealing with your current request is likely to substantially and unreasonably divert Council's resources from its other work, and may be refused pursuant to Section 19 of the Act.

- 5 The Applicant ultimately did not refine the application and, on 5 June 2023, Ms McCall released a decision to the Applicant by post. After some uncertainty over whether the decision was received by Mr Maryniak, it was re-released by email in identical terms on 7 July 2023. The decision found:

Under section 19(1)(a), I have determined that your request should be refused as I am satisfied that the work involved in providing the information will substantially and unreasonably divert the resources of the Council. ...

¹ Description of organisation, available at www.derwentvalley.art/ accessed on 8 August 2024.

- 6 On 18 July 2023, Mr Maryniak sought internal review and on 8 August 2023 received an email from Grace Smith, an Executive Officer at Council. This set out that:

Derwent Valley Council's Acting General Manager has reviewed RTI reference 105, RTI 2023.

The Acting General Manager's response to your request is below.

Further to the request of Mr Brett Maryniak I have conducted an internal review of his RTI application, reference 105, RTI 2023.

I have made the determination that supports the original decision by Council's Executive Manager Corporate dated 7 July 2023.

- 7 On 10 August 2023 Mr Maryniak applied for external review, which was accepted pursuant to s44 of the Act.
- 8 My office identified opportunities for early resolution of this matter and forwarded a preliminary view to Council on 1 August 2024, inviting it to issue a fresh decision which did not rely on s19 or provided further reasoning to justify reliance on this section. On 8 August 2024, Council declined to do so.

Issues for Determination

- 9 There are two issues for determination regarding the use of s19 and this review:

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

Relevant legislation

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

Submissions

Applicant

- 11 In his application for external review, Mr Maryniak submitted:

Council encouraged me to refine the scope of my RTI but provided me no guidance on how to do this, which I felt went against the spirit of the Act.

Council

- 12 Council made no submissions beyond the reasoning in the initial decision, relevant parts of which are extracted below:

Under section 19(1)(a), I have determined that your request should be refused as I am satisfied that the work involved in providing the information will substantially and unreasonably divert the resources of the Council. Schedule 3, of the Act provides the matters relevant to the assessment of refusing the application. In relation to this refusal items 1(a) the global nature or a generally expressed request and in that regard whether the terms of the request offer a sufficiently precise description to permit the public authority, as a practical matter, to locate the document sought within a reasonable time and with the exercise of reasonable effort.

Additionally, you have not been able to (b) demonstrate the importance of the document or documents.

This determination has been made after an opportunity has been provided to clarify the scope as required under section (19)(2) through the above-mentioned email correspondence and assessment.

Notice under section 22(2) is made on the basis that you have not been able to provide any clarity on what topics, scope, or information you are specifically requesting, instead relying on Council to provide all information including internal communications, with no clarity on whom the parties involved may be.

Analysis

Consultation

- 13 Council made a determination under s19(1) that the work involved in providing the information requested by Mr Maryniak would substantially and unreasonably divert its resources from its other work. Section 19(2) requires that, before making such a determination, Council must first give the applicant:

...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.

- 14 Mr Maryniak provided copies of emails between himself and Ms Amanda McCall of Council, which constituted the consultation under s19(2), with the relevant parts extracted below in chronological order:

Applicant: *I would appreciate guidance regarding refining the scope of my RTI request. It has been mentioned that fulfilling this request would excessively burden Council*

resources. Could you clarify what about my request creates that burden?

...

I would also be happy to discuss which matters in Schedule 3 are barriers to this RTI request to see if it is possible to overcome them. For example, I might be prepared to consider extending the statutory timeframe. I am happy to negotiate with council to reach an outcome that works for both our needs...

Council: *As a public authority, our dealings with individuals or entities can be diverse in nature and scope, including multiple parties, and can be historic.*

By simply requesting 'any information and communications [sic] related to Derwent Valley Arts (DVA) since 2020' it doesn't provide what information or communication or with whom you are relating your request.

The request for more information is to enable us to; [sic]

- a) *ascertain whether the information you are requesting is relevant under this type of disclosure; and*
- b) *understand in greater detail what research, is required to respond to your request.*

Applicant: *I am not really in a position to narrow down the scope of what I am looking for when I need to know what you have. Although my priority is on internal council communications, information and documents and that between [Council] and other parties, until I receive some assistance I am reluctant to rule out anything. Perhaps, if you provided me with a list of the third parties, I could review it and decide what is relevant and irrelevant to my request.*

I need clarification on your reference to historic information. I am requesting information relating to the three years since 2020. I wouldn't consider this historical data. ...

Council: *I note that you have stated that you aren't in a position to narrow your scope. However, I will request that you provide clarity by addressing the questions below so that we may assist with assessing this application.*

1. *Can you explain the purpose or importance of the information, as that might help to identify sources of the information sought?*
2. *Are there any details that might help define the parameters of the information requested? This might narrow or clarify what is being sought (eg correspondence from a particular person at Council or relating to a particular part of a project)?*
3. *Can you describe the information in a way that will enable it to be identified and located by Council? If not, are you able to list or particularise it in a different way?*

Initial searches of Council's EDRMS [Electronic Documents and Records Management System] reference categories tags such as events, property, projects, support, and heritage. By requesting refinement as above I am further trying to seek clarification as your current request is global in nature and demonstrates a substantial and potentially unreasonable diversion of resources.

Applicant: *If you do a search for records for 2020-23 with "Derwent Valley Arts" in either the title or subject, how many records are returned?*

Council: *That's not how our EMDRS [sic] works.*

Again, are you happy to respond?

Applicant: *In my view, my request was specific. It is related to a specific entity over a particular three-year period. Meanwhile, the Council has given me no indication that even a preliminary search has been conducted, or given me any guidance on how to refine the scope of my question or any information that may help me do so. ...*

- 15 The fundamental starting point for any application under the Act is that under s7 a person has a *legally enforceable right to be provided, in accordance with this Act, with information in the possession of a public authority or Minister unless the information is exempt information*. This clear intention of Parliament should only be displaced as a last resort when all reasonable avenues for enabling acceptance of an application are exhausted.
- 16 For a request for information to be refused under s19(1)(a), I must be satisfied that the work involved in providing the information requested would substantially and unreasonably divert the resources of Council from its other work. In doing so I must have regard to the nine matters in Schedule 3, as

required by ss19(1)(a) and (c). When a decision to refuse information under s19 is considered, pursuant to s19(2) the applicant must be given *a reasonable opportunity to consult the public authority...with a view to being helped to make an application in a form that removes the ground for refusal.*

- 17 Council is not required to identify, locate and collate the information when considering s19 but is required to assess the application sufficiently to be able to provide an explanation to the applicant of the reasons for the proposed refusal. The applicant cannot be assisted to make their application in a form which will remove the ground of refusal if such an explanation is not provided. As the Ombudsman has previously determined, to refuse an application without making any effort to identify whether information can be located will only be justified in extremely limited circumstances². It is routine that initial enquiries, for the purpose of assessing the volume of information and estimating the time and associated costs involved will be undertaken.
- 18 Council is required to play a positive role in good faith in any consultation process with the intention being to assist an applicant. In this matter, Council did approach my office for guidance and my officer provided Council with *[s]ome possible guiding questions for clarifying or refining scope*, but indicated that *they are suggestions to assist the parties in their consultation or they may prompt questions more directly on point...* My officer also advised, *Section 19 refers to Schedule 3 matters relevant to assessment of refusing application and ... the matters raised in the Schedule might be useful in the task of refining scope.*
- 19 Council did contact the Applicant and pose questions, however Mr Maryniak did not specifically respond to them. Likewise, Council did not engage with Mr Maryniak's mention of an extension of time, request for guidance or suggested compromise positions.
- 20 Mr Maryniak, during consultation, asked how many records were identified in response to specific search criteria. Council's response was to indicate that was not the way in which its document management system worked. It did not, however, offer any guidance to Mr Maryniak about how he could rephrase his request. I have previously addressed the question of a public authority's record keeping³. Council has obligations under the Act that must be fulfilled, which include responding to requests under the Act, and therefore information should be retrievable with sufficient ease to meet that statutory purpose. If Council's document management system is unable to provide an applicant with the most basic of estimates, it is for Council to suggest an alternative approach, not transfer the onus to an applicant.
- 21 On balance, I consider Council has given Mr Maryniak a reasonable opportunity to consult, although its lack of assistance to Mr Maryniak to remove the ground of refusal was far from best practice. It is far preferable for reasons

² See, for example, my decision in *C and Sustainable Timber Tasmania* (February 2023), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

³ See *C and Sustainable Timber Tasmania* (February 2023) at [99], available as per Note 2.

why the public authority considers the application to be an unreasonable diversion of resources to be advanced and the applicant genuinely aided with practical assistance in relation to how the request could be refined to remove these reasons. As has been previously set out in *Robin Smith and City of Launceston*⁴, reference to the Schedule 3 factors during consultation, and not just in a formal refusal decision, is better practice to meet the requirements of s19(2). Ultimately, in this matter what consultation did occur was unsuccessful and Mr Maryniak's application was not amended.

Schedule 3

- 22 I now turn to the nine matters in Schedule 3 that must be considered when assessing if the processing of an application for assessed disclosure of information would result in a substantial and unreasonable diversion of resources.
- 23 Matter (a) – *the terms of the request, especially whether it is of a global kind or a generally expressed request, and in that regard whether the terms of the request offer a sufficiently precise description to permit the public authority ... as a practical matter, to locate the document sought within a reasonable time and with the exercise of reasonable effort* – was identified by Council as relevant to refusing the request. However, Council did not provide any further reasoning as to why this was relevant, either during negotiation or in its determination. Mr Maryniak's request is, in one sense, globally expressed in that he requested *any information, documents and communications*. However, it related to one specific entity, Derwent Valley Arts, for a relatively narrow time period of three years. In the absence of any detailed reasoning by Council as to why the request is insufficiently precise or presents practical difficulties, I am not persuaded this matter weighs in favour of refusal.
- 24 Matter (b) – *whether the demonstrable importance of the document or documents to the applicant might be a factor in determining what in the particular case are a reasonable time and a reasonable effort* – was identified by Council as relevant to refusing the request. As I have previously observed,⁵ the Act does not require an applicant to provide reasons for their interest in the requested information. Whilst it is true that this matter does allow Council to consider the purpose of an application, I remain of the view that an unknown purpose should not be significantly weighed against an applicant and to interpret the Act otherwise would be contrary to an applicant's legal right to information. I do not consider this a relevant matter in this application.
- 25 Matter (d) – *[Council's] estimate as to the number of sources of information affected by the request, and by extension the volume of information and the amount of officer-time, and the salary cost* – was not considered by Council and there was no indication such an estimate had been compiled, notwithstanding Mr Maryniak's request for this assistance. This matter therefore

⁴ (September 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions at [34].

⁵ See *Robin Smith and City of Launceston* (September 2022) at [51], available as at Note 4.

weighs against refusal, as whether the request will be an unreasonable diversion of Council's resources from its other work is the key consideration regarding s19.

- 26 I consider that matter (e) – *the timelines binding the public authority or Minister* - weighs against refusal, as Mr Maryniak specifically indicated he was open to extending the statutory timeframe and this was not pursued by Council.
- 27 Matters (c), (f), (g), (h) and (i) were not addressed by Council at any point and so I do not accept that they can be considered to weigh in favour of refusal.
- 28 Overall, after considering all the matters contained in Schedule 3, I am not satisfied that Council has demonstrated that processing Mr Maryniak's application would substantially and unreasonably divert the resources of Council from its other work.
- 29 Council's lack of reasoning in relation to these mandatory matters in Schedule 3 is disappointing, especially as Mr Maryniak specifically asked for clarification on these points during consultation. I agree with his concern raised that Council's response went against the spirit of the Act and did not appear to be trying to release the *maximum amount of official information* or ensure that refusal could be properly justified.

Internal Review

- 30 I now make some observations concerning the internal review of Council's initial decision. Section 43 of the Act relevantly provides:
 - (4) *If an application for a review of a decision is made to the principal officer in accordance with subsection (1), (2) or (3), the principal officer must as soon as practicable –*
 - (a) *review the decision and make a fresh decision;*
...
 - (5) *A decision on a review under this section in respect of an application made under section 13 is to be given in the same manner as a decision in respect of the original application.*
- 31 It has been the Ombudsman's consistent position⁶ that, even if affirming an original decision, an internal review decision should stand alone, have clear findings and be capable of being read without reference to the original decision. Ms Smith's email set out that Council's unnamed Acting General Manager made a determination that supported the original decision, however I am not satisfied the Acting General Manager sufficiently reviewed the decision and made a fresh decision in accordance with the requirements of the Act.
- 32 The extreme brevity of the internal review decision does not assist Mr Maryniak to understand the reasoning which underpins the review decision. The Acting

⁶ See, for example, R2202-121 Q and Northern Midlands Council (September 2023) from [26], available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

General Manager did not particularise anything that was considered and did not even mention the section of the Act upon which the decision relied. The mandated information under s22(2)(c) regarding the Applicant's right to a review was also omitted.

- 33 If a thorough and considered internal review had been carried out, the deficiencies in Council's original decision may well have been identified and remedied, making this external review unnecessary.
- 34 I urge Council to improve its practices in future and ensure it is complying with the requirements in the Act.

Preliminary Conclusion

- 35 For the reasons set out above, I determine that Council is not entitled to rely on s19 to refuse Mr Maryniak's application. I direct it to reassess the application in accordance with the provisions of the Act.

Conclusion

- 36 As the above preliminary decision was adverse to Council, it was made available to Council on 26 August 2024 to seek its input before finalisation, pursuant to s48(1)(a) of the Act.
- 37 Council did not respond or make any submissions.
- 38 Accordingly, for the reasons given above, I determine that Council is not entitled to rely on s19 to refuse Mr Maryniak's application. I direct it to reassess the application in accordance with the provisions of the Act.
- 39 I apologise to the parties for the delay in finalising this external review.

Dated: 19 September 2024



Richard Connock
OMBUDSMAN

ATTACHMENT 1 – Relevant legislation

Section 19 - Requests may be refused if resources unreasonably diverted

- (1) If the public authority or Minister dealing with a request is satisfied that the work involved in providing the information requested –
 - (a) would substantially and unreasonably divert the resources of the public authority from its other work; or
 - (b) would interfere substantially and unreasonably with the performance by that Minister of the Minister's other functions – having regard to –
 - (c) the matters specified in Schedule 3 –

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

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

SCHEDULE 3 - Matters Relevant to Assessment of Refusing Application

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

1. The following matters are matters that must be considered when assessing if the processing of an application for assessed disclosure of information would result in a substantial and unreasonable diversion of resources:
 - (a) the terms of the request, especially whether it is of a global kind or a generally expressed request, and in that regard whether the terms of the request offer a sufficiently precise description to permit the public authority or Minister, as a practical matter, to locate the document sought within a reasonable time and with the exercise of reasonable effort;
 - (b) whether the demonstrable importance of the document or documents to the applicant might be a factor in determining what in the particular case are a reasonable time and a reasonable effort;
 - (c) more generally whether the request is a reasonably manageable one, giving due, but not conclusive, regard to the size of the public authority or Minister and the extent of its resources available for dealing with applications;
 - (d) the public authority's or Minister's estimate as to the number of sources of information affected by the request, and by extension

the volume of information and the amount of officer-time, and the salary cost;

- (e) the timelines binding the public authority or Minister;
- (f) the degree of certainty that can be attached to the estimate that is made as to sources of information affected and hours to be consumed, and in that regard importantly whether there is a real possibility that processing time might exceed to some degree the estimate first made;
- (g) the extent to which the applicant has made other applications to the public authority or Minister in respect of the same or similar information or has made other applications across government in respect of the same or similar information, and the extent to which the present application might have been adequately met by those previous applications;
- (h) the outcome of negotiations with the applicant in attempting to refine the application or extend the timeframe for processing the application;
- (i) the extent of the resources available to deal with the specified application.

DECISION
OMBUDSMAN TASMANIA



Right to Information Act Review Case Reference: O2101-018
R2202-141

Names of Parties: C and Department of State Growth

Reasons for decision: s48(3)

Provisions considered: s27, s35, s37, s38, s39

Background

- 1 Screen Tasmania is part of the Culture, Arts and Sport division of the Department of State Growth (the Department). According to its website, it *fosters and develops the state's film, television and multimedia industries by increasing the amount of independent screen production occurring in Tasmania.*¹
- 2 Screen Tasmania provided a grant of funding to 360 Degree Films Pty Ltd, for it to produce *Wild Things: A year on the Frontline of Environmental Activism*. This is a documentary film produced and directed by the Australian documentary filmmaker, Sally Ingleton. It follows contemporary activists, focusing on the anti-Adani mine campaign in Queensland, the campaign to save old-growth forest in Tasmania, and a student-led climate change movement in Victoria.
- 3 On 28 August 2020, C filed a request for information under the Right to Information Act 2009 (the Act) with the Department concerning Screen Tasmania's funding of the *Wild Things* documentary. The usual application fee was paid.
- 4 According to C, at the time of making the application:

Screen Tasmania (ST) does not have any information about the funded documentary "Wild Things" on their website. Additionally, there is no specific mention of funding of the applicant – 360 Degree Films, in the funding approval section of the website beyond stating in March 2019 "One production was approved for \$50 000 of Production Investment, which will be announced at a later date." This statement has been removed from the ST website in the past week. The ST website does not mention the proponent, 360 Degree Films, beyond a Dec 2008 media release. Despite this, 360 Degree Films issued a media release in July 2019 announcing \$50,000 in funding from ST. see

¹ About Us – Culture, Arts and Sport Division, available at www.stategrowth.tas.gov.au/cas/about_us, accessed 18 March 2024.

<https://360degreefilms.com.au/news/2019/07/wild-things-earns-support-from-screen-tasmania/>

- 5 C requested the following information related to Screen Tasmania's funding of 360 Degree Films and the Wild Things documentary:
1. *All information provided by the proponent to Screen Tasmania regarding details of the project and what the documentary was to be about;*
 2. *All documents and information provided to STEAG [Screen Tasmania Expert Advisory Group] by Screen Tasmania regarding the proposed project.*
 3. *According to the Cultural and Creative Industries Act 2017 S 12(2), the expert panel (STEAG) “is to take minutes of its meetings and keep records of its recommendations”. I wish to request a copy of the minutes of the STEAG meetings that relate to/discuss the Wild Things project;*
 4. *The recommendation from STEAG/ST to the Minister recommending approval of the Wild Things project funding;*
 5. *The Ministerial approval of the project funding;*
 6. *A copy of the funding agreement between ST and the proponent;*
 7. *Any terms and conditions associated with the funding;*
 8. *Any Government requirement that stipulates the proponent must ensure factual correctness/accuracy of the information contained within the documentary;*
 9. *A copy of the finished documentary. Note that I have been advised that the head of Screen Tasmania has viewed the documentary.*
 10. *Advice as to when and why the funding statement mentioned above in the RTI Description was removed from ST website and why that although the documentary has been released, there is no mention of it or the funding on the Screen Tasmania website.*
- 6 The Department retrieved a number of documents that were determined to be within the scope of the request. On 30 October 2020, Ms Tiahna Tomac, a delegated officer of the Department under the Act, provided a decision to C. Some information was released to the applicant, however some information was considered to be already publicly available and was not released. In addition, a substantial amount of information was considered to be exempt pursuant to the following sections of the Act:
- s27 – internal briefing information of a Minister;

- s30 – information relating to enforcement of the law;
 - s35 – internal deliberative information;
 - s37 – information relating to business affairs of a third party; and
 - s39 – information obtained in confidence.
- 7 In relation to s37, Ms Tomac determined that disclosure of the information may reasonably be expected to be of substantial concern to the relevant third party and had conducted consultation in accordance with s37(2) of the Act. She indicated that the result of that consultation had been taken into account in her reasons for decision. In addition, Ms Tomac provided written responses to items 8 to 10 of the applicant's request.
- 8 On 20 November 2020, C wrote to the Department seeking an internal review of the decision. C disputed Ms Tomac's application and interpretation of certain provisions of the Act, and provided extensive submissions which are set out later in this decision.
- 9 On 16 December 2020, Ms Alison Lander, a delegated officer of the Department under the Act, released an internal review decision. Ms Lander noted that the applicant had refined the scope of the original application to exclude third party personal information and she took this into account in her review. Ms Lander determined that additional information could be released. However, she determined to withhold information under ss27, 35, 37, 38 and 39 of the Act, and found that some information was subject to copyright. In view of the decision to release some further information, Ms Lander consulted again with the affected third party who advised that they did not object to her determination.
- 10 In summary, Ms Lander decided to release additional information to the applicant that had been claimed exempt under s30, but raised a new ground for exemption of other information, specifically, s38 – information relating to the business affairs of a public authority. A new Document Schedule was provided which indicated the information that had been released, in addition to the information that had been found to be exempt under various sections of the Act.
- 11 On 5 January 2020, C sought an external review. The application for external review was accepted under s44 of the Act on the basis that the applicant had received an internal review decision and had submitted it to this office within 20 working days of receiving it.

Issues for Determination

- 12 I must determine whether the information not released by the Department is eligible for exemption under ss27, 35, 37, 38, 39, or any other relevant section of the Act.
- 13 As ss35, 37, 38 and 39 are contained in Division 2 of Part 3 of the Act, part of my assessment is subject to the public interest test in s33. This means that, if I determine that the information is *prima facie* exempt under these sections, I am then required to determine whether it would be contrary to the public interest to release it, having regard to, at least, the matters contained in Schedule 1.

Relevant legislation

- 14 Copies of ss27, 35, 37, 38 and 39 are at Attachment A.
- 15 Copies of s33 and Schedule 1 are also attached.

Submissions

- 16 On 15 January 2021, C advised that he wished to rely on his 30 November 2020 submissions filed in support of his request for internal review, and the information filed in support of the application for external review on 5 January 2021. The applicant's submissions addressed concerns regarding the Department's application and interpretation of the relevant provisions of the Act.
- 17 As some issues have been resolved by the decision on internal review, I will confine my assessment and analysis to submissions relating to the outstanding issues only. The outstanding information that the Department submits is exempt under the Act is set out in the Document Schedule attached to the decision on internal review.
- 18 With regard to the Department's claim that certain information is exempt from disclosure under s35 (items 32 and 33 in the Document Schedule), the Applicant submits that s35 cannot be relied upon because the information falls within the exceptions described in s35(2) and s35(3)(b).
- 19 The applicant argued that the information is substantially factual and, by virtue of s35(2), an exception to the internal deliberative information exemption and must be released. And further:

This information can be separated from the opinion and advice also contained in the same document, meaning that it is capable of 'standing alone'. The information concerns the eligibility of the production for the investment scheme, and ..., therefore, cannot be anything other than 'simply or merely' factual.

- 20 The applicant also argued that, pursuant to s35(3)(b), the information is not exempt because it includes a reason that explains a final decision:

The Report, identified by the original decision-maker at paragraph 20 contains evidence on the applicability of the Wild Things documentary for production investment by the Department, and this information contains reasons which explain why a final decision was made to grant the investment. The Report also contains opinions and advice by the Screen Tasmania Project Officer on the suitability of the documentary application. These opinions and advice have great bearing in explaining the final decision to invest, and therefore the entirety of the Project Officer's Report including reasons which explain the final decision, fall within the exception to the internal deliberative information exemption, meaning it must be released.

- 21 With regard to the exemption claimed under s37, the applicant submitted that as approval has already been given for the documentary, release of the information will have no impact on the third party's profit-making capacity:

No further grants are needed to fund the documentary (meaning no potential for other bidders to use the third party's information against them), and the documentary's success upon release will not be impacted by the release of information regarding its financials or intellectual property. Furthermore, release of this information will not increase the third party's expenses, resulting in no reduction in its overall profit.

The public should be given access to information that explains and justifies the expenditure of public funds where the Government enters into commercial arrangements. This extends far enough to allow the public access to information about competing tenders to be able to assess the propriety of the tendering process. Here, no information is being released about how 360 Degree Films Pty Ltd performed against government criteria such as pricing, experience, or other requirements which could reasonably be expected to lead to a commercial disadvantage as competitors would exploit the tender's weaknesses.

- 22 The applicant argued that access to the third party's information comprising its financial and intellectual property would not cause competitive disadvantage, because the third party retains its intellectual property rights, and release of the financial information will not impact the profitability of the film.
- 23 The above submissions apply in particular to information located in response Questions 1, 2 and 5, as per the Document Schedule.
- 24 The applicant also disputed the reliance by the Department on s39 of the Act to exempt certain information (Questions 1, 2 and 3 of the Document Schedule). The applicant argued that the information provided to the

Department was not provided in confidence, and that no confidential agreement was made between the Department and the third party.

- 25 The applicant submitted that, on pages 18-19 and 22 of the Production Investment Application, the third party has expressly agreed to the information they provided to the Department and details of the investment being made available to the public by way of disclosure under the Act.
- 26 In addition, the applicant argued that the release of the information is not reasonably likely to impair the ability of the Department to obtain similar information in the future.
- 27 The applicant also made submissions in respect of the Department's assessment of matters in relation to the public interest test under s33 of the Act. I will discuss this below.
- 28 On 5 January 2021, the applicant filed further submissions to this office in support of the application for external review. In its decision on internal review, the Department raised a new ground for exemption under s38 of the Act. The delegate under the Act claimed that the information about Screen Tasmania, if disclosed, would result in commercial disadvantage.
- 29 The applicant argued that the release of the information would not result in a commercial disadvantage to Screen Tasmania, as its competitiveness can be assessed based on information available to the public. In particular, its website lists the minimum value of the grants which are on offer and the eligibility requirements. The applicant submitted that this information can then be compared to other opportunities available in other jurisdictions.
- 30 The applicant also filed further submissions in relation to the Department's application of s39 of the Act, matters relevant to the public interest, and the Department's reliance on copyright law.
- 31 The Department did not provide submissions beyond the reasoning of its decisions, which will be discussed under the relevant sections of the below Analysis.

Analysis

- 32 The Department determined that information responsive to C's request was exempt from disclosure under ss27, 35, 37, 38 and 39. The information is listed in a Document Schedule attached to the internal review decision, which indicates the applicable item of the applicant's request, the document number and description, and the relevant section of the Act. For the purposes of consistency, I will follow this system when referring to various documents.

Section 27 – Internal briefing information of a Minister

- 33 The Department claims that the information responsive to question 5 of the Applicant's request is exempt under s27 of the Act. Specifically, information in Document 36 and an attachment to that document. Document 36, headed Minute to the Minister for the Arts, consists of four pages concerning a Screen Tasmania Export Advisory Group (STEAG) Production Investment Recommendation. It has been released in part. The attachment is draft correspondence to 360 Degree Films Pty Ltd.
- 34 Section 27 relevantly provides:
- (1) *Information is exempt information if it consists of –*
- (a) *an opinion, advice or a recommendation prepared by an officer of a public authority or a Minister; or*
- (b) *a record of consultations or deliberations between officers of public authorities and Ministers –*
- in the course of, or for the purpose of, providing a Minister with a briefing in connection with the official business of a public authority, a Minister or the Government and in connection with the Minister's parliamentary duty.*
- 35 I must determine if the information consists of an opinion, advice, or a recommendation prepared by an officer of a public authority or a Minister, or is a record of consultations or deliberations between officers of public authorities and a Minister. If so, I need to be satisfied that the information meets the other criteria of s27. These are that it is not over 10 years old, not brought into existence for another purpose, or purely factual information, and therefore covered by one of the exceptions under ss27(2) to (4). Section 27 is not subject to the public interest test.
- 36 In the initial decision, the Department's delegate under the Act said that she was satisfied that some of the information qualified as purely factual information and this was released to the applicant. The delegate found that some of the remaining information was exempt from disclosure pursuant to s27. In the decision on internal review, Ms Lander noted that the scope of the original application had been refined to exclude third party personal information. In addition, further information that had previously been withheld was subsequently released.
- 37 As Ms Lander noted, the applicant has not raised specific concerns with the Department's claim for exemption under s27.

- 38 In the first document, Document 36, there are two sections for which the Department relies on s27, specifically on pages 2 and 3. In both cases I am satisfied that the information consists of an opinion, advice or recommendation prepared by an officer of a public authority for the purpose of providing a Minister with a briefing in connection with the official business of a public authority in connection with the Minister's parliamentary duty.
- 39 I am satisfied that the relevant information on pages 2 and 3 of the *Minute to the Minister for the Arts*, is less than ten years old, and that any purely factual information that is capable of standing alone has already been released to the Applicant. I consider that the remaining information is exempt from disclosure under s27.
- 40 With regard to the second document, Attachment A, s27(4) provides that the exemption under s27(1) does not include purely factual information unless its disclosure would reveal the nature or content of the opinion, advice, recommendation, consultation or deliberations of the briefing.
- 41 In this instance I consider that any factual information contained in the attachment would reveal the nature or content of the opinion, advice, recommendation, consultation or deliberations of the briefing, as this is draft correspondence which is unapproved. I am also satisfied that the information is less than ten years old and not brought into existence for another purpose. Therefore, I consider that the information is also exempt from disclosure under s27.

Section 35 – internal deliberative information

- 42 The Department relied upon s35 of the Act to exempt information in two documents responsive to Question 2 of the request for disclosure. For information to be exempt under this section, I must be satisfied that it consists of an opinion, advice or recommendation prepared by an officer of a public authority or is a record of consultations or deliberations between officers of a public authority.
- 43 If I find that this is the case, I must then determine whether the information was prepared in the course of, or for the purpose of, the deliberative processes related to the official business of the Department.
- 44 According to the Act, the exemption outlined above does not apply to the following:
- purely factual information² ;

² Section 35(2).

- a final decision, order or ruling given in the exercise of an adjudicative function³; or
 - information that is older than 10 years.⁴
- 45 The meaning of the phrase ‘in the course of, or for the purpose of, the deliberative processes’ has been considered by the Commonwealth Administrative Appeals Tribunal. In *Re Waterford and Department of Treasury* (No 2) the Tribunal adopted the view that these are an agency’s ‘thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action’.⁵
- 46 Section 35 is subject to the public interest test contained in s33 and by extension, the relevant matters in Schedule 1 of the Act. In order for the exemption to apply, the Department must establish that the release of information would be contrary to the public interest.
- 47 The Department maintains that information in the following documents are exempt pursuant to s35:
- Document 32, dated 22 March 2019, Project Officer’s Report to Screen Tasmania Export Advisory Group (STEAG) – (pages 2, 3, 4, 5, 6, 8, 9, 10)
 - Document 33, 16 March 2019, Attachment to Project Officer’s Report – responses to STEAG queries – (page 3)
- 48 Document 32 consists of an internal report of the assessment of the application for funding by 360 Degree Films Pty Ltd. The report refers to all aspects of the application within the framework of the specialist advisory group under the *Cultural and Creative Industries Act 2017*. The project officer discusses all aspects of the film project and gives opinions, advice and recommendations on the information in the application.
- 49 The applicant has submitted that the information in the project officer’s report must by its nature be factual. However, I cannot agree and this is clearly not the case. Rather, the information comprises analysis and assessment of the factual information, by an officer in the course of his specialised duties in accordance with the *Cultural and Creative Industries Act 2017*.
- 50 The applicant also argued that the information should be disclosed because it comes within an exception in s35; that it includes reasons that explain a decision, order or ruling.⁶ However, I am in agreement with Ms Lander in her internal review decision that the Act is clear that this subsection applies to decisions, orders or rulings given in the exercise of an adjudicative function.

³ Section 35(3).

⁴ Section 35(4).

⁵ *Re Waterford and Department of Treasury* (No 2) (1985) 5 ALD 588.

⁶ S35(3)(a) and (b) of the Act

The process of assessment of applications and reports to the Screen Tasmania Expert Advisory Group does not amount to an adjudicative function.

- 51 In respect of the remaining information claimed to be exempt by the Department under s35, I determine that it constitutes opinion, advice or recommendation in the course of a deliberative process, and is therefore *prima facie* exempt under s35(1)(a) of the Act.
- 52 Document 33 consists of a series of emails between the applicant for funding, 360 Degree Films Pty Ltd, and officers of the Department. The document is an attachment to Document 32 and comprises questions and answers regarding the application for funding. The Department has only sought to exempt one small section on page 3, comments from Mr Andrew McPhail at the Department to 360 Degree Films Pty Ltd about the progress and likely success of the funding application. It is entirely unclear why it has sought to do so, however, as this is an external communication between a Departmental officer and the proponent of the project. It cannot be exempt as internal deliberative information if it is communicated outside of government. The Department has not discharged its onus under s47(4) to show why this information should be exempt, so it is to be released to C.

The public interest test

- 53 Section 35 is subject to the public interest test set out in section 33. It is therefore necessary to assess whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt. I am required to have regard to, at least, the matters in Schedule 1 in making this assessment.
- 54 The Department decided that considerations against disclosure of the exempt information outweighed those in favour of disclosure and that it would be contrary to the public interest to disclose the information. In the Decision on Internal Review dated 16 December 2020, the Department found the following matters to be of particular relevance in this instance:
 - (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;
 - (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;

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

- 55 I agree that matter (a), the general public need for government information to be accessible is relevant and weighs in favour of disclosure.
- 56 With regard to matter (b), I do not give much weight to it in this instance, as the film has now been available to the public for some time and the debate on the topic is minimal. However, the subject matter of the film is certainly of public interest and I still consider that ongoing debate on this subject results in this matter weighing in favour of disclosure.
- 57 I agree with the Department that matters (c) and (f) are relevant and weigh in favour of disclosure.
- 58 I do not think that matter (h) is particularly relevant in this instance, as this is internal deliberative information rather than information provided by a third party.
- 59 Whether the disclosure would promote or harm the economic development of the State, it is difficult to say. While it could be argued that details of the assessment process for funding applications may reduce applications for investment, it could equally be argued that showing the process for awarding funding would enable applicants to assess whether it was a robust process. Accordingly, I believe that this factor on balance is neutral in terms of the merits of disclosure regarding matter (k).
- 60 Likewise, I am of the opinion that the matter (m) is neutral in this instance. I also do not agree that matter (n) is relevant in the circumstances, though I do note that the Department undertook a global public interest test assessment across all exemptions it applied and may not have intended to claim these matters were relevant regarding s35. I am not easily persuaded that (n) is relevant regarding s35, as this relates to internal government information and I

do not accept that disclosure of information regarding their activities under the Act would stop public servants undertaking their paid duties.

- 61 As I have said in earlier decisions,⁷ I recognise that s35 exists to address circumstances in which it is not appropriate to disclose information which shows the internal ‘thinking process’ of a public authority, as this can inhibit preliminary discussions or the exploration of alternative options prior to a final decision being made. I consider this a general public interest reason, rather than relating to matter (n), but recognise that this chilling effect is a factor that weighs against disclosure.
- 62 I agree that matter (s) is relevant. Although as the film has now been released, the people behind the film are in the business of making films such as the one which is the subject of this application. They may make further applications, which will involve the Department, where the information is relevant and impacts their business and finances.
- 63 I also agree that matter (x) is also relevant. In this case, I think it is likely that the information is information that is related to the business affairs of a person that is generally not available to the competitors of that person. Although the film has achieved public release, the information remains relevant to the business of the producer and director of the film and may be relevant to future projects.
- 64 Having considered the factors for and against, I am satisfied that it is not contrary to the public interest to release the following information:
 - The nine redacted words in the second point under the heading *Remarks on page 2*;
 - all of the Introduction/Background on pages 3 and 4, except for the final paragraph;
 - all of the information under Criterion 3 on pages 5 and 6; and
 - the information claimed to be exempt under s35 on Page 8.
- 65 I am satisfied that the Department has discharged its onus under s47(4) of the Act to show that s35 is applicable to the remainder of the information I found to be *prima facie* exempt. This information is exempt pursuant to s35(1)(a) and is not required to be released to C.

⁷ See Suzanne Pattinson and Department of Education (2 August 2022) and Todd Dudley and Department of Natural Resources and Environment (12 May 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

Section 37 – Information relating to business affairs of a third party

- 66 For information to be exempt under this section, I must be satisfied that its disclosure would disclose information related to business affairs acquired by the Department from a third party and that –
1. the information relates to trade secrets; or
 2. the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.
- 67 The Department seeks to exempt the following information pursuant to s37 in Documents 1, 9, 10, 32, 33, 34, 35 and 36.
- 68 The Department notes that for information to be exempt under s37, it must be likely to expose the undertaking to a disadvantage that is characterised by competition and relies on the Tasmanian Supreme Court case of *Forestry Tasmania v Ombudsman*.⁸ In considering the equivalent provision under the now repealed *Freedom of Information Act 1991*, the Supreme Court of Tasmania held that:
- For the information to be exempt its disclosure needs to be likely to expose the undertaking or agency not to any disadvantage, but a disadvantage which relates to or is characterised by competition.*
- 69 The concept of competitive disadvantage was held to be one which puts an entity at a disadvantage in relation to a matter which affects its profit-making capacity relative to its competitive rivals.⁹ The Court interpreted likely to mean that there must be a real or not remote chance or possibility, rather than more probably than not.
- 70 I note here that in the New South Wales Supreme Court decision of *Kaldas v Barbour*¹⁰ it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts in New South Wales. I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction and that I am also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.
- 71 Accordingly, the value of the Forestry Tasmania case as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases ‘competitive disadvantage’ and ‘likely to expose’, all of which are instructive and with which I agree.
- 72 The Department reasons that the information in issue contains financial and intellectual property information belonging to the makers and owners of the *Wild Things* documentary film. The Department considers that the information

⁸ [2010] TASSC 39.

⁹ See Note 8 at [55].

¹⁰ [2017] NSWCA 275 (24 October 2017)

is of such a nature that, if released, it has a realistic chance of exposing the third party to competitive disadvantage.

- 73 The Department's internal reviewer, Ms Lander, advised that she had consulted with the third party as part of the original decision-making process and the third party had strongly objected to its business information being released.
- 74 The applicant argued that any commercial disadvantage in connection with the release of the information would be limited to the context of this particular production and the profitability from its release. The Department considered that this assumption was wrong. Ms Lander set out her view that the information in question has commercial worth extending beyond the production of this film. She considered that the information reveals contributions towards the financing of the film, the costs of services to the production company, as well as valuable intellectual property. It also showed the approach taken by 360 Degrees Pty Ltd in pitching the project to Screen Tasmania which, if it were to be released, would be commercially valuable to other filmmakers and service providers. She considered that this could place the third party at a competitive disadvantage in future dealings, or cause it to suffer loss through the exposure of its intellectual property.
- 75 In assessing whether the information is *prima facie* exempt under s37, I take into account the passage of time and the fact that the film is now publicly available. I consider any change or impact that may have on the applicability of the exemption. I will consider each relevant document below.

Document 1

- 76 The Department has sought to exempt financial information in this document, which is a Production Investment Application for a funding round closing 4 February 2019. It has redacted dollar figures on pages 6 and 19 and a *Drawdown Schedule* table on page 22 containing further financial information. I am satisfied that this information is *prima facie* exempt pursuant to s37(1)(b), though I consider this the case for the dollar figures only on page 22 and not the remainder of the table.

Document 9

- 77 The Department has sought to exempt in full this spreadsheet containing the proposed budget for the project. I am satisfied that this is *prima facie* exempt pursuant to s37(1)(b).

Document 10

- 78 The Department has sought to exempt in full this finance plan document, containing details of proposed financial backing sought for the project. I am satisfied that this is *prima facie* exempt pursuant to s37(1)(b).

Document 32

- 79 The Department has sought to exempt information on pages 1, 2 ,4, 5 and 6 of this document, which is an *Internal Report Project Summary* prepared by a project officer of the Department to inform Screen Tasmania's decision on whether to fund the project. I am satisfied the information it has sought to redact contains financial and distribution information which may expose 360 Degrees Pty Ltd to a competitive disadvantage and it is *prima facie* exempt under s37(1)(b).

Document 33

- 80 This is a series of emails between Mr McPhail of the Department and Ms Ingleton, the filmmaker, asking and answering questions regarding the funding application. It was attached to Document 32 and the Department has sought to exempt information on pages 1, 2 and 3. The information redacted by the Department relates to clarifications of budget information for the project. I am satisfied it is *prima facie* exempt under s37(1)(b) of the Act.

Document 34

- 81 This is a report by a consultant hired by Screen Tasmania to provide a review of the funding application. The Department has sought to exempt information on pages 1, 5, 6 and 7 of the document, which details financial and distribution information about the project. I am satisfied that this information is *prima facie* exempt under s37(1)(b) of the Act.

Document 35

- 82 This contains the minutes of a meeting of the STEAG on 28 March 2019. The Department has sought to exempt information on pages 4 and 5, which contains financial information about the project. I am not satisfied that the words *The STEAG noted that this was a story worth funding*, on page 5 could cause any competitive disadvantage, but am satisfied that the remainder of the redacted information is *prima facie* exempt under s37(1)(b).

Document 36

- 83 This is a Minute to the Minister for the Arts regarding the STEAG recommendation for the project signed on 2 May 2019. The Department has sought to exempt one sentence regarding distribution of the film. I am satisfied that this information is *prima facie* exempt under s37(1)(b).

Public interest test

- 84 Section 37 is subject to the public interest test set out in section 33. It is therefore necessary to assess whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt.
- 85 As above, referring to Schedule 1 of the Act, the Department found matters (a), (b), (c), (f), (h), (k), (m), (n), (s) and (x) to be of particular relevance in this instance, though it did undertake a global public interest test assessment across

all exemptions it applied. In the context of s37, I consider that the following matters are of most relevance:

- (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 future;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation; and
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person.

86 Further, Ms Lander advised that [footnotes omitted]:

In addition to the relevant Schedule 1 items, I have also taken into account the following matters:

- *The investment is partial (in Tasmania's case, less than 10% of the production costs), and supports production of a creative work intended for commercial distribution.*
- *Public statements, made in Parliament, that the purpose of the investment program is to generate economic benefits for Tasmania, job creation and to 'leverage investment from outside Tasmania for the benefit of Tasmanian filmmakers, crews, creatives and actors'.*
- *While a final acquittal has not yet been provided by the proponent (I understand it has been delayed due to COVID-19 impacts), I am advised that the local 'spend' intended to be generated by the investment has been achieved.*
- *Production investment in 2019-20 leveraged an estimated spend of just over \$5.2 million on Tasmanian goods and services and 203 jobs for Tasmanian cast and crew (excluding extras).*
- *Tasmania competes with other jurisdictions to attract projects.*
- *Artistic merit, factual accuracy, subject matter or other such considerations do not form part of the assessment criteria for investment.*
- *The investment decision for the Wild Things documentary has been reviewed by the Minister for Arts, who has publicly confirmed her decision to invest was 'the right decision in law'.*

- *The assessment process for the investment program has been reviewed by the Minister for Arts, who has publicly endorsed the process as ‘an independent process … that is in place so that there is no political interference or censorship of the arts’.*
 - *The subject of the film is environmental protest action across the country, not just in Tasmania. The topic is controversial and Tasmania’s decision to invest has provoked local praise and criticism (especially from Tasmania’s forestry industry).*
 - *The proponent was consulted with regard to the release of its information and has strongly objected to release of information of information it considers commercially sensitive.*
- 87 I considered the Department’s assessment of the public interest test to be reasonable and its application of s37 to be restricted to financial and distribution information which would be of a kind unlikely to be available to the competitors of the filmmaker. I am satisfied that this information provides insights beyond this particular project and it remains likely to cause disadvantage despite the passage of time.
- 88 In view of the above, I consider that it would be contrary to the public interest to disclose I found *prima facie* exempt. This information is exempt pursuant to s37(1)(b) and is not to be released to C.

Section 38 - Business affairs of public authority

- 89 Information is exempt under s38(a)(ii) if it is, in the case of a public authority engaged in trade or commerce, information of a business, commercial or financial in nature that would, if disclosed under this Act, be likely to expose the public authority to competitive disadvantage. Other parts of s38 can be used to exempt information relating to trade secrets, results of scientific or technical research or unfinalised examination records.
- 90 The Department relies upon s38 to exempt Screen Tasmania’s available funds, as set out on page 1 of Document 32. While the Department did not specify the particular sub-section of s38 that it sought to rely upon, it is clear from the nature of the information that s38(a)(ii) is the relevant sub-section. Section 38 is subject to the public interest test.
- 91 Screen Tasmania provides investment in screen projects and I am satisfied that it can be characterised as being engaged in trade and commerce. I am also satisfied that the information in Document 32 which the Department has sought to exempt is of a business, commercial or financial nature.
- 92 The next consideration is whether the information would, if released, be likely to expose the public authority to competitive disadvantage. As mentioned

above, the concept of competitive disadvantage was considered by the Supreme Court of Tasmania in *Forestry Tasmania v Ombudsman*, which found that the disclosure of the information must be likely to expose the undertaking to a disadvantage that is characterised by competition.

- 93 I am satisfied that the dollar figure on page 1 of Document 32 is information of that nature and it is, therefore, *prima facie* exempt under the Act. I am not so satisfied regarding the words *Screen Tasmania's Total Available Funds* and this information should be released to C.
- 94 I now turn to my assessment of the public interest test set out in section 33. It is necessary to assess whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt.
- 95 The Department used the same public interest test assessment across all of the exemptions it found applicable, so I will not repeat all of its findings or my agreement regarding the matters (a), (b), (c) and (f) being relevant and weighing in favour of disclosure.
- 96 In relation to matters weighing against disclosure, I find that the Schedule 1 matter (s) is of most relevance, specifically whether the disclosure would harm the business or financial interests of a public authority. Matter (k) – whether the disclosure would promote or harm the economic development of the State – is also of relevance and weighs slightly against disclosure.
- 97 I understand that the grant process is a highly competitive one. When an applicant competes for grants, it is engaged in a competition for limited resources. The public body that administers the grants has competitive and commercial interests in who obtains the grants and the finished product because of the possibility of enhancement to the Tasmanian film industry and arts sector. It necessarily competes, not only in an Australian national arena but also internationally, as is shown here as the subject documentary covers global issues. In this situation, the Department, is acting as a backer or investor in an industry that has potential to promote the economic development of the State. Knowledge of its available funds at a particular time has a slight but genuine chance of causing harm to the business interests of Screen Tasmania. Its overall financial position is required to be reported in mandatory annual reporting, as for all public authorities, but I consider that this point in time information has a different quality and its release could cause harm.
- 98 Accordingly, I am of the view that it would be contrary to the public interest to disclose this particular dollar figure. It is exempt under s38(a)(ii) and not to be released to C.

Section 39 – Information obtained in confidence

- 99 The Department relied on s39 to exempt information in Documents 1, 7, 12, 32, 33, 34 and 35.

- 100 For information to be exempt under s39, I must be satisfied that its disclosure under the Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –
- (I) (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.
- 101 Information sought to be exempted in Document 1, at page 7, comprises a short synopsis of the film project. I accept that this was provided in confidence and its release may have impaired the ability of the public authority to obtain similar information prior to the release of the film. However, as the film is now publicly and freely available, any confidential character that had existed in the information seems to be exhausted. I am not satisfied that its release at this stage would have any chilling effect on the public authority obtaining similar information in future. Accordingly, this information is not exempt and may be released to C. The Department has considered that the material may be subject to copyright, and it is open to it to consider whether an alternative method of provision of the information is necessary pursuant to s18.
- 102 Document 7 consists of a more thorough summary of the documentary film. While this is significantly more detailed, my comments above apply equally here and it is not apparent what impairment to the ability to obtain such information would occur due to this information being divulged after the release of the film. I consider that the information may be released to the applicant, though it is again open to the Department to consider whether alternative provision of the information under s18 would be applicable.
- 103 Document 12 consists of the Producer and Director's Statement by Ms Ingleton. I am of the view that Ms Ingleton's statement, which was made for the purpose of supporting her application for grant of funds, contained some information which was intended to be in confidence at the time it was made. Since that time the documentary film has been made and released in line with its original synopsis. Accordingly, the information has otherwise been made available or is in the public domain. Therefore, I am of the view that the confidential nature of the information has been exhausted and its release would be unlikely to impair the ability of the Department to obtain similar information in future. I consider that the information in Document 12 for which the Department has claimed exemption under s39 may be released.
- 104 On page 10 of Document 32, there are two sections for which the Department claims exemption under s39. I have already found this information exempt under s35, so will not assess it again.

- I05 Document 33 consists of a series of emails between officers of the Department and Ms Ingleton. On pages 3 and 4 of Document 33, the Department has claimed two sections of this email exchange are exempt under s39. I have already found the part of page 3 to be exempt under s37, so will not assess it again. There is a comment made by Ms Ingleton on page 4 which has not been assessed and does reveal information provided in confidence regarding the plan for the film. I am satisfied that this is *prima facie* exempt under s39(1)(b).
- I06 Document 34 comprises an external assessment and report on the merits of the project application for funding. The Department replies on s39 to exempt information on pages 2, 3, 4, 5 6, 7, and 8.
- I07 The information on pages 2, 3 and 4 consists of restatements of the planned content of the film and filming process, supplied by 360 Degree Films Pty Ltd. I consider that the same reasoning applies as I set out in relation to Documents 1 and 7, and do not consider this information exempt under s39. It may be released to C, but it is open to the Department to consider how the information should be released under s18 due to the copyright considerations.
- I08 The Department has also relied on s39 for information from page 5 to 7 under the heading of 'Proposed Finance & Budget'. I have already dealt with this information under s37 of the Act, therefore I do not need to consider it further.
- I09 The Department also relies on s39 for information on page 8 of document 34, under the heading 'Summary'. This contains some information setting out the summary opinion of the consultant engaged by the Department. It does not provide any information provided in confidence from the film-maker. I am not satisfied that a paid consultant would not provide their services again if this information were divulged. Accordingly, I am not satisfied that this information is exempt under s39(1)(b) and it may be released to the applicant.
- I10 Document 35 comprises the Minutes of a meeting of STEAG during which the subject project was discussed. As I have already dealt with relevant part under s37, I do not need to consider it further under s39.

Preliminary Conclusion

- I11 For the reasons set out above, I determine that:
- exemptions claimed by the Department pursuant to s27 are upheld;
 - exemptions claimed by the Department pursuant to ss35, 37 and 38 are varied; and
 - exemptions claimed by the Department pursuant to s39 are set aside.

Submissions to the Preliminary Conclusion

- 112 As the above preliminary decision was adverse to the Department, it was made available to it on 24 March 2024 to seek its input prior to finalisation in accordance with s48(1)(a) of the Act.
- 113 On 28 May 2024, Mr Craig Limkin, Secretary of the Department, provided submissions in response. These set out that the film director had been consulted and agreed to the disclosure of her copyright material and the Department had determined that additional information could be released to the applicant. This information comprised:
- Document 1:
 - o Project Synopsis on page 7
 - o Previously redacted components of the Proposed Drawdown of Screen Tasmania funds on page 22
 - Document 7 – Pitch Statement – entire document
 - Document 12 – Producer and Director’s Statement – entire document
 - Document 32 – the relevant words on page 1
 - Document 33 – the relevant paragraph on page 3
 - Document 35 – the relevant words on page 5

- 114 Mr Limkin identified an inadvertent error in relation to my conclusion regarding s27, which I have now corrected in the text above. He also objected to the proposed release of information the Department had originally found to be exempt under ss35 and 39, for the following reasons:

Submissions – section 35

3. I have considered the preliminary reasons, and consider the following

information should continue to be withheld under s 35:

- Document 32:
 - o The relevant words on page 2
 - o Project Officer’s Remarks Introduction/Background section on pages 3 and 4
 - o Criterion 3 on pages 5 and 6
 - o The first paragraph of the Project Officer’s Remarks on page 8

4. The preliminary decision finds that the information withheld from this document consists of internally deliberative information, and is therefore only to be released if doing so would not harm the public interest. The preliminary decision that the information should be disclosed rests on findings in relation to the public interest test, which I address below.

Public interest test

Matter (b), in response to [56] of the preliminary decision:

5. You state that the subject matter of the film is of public interest and, you consider that ongoing debate on this subject results in this matter

weighs in favour of disclosure. I do not dispute that the subject matter of the film is of public interest. I do, however, dispute that the internal deliberations of the Project Officer regarding funding of the film are somehow connected to the debate surrounding the subject matter of the film.

6. I do not agree that matter (b) weighs in favour of disclosure, particularly in light of the finding that public interest in the film has been significantly diminished due to the passage of time.

Matter (k), in response to [59] of the preliminary decision:

7. You state that matter (k) on balance is neutral in terms of the merits of disclosure. Respectfully, I disagree. Artistic works are often highly personal, and open to interpretation. Releasing the evaluation of one Project Officer, generated for the purposes of determining funding, has the possibility of tainting the public's perception and interpretation of the artwork. This is a strong deterrent for future applicants.

8. You state that the release of this information would promote the economic development of the state by allowing applicants to assess whether the process for awarding funding is robust. Again, I disagree. The relevant report forms only part of the decision-making process, for which the Minister is ultimately responsible. And it is the knowledge that the assessment includes internal departmental evaluation as well as consideration by an independent expert panel that will give potential applicants a sense that there is a robust process, not the specific comments of an individual officer in respect of a specific application.

9. Tasmania competes with other national and international jurisdictions to attract productions to the State. The attraction of productions promotes local spending and provides opportunities for local creatives to gain invaluable experience and opportunities to build critical networks to foster their own work. The release of information that could jeopardise Tasmania's position in this respect would not be in the public interest.

10. I consider matter (k) to weigh against disclosure.

Matter (m), in response to [60] of the preliminary decision:

11. You state that matter (m) is neutral in this instance. I disagree for the reasons stated above regarding matter (k). Releasing the evaluation of one Project Officer, generated for the purposes of determining funding, could impact the public's perception of the relevant work, the artist, and their business.

12. This is evidently harmful to that individual, and matter (m) therefore weighs against disclosure.

Matter (s) in response to [62] of the preliminary decision:

13. Matter (s) is relevant, and weighs in favour of non-disclosure for the same reasons as matters (k) and (m) above.

14. For the above reasons, I submit that the public interest test weighs against disclosure and the information should continue to be withheld under s 35.

Submissions – section 39

15. I have considered the preliminary reasons and consider the following information should continue to be withheld under s 39(1)(a):

- Document 34 – information on pages 2, 3, 4 and 8.

16. The preliminary decision finds that the relevant information was withheld under s 39(1)(b) of the Act. On the basis of a belief that ‘a paid consultant would not provide their services again’, the decision finds that the information is not exempt under this section.

17. Firstly, I submit this belief relies on an incorrect assumption regarding the nature of the contract with the External Reader. External Readers are not engaged under contracts paying commercial rates for the expert’s time, but on an honorarium basis only. The Department relies heavily on the goodwill of industry experts, and their willingness to give up their time to undertake this work. There is significant risk that if the opinions and advice they provide become liable to disclosure that they will see this as a breach of what they had understood to be a confidential relationship, without the off-set of a lucrative commercial contract to make the breach an acceptable risk of undertaking the work.

18. Furthermore, the preliminary decision fails to consider that the exemption claimed for this information was s 39(1)(a). This section provides that information is exempt if it was provided in confidence and would be exempt information if it had been generated by an officer of a public authority.

19. The information in the External Reader report, including the summary of the film, are the External Reader’s own words and views on the proposal. The report is prepared to inform the deliberations of the STEAG. The information is clearly opinion, and is equally clearly prepared for a deliberative process.

In response to [107] preliminary decision:

20. You state that information on pages 2,3 and 4 is a mere restatement of the planned content of the film, and filming process. While it is correct that the information is a restatement, it is a restatement in the words of an industry expert, and forms the beginning of his evaluation of the project.

21. You state that these pages should be released in accordance with your reasoning at [101] and [102] of the preliminary decision, regarding the release of documents 1 and 7. In these paragraphs, you state that you accept that the information surrounding the film was provided in confidence by the film-maker, and as the film has now been released, the information is no longer confidential. The difference between documents 1 and 7, and document 34, is that document 34 was not provided to us by the film-maker, but rather by an industry expert.

22. As noted above, the Department engages with such industry experts primarily on a good will basis. Releasing this document, and consequently, the in-depth evaluation carried out by the expert, carries a significant risk of such experts refusing to provide their services for similar projects in the future.

In response to [109] preliminary decision:

23. You state that the Summary on page 8 of the document does not contain information provided in confidence by the film maker. This is correct. The Summary contains information provided in confidence by the industry expert.

24. You state that you are not satisfied that a paid consultant would not provide their services again if this information were divulged. I do not agree with this statement. As noted above, these industry experts are paid in honorarium, and on a good will basis. As such, there is a real possibility that these experts would refuse to provide similar information and analysis in the future if this information is disclosed.

Additional public interest test submissions:

25. I further submit that the public interest test considerations in respect of s 35 (at [5]-[14] of this document) apply equally in respect of this information, on the basis that the exemption under s 39(1)(a) is used as a ‘proxy’ for internally deliberative information prepared for the department by an external provider.

Further analysis

Section 35 – internal deliberative information

115 In relation to s35, I have carefully considered the Department’s further submissions. However, I maintain my view that matter (b) in Schedule 1 of the Act weighs in favour of disclosure, as environmentalism is Tasmania continues to be a subject of significant public debate and is a matter of public interest due to valid concerns about how best to preserve the natural environment while enabling the appropriate extraction of natural resources. The reasons for deciding to allocate public funds to this film is relevant to this debate.

- 116 In relation to matter (k), I accept that this weighs slightly against release in relation to the comments regarding Criterion 3 on pages 5 and 6. I maintain my view that this is not of any significant weight in this assessment in relation to the other three parts of Document 32 in question.
- 117 In relation to matter (m), I do not agree with the Department. The Project Officer's comments are positive and it is not apparent to me why this would taint the public's perception of the *relevant work, the artist, and their business*. I maintain my view that this is a neutral consideration regarding these specific pieces of information. this documentary.
- 118 In relation to matter (s), I agreed in my preliminary decision that this was relevant and weighed against disclosure.
- 119 Overall regarding s35, I maintain my findings regarding the information on pages 2-4 and page 8, but find that it is contrary to the public interest to release the Criterion 3 analysis on pages 5 and 6.

Section 39 – information obtained in confidence

- 120 In relation to s39, I acknowledge that the Department did seek to exempt this information under s39(1)(a) and not s39(1)(b) and this was not properly addressed in my original analysis. I apologise for this oversight and accept that this information would be eligible for exemption under s35, had it been prepared by an officer of a public authority. As the Department's further submissions almost entirely relate to the reasons it considers that the disclosure of this information would be reasonably likely to impair its ability to obtain similar information in future, however, s39(1)(b) does appear to be equally valid.
- 121 Due to the further information provided about the goodwill basis on which these opinions are provided by industry experts, I attach greater weight to matter (n) in Schedule 1 in my public interest test assessment and consider that this factor weighs significantly against disclosure.
- 122 Despite this, I maintain my view that the information in the *Project Synopsis* part of the External Reader's Report on pages 2 and 3 is a restatement of information provided by 360 Degree Films and it is not contrary to the public interest for this to be released. I did not intend to imply that the restatement was not in the external reader's own words, but to convey that it closely mirrors the material provided by 360 Degree Films.
- 123 I have altered my proposed determination in relation to the *Project Analysis* on pages 3 and 4, and the *Summary* on page 8, however, and find that the release of this information would be contrary to the public interest. This information is exempt pursuant to s39(1)(a) and is not to be released to C.

Conclusion

I24 For the reasons set out above, I determine that:

- exemptions claimed by the Department pursuant to s27 are upheld; and
- exemptions claimed by the Department pursuant to ss35, 37, 38 and 39 are varied.

I25 I apologise to the parties for the inordinate delay in finalising this decision.

Dated: 29 May 2024



Richard Connock
OMBUDSMAN

Attachment A

Relevant Legislation

Section 27 – Internal briefing information of a Minister

- (1) Information is exempt information if it consists of –
- (a) an opinion, advice or a recommendation prepared by an officer of a public authority or a Minister; or
 - (b) a record of consultations or deliberations between officers of public authorities and Ministers –
in the course of, or for the purpose of, providing a Minister with a briefing in connection with the official business of a public authority, a Minister or the Government and in connection with the Minister's parliamentary duty.
- (2) Subsection (1) ceases to apply after the end of the period of 10 years commencing on the date of the creation of the information referred to in that subsection.
- (3) Subsection (1) does not include information solely because it –
- (a) was submitted to a Minister for the purposes of a briefing; or
 - (b) is proposed to be submitted to a Minister for the purposes of a briefing –
if the information was not brought into existence for submission to a Minister for the purposes of a briefing.
- (4) Subsection (1) does not include purely factual information unless its disclosure would reveal the nature or content of the opinion, advice, recommendation, consultation or deliberations of the briefing.
- (5) Nothing in this section prevents a Minister from voluntarily disclosing information that is otherwise exempt information.

Section 35 – Internal Deliberative Information

- (1) Information is exempt information if it consists of –
- (a) an opinion, advice or recommendation prepared by an officer of a public authority; or
 - (b) a record of consultations or deliberations between officers of public authorities; or
 - (c) a record of consultations or deliberations between officers of public authorities and Ministers –

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

(2) Subsection (1) does not include purely factual information.

(3) Subsection (1) does not include –

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

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

37. Information relating to business affairs of third party

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

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

(2) If –

- (a) an application is made for information under this Act; and
- (b) the information was provided to a public authority or Minister by a third party; and
- (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of substantial concern to the third party –

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

- (d) notify the third party that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information applied for; and
- (f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

- (3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f), decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party of the decision.
- (4) A notice under subsection (3) is to –
- (a) state the nature of the information to be provided; and
 - (b) if the decision was made on behalf of a public authority, state the name and designation of the person who made the decision; and
 - (c) inform the third party of –
 - (i) its right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.
- (5) A public authority or Minister must not provide the information referred to in a notice given to a third party under subsection (3) –
- (a) until 10 working days have elapsed after the date of notification of the third party; or
 - (b) if during those 10 working days the third party applies for a review of the decision under section 43, until that review determines that the information should be provided; or
 - (c) until 20 working days after notification of an adverse decision under section 43; or
 - (d) if during those 20 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or
 - (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

38. Information relating to business affairs of public authority

Information is exempt information –

- (a) if it is –
 - (i) a trade secret of a public authority; or

- (ii) in the case of a public authority engaged in trade or commerce, information of a business, commercial or financial nature that would, if disclosed under this Act, be likely to expose the public authority to competitive disadvantage; or
- (b) if it consists of the result of scientific or technical research undertaken by or on behalf of a public authority, and –
 - (i) the research could lead to a patentable invention; or
 - (ii) the disclosure of the results in an incomplete state would be likely to expose a business, commercial or financial undertaking unreasonably to disadvantage; or
 - (iii) the disclosure of the results before the completion of the research would be likely to expose the public authority or the person carrying out the research unreasonably to disadvantage; or
- (c) if it is contained in –
 - (i) an examination, a submission by a student in respect of an examination, an examiner's report or any such similar record; and
 - (ii) the use for which the record was prepared has not been completed.

39. Information obtained in confidence

- (1) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –
 - (a) the information would be exempt information if it were generated by a public authority or Minister; or
 - (b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.
- (2) Subsection (1) does not include information that –
 - (a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and
 - (b) relates to trade secrets or other matters of a business, commercial or financial nature; and
 - (c) was provided to a public authority or Minister pursuant to a requirement of any law.

33. Public interest test

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

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

Section 30(3) and 33(2)

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

- (k) whether the disclosure would promote or harm the economic development of the State;
- (l) whether the disclosure would promote or harm the environment and or ecology of the State;
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

**Right to Information Act Review****Case Reference R2202-099**

O2012-009

Names of Parties: Carlo Di Falco and City of Hobart**Reasons for decision:** s48(3)**Provisions considered:** s36

Background

- 1 In 2004, Mr Carlo Di Falco worked at the then Hobart City Council, now renamed the City of Hobart (Council). Following a workplace incident on 16 March 2004, Mr Di Falco sought information regarding the investigation of the incident under the *Freedom of Information Act 1991*. A decision on his application was eventually made by the Ombudsman, following a request for external review. The Council's decision that information was exempt as internal deliberative information (or was out of scope) was upheld by the then Ombudsman, Ms Jan O'Grady. In March and October 2020, Mr Di Falco applied to Council for information regarding the same incident, this time under the *Right to Information Act 2009* (the Act).
- 2 On 10 March 2020, Mr Di Falco applied to Council for an assessed disclosure under the Act. He gave an overview of the information sought as *all the information not supplied to me when I asked in 2004 in relation to an allegation that was put to police in that year*. When asked to describe the efforts he had made prior to his application to obtain the information, Mr Di Falco set out that he *asked 15 years ago but the missing information was exempt because it was "working notes" or hidden in the archives Council had a duty of disclosure and a duty of care to carry out a fair investigation*.
- 3 He then set out his detailed request for information as:
 - *The exempt working notes - allegations made against C Di Falco by [Council employee 1] and [Council employee 2] 2004;*
 - *Legal advice that the Council sought both before and after – any and all advice or comment regarding the polygraph I provided*
 - *Roger Brown's letter from the incident referred to in the B. Lumb memo.*
 - *All documents from the "Bennett Review" – refer to "thank for the reply Glen" [sic]*

- 4 On 22 April 2020, Mr Nick Heath, then General Manager of Council and its principal officer under the Act, informed Mr Di Falco that his application was accepted and the application fee was waived.
- 5 Mr Heath also informed him that the file containing the FOI request was destroyed as part of a periodical review of Council's records undertaken in accordance with the relevant Retention and Disposal Schedule. Mr Di Falco replied on 24 April 2020 and questioned this action. On 1 May 2020, Council advised Mr Di Falco that it does however, have a file relating to the investigation of the incident.
- 6 On 2 June 2020, Mr Di Falco replied and redefined his request as seeking everything that Council had relating to the investigations including the working notes that the Council acknowledged exist but did not disclose to me (in 2004).
- 7 On 24 August 2020, Mr Heath issued the first part of his decision, outlining the scope of Mr Di Falco's request as:
 - "...everything that you have in relation the file relating to the investigations, including the working notes that the Council acknowledged exist but did not disclose to me" ("Item 1"); and
 - "the other documents that I listed ("Item 2"), which I have inferred to mean:
 - "the exempt working notes-allegation against C-Di Falco by [Council employee 1] & [Council employee 2] 2004";
 - "legal advice that the council sought both before & after – any & all advice or comment regarding the polygraph I provided";
 - "Roger Brown's letter from the incident referring to in the B. Lumb memo"; and
 - "all documents from the Bennett review" – refer to "thank you for the reply Glen" doc"
- 8 Mr Heath provided Mr Di Falco with 244 pages of information that comprised Council's investigation file, with a small amount of information. Two parts were redacted as out of scope (relating to another employee) and the remainder was removed as potentially exempt under s36 (personal information of a person other than the applicant). He set out that consultation with the relevant third parties was required and a further decision would be issued once their input was received.
- 9 Mr Health indicated that three further documents has been assessed and not released as he considered they were exempt under s31 (legal professional privilege). He noted that Council was unable to find the Bennett review records.

- 10 Mr Heath also set out Mr Di Falco's review rights to Ombudsman Tasmania in relation to the finalised parts of his decision.
- 11 On 26 August and on 15 September 2020, Mr Di Falco emailed Council in relation to the information he received, indicating that it contained *no mention of meeting at Town Hall* and that he sought *all of the documentation in relation to the allegation*.
- 12 In his application for an external review to this Office on 20 October 2020, Mr Di Falco indicated that he sought external review and was particularly concerned that he still did not have *the exempt working notes that [he] was denied last time*.
- 13 On 21 October 2020, this Office emailed Mr Di Falco to advise him that his application for external review could not be accepted. This was because the time limit for his application for external review had expired, as it had been more than twenty working days since the Mr Heath's part decision dated 24 August 2020 had been delivered. The exemption of information under s31 therefore cannot be considered as part of this external review.
- 14 On 25 November 2020, Mr Heath issued a further decision entitled *Final Assessment* concerning Mr Di Falco's application. Mr Heath addressed matters raised by Mr Di Falco in his 15 September 2020 email which he considered were outside the scope of the right to information process. He advised Mr Di Falco to raise these further queries with his manager.
- 15 Mr Heath advised that he had also received responses from the third parties and formed the view that the information initially redacted as potentially exempt under s36 in fact was exempt under this section. In making this determination, he considered that Schedule 1 public interest matters (h) and (m) (erroneously labelled (i) and (ii)) were *particularly persuasive*. He set out that Mr Di Falco could seek review of this decision by the Ombudsman.
- 16 On 26 November 2020, Mr Heath released another decision, this time in relation to a second application for assessed disclosure submitted by Mr Di Falco on 25 October 2020. He refused this application under s20(a) of the Act, on the basis that it was a repeat of the first application and did not disclose a reasonable basis for seeking the same information again. He also set out that Mr Di Falco could seek review of this decision by the Ombudsman.
- 17 On 30 November 2020, my office received Mr Di Falco's application for an external review. It was accepted and was initially taken only to relate to the 26 November 2020 decision. It was later clarified that Mr Di Falco sought review of both decisions in his single request. I will issue a separate decision in relation to the external review request regarding Council's 26 November 2020 decision. Mr Di Falco is entitled to external review on both matters, as he was in receipt of decisions made by a principal officer of a public authority and sought review within 20 working days of receiving those decisions.

Issues for Determination

- 18 I must determine if the information is eligible for exemption under s36 or any other section of the Act.
- 19 As s36 is contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test contained in s33. This means that should I determine that the information is *prima facie* exempt, I am then required to determine whether it would be contrary to the public interest to release it having regard to, at least, the matters contained in Schedule 1.

Relevant legislation

- 20 Relevant to this review is 36 of the Act. I attach a copy of this sections to this decision as Attachment 1. Copies of s33 and Schedule 1 of the Act are also included at Attachment 1.

Submissions

- 21 No specific submissions relevant to this external review have been provided by either party.

Analysis

Section 36

- 22 Council has sought to exempt four pages of a record of a formal meeting on 27 May 2004 between the parties regarding the relevant workplace incident. The complainant was interviewed by Human Resources staff at Council, then the key witness, and then both the complainant and witness were interviewed together. They then left and an interview occurred with Mr Di Falco. This part of the record of the meeting has been released in full to Mr Di Falco, it is only the section which relates to the complainant and witness which has been claimed to be exempt by Council under s36.
- 23 Council's reasoning regarding why it considers the information exempt under s36 is very minimal. It is so brief that it is questionable whether it actually fulfils the requirement of s22 of the Act for reasons for decision to be given and that the relevant public interest considerations relied upon be stated. The total of the reasoning provided by Council is as follows:

I have formed the view that this information is exempt under section 36 of the act [sic].

This exemption is subject to the public interest test set out in section 33 of the Act. As part of this test, I am required to consider all relevant matters (including twenty five factors contained in Schedule 1 of the Act).

Having considered all relevant matters, I am of the view it is contrary to the public interest to disclose the requested information. Some of the factors from Schedule 1 I found particularly persuasive are:

- (i) “whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government”; and
 - (ii) “whether the disclosure would promote or harm the interests of an individual or group of individuals”.
- 24 I strongly encourage Council to provide more fulsome reasons in future and provide specific discussion and reasoning in its decisions, which references the actual circumstances regarding relevant third parties and the documents in question. This would provide the applicant with a better understanding of the matters considered, the reasons for the conclusions reached and can reduce the likelihood of further review.
- 25 It is interesting to note that the decision of the former Ombudsman Jan O’Grady, in relation to the previous review of Mr Di Falco’s 2004 application, also set out the importance of providing proper reasons for decision and noted deficiencies in the Council’s approach. It is unfortunate that this remains a common criticism on external review, regarding Council and many other public authorities, 19 years later.
- 26 I do not disagree that s36 is relevant and applicable, however. The record of the meeting information contains personal information, that is, the names and statements of persons other than Mr Di Falco. Their identities are apparent and those of the complainant and witness would be reasonably ascertainable even with the redaction of their names due to the nature of the workplace incident. I am satisfied that the information on the relevant three and a half pages is *prima facie* exempt under s36, with the exception of the headers and footers of each page, and the first line of the document which does not identify any person. The small parts cannot be exempt under s36 and should be released to Mr Di Falco.

Public interest test

- 27 I have consistently found that the personal information of public servants performing their regular duties is not exempt, unless unusual circumstances are established. Accordingly, I am not satisfied that it would be contrary to the public interest to release the details on the second line of the document, being the Council officers present at the meeting in their Human Resources roles.
- 28 The remainder of the material requires a fuller assessment of the public interest test.
- 29 Council broadly set out that it had considered the public interest test, but only identified matters (h) and (m) in Schedule I as being particularly relevant. I do not consider that this captures all relevant matters.
- 30 Matter (a) – the general public need for government information to be accessible – is always relevant and weighs in favour of disclosure. I also consider matter (d), (f) and (g) to be of relevance and to favour disclosure as the information would provide further contextual information regarding

government decisions, would enhance scrutiny of government decision-making and administrative processes. A decision was made to refer Mr Di Falco to Tasmania Police and he was prosecuted and convicted of assault. The release of this information would provide further information about the investigation and administrative process which led to this decision.

- 31 While I understand the point Council was trying to make, I do not agree that matter (h) is particularly relevant in this instance. This relates to whether the disclosure would promote or hinder the fair treatment of persons in their dealings with government. The complainant and witness were public officers and this provision is usually more targeted at those outside government dealing with it.
- 32 I agree with Council that matter (m) is the most important factor to consider in this public interest test assessment. Whether the disclosure would promote or harm the interests of an individual or group of individuals is the key consideration here. Mr Di Falco has an ongoing strong interest in this information and believes it will assist him to pursue his objectives. He continues to seek this information 19 years after the incident occurred.
- 33 Conversely, the interests of the complainant and witness are also a major consideration and do not favour release. Mr Di Falco was convicted of assault against the complainant and the public interest in ensuring that victims feel able to report crimes and inappropriate workplace conduct is high. As I have previously expressed¹, I weigh the interests of those who are the victim of crime as higher than the interests of the perpetrators. Accordingly, I consider overall that matter (m) weighs against disclosure.
- 34 In the same vein, a further key consideration weighing against disclosure is matter (n) – whether the disclosure would prejudice the ability to obtain similar information in the future. I considered similar information, statements in relation to misconduct allegations, in my past decision of *Simon Cameron and the Department of Natural Resources and Environment*² and set out that:

I consider this is a valid concern and that caution is indeed required to ensure the willingness of investigated employees and other witnesses to provide statements and co-operate in similar investigations in future.
- 35 The encouragement of victims of workplace misconduct and witnesses to come forward and give statements is of high public interest and the potential cooling effect on such disclosures of cooperation is significant, if this information was routinely able to be accessed by the perpetrator under the Act. It is appropriate for allegations against an employee to be made known to that employee as part of any disciplinary process, but there are structured processes for this and caution must be used to ensure these are not

¹ See Q and Northern Midlands Council (27 September 2023), See X, Y and Tasmania Police (4 March 2021) and see also D, E and Department of Education (17 December 2021), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

undermined through applications for information under the Act. Accordingly, I also weigh matter (p) – whether the disclosure would have a substantial adverse effect on the management by a public authority of its staff – against disclosure of this information.

- 36 Overall, the balance of factors favours exemption under s36, except in relation to the third, fourth and fifth paragraphs. These parts are not exempt, as they set the scene for a meeting attended by Mr Di Falco and are of a similar tenor to other documents released to him. They are to be released to Mr Di Falco.

Preliminary Conclusion

- 37 For the reasons set out above, I determine that the exemption claimed by Council under s36 is varied.

Conclusion

- 38 As the above preliminary decision was adverse to Council, it was made available to it on 11 December 2023 under s48(1)(a) of the Act, to seek its input before finalising the decision.
- 39 On 21 December 2023, Council advised this office that it will not provide feedback in relation to this decision.
- 40 Accordingly, for the reasons set out above, I determine that the exemption claimed by Council under s36 is varied.
- 41 I apologise to the parties for the inordinate delay in finalising this decision.

Dated: 11 January 2024



Richard Connock
OMBUDSMAN

Attachment I – Relevant Legislation

Section 36 – Personal information of a person

- (1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13.
- (2) If –
 - (a) an application is made for information under this Act; and
 - (b) the information was provided to a public authority or Minister by a third party; and
 - (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party –

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

 - (d) notify that person that the public authority or Minister has received an application for the information; and
 - (e) state the nature of the information that has been applied for; and
 - (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.
- (3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f), decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.
- (4) A notice under subsection (3) is to –
 - (a) state the nature of the information to be provided; and
 - (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
 - (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.
- (5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) –
 - (a) until 10 working days have elapsed after the date of notification of that person; or
 - (b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or
 - (c) until 20 working days after notification of an adverse decision under section 43; or

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

Where :

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

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

Section 33 – Public Interest Test

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

Schedule 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;
- (l) whether the disclosure would promote or harm the environment and or ecology of the State;
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

**Right to Information Act Review****Case Reference R2401-008**

O2012-009

Names of Parties: Carlo Di Falco and City of Hobart**Reasons for decision:** s48(3)**Provisions considered:** s20

Background

- 1 In 2004, Mr Carlo Di Falco worked at the then Hobart City Council, now renamed City of Hobart (Council). Following a workplace incident on 16 March 2004, Mr Di Falco sought information concerning the investigation of this incident under the *Freedom of Information Act 1991*. A decision on his application was eventually made by the Ombudsman, following a request for external review. Council's decision that information was exempt as internal deliberative information (or was out of scope) was upheld by the then Ombudsman, Ms Jan O'Grady. In March and October 2020, Mr Di Falco applied to Council for information regarding the same incident, this time under the *Right to Information Act 2009* (the Act).
- 2 On 10 March 2020, Mr Di Falco applied to Council for an assessed disclosure under the Act. He gave an overview of the information sought as *all the information not supplied to me when I asked in 2004 in relation to an allegation that was put to police in that year*. When asked to describe the efforts he had made prior to his application to obtain the information, Mr Di Falco set out that he *asked 15 years ago but the missing information was exempt because it was "working notes" or hidden in the archives Council had a duty of disclosure and a duty of care to carry out a fair investigation*.
- 3 He then set out his detailed request for information as:
 - *The exempt working notes - allegations made against C Di Falco by [Council employee 1] and [Council employee 2] 2004;*
 - *Legal advice that the Council sought both before and after – any and all advice or comment regarding the polygraph I provided*
 - *Roger Brown's letter from the incident referred to in the B. Lumb memo.*
 - *All documents from the "Bennett Review" – refer to "thank for the reply Glen" [sic]*
- 4 On 22 April 2020, Mr Nick Heath, then General Manager of Council and its principal officer under the Act, informed Mr Di Falco that his application was

accepted and the application fee was waived. Mr Heath also informed him that the file containing the FOI request was destroyed as part of a periodical review of Council's records undertaken in accordance with the relevant Retention and Disposal Schedule.

- 5 On 24 April 2020, Mr Di Falco replied to Mr Heath and queried this action. On 1 May 2020, Council advised Mr Di Falco that it does however, have a file relating to the investigation of the incident.
- 6 On 2 June 2020, Mr Di Falco replied and redefined his request as seeking everything that Council had relating to the investigations including the working notes that the Council acknowledged exist but did not disclose to me (in 2004).
- 7 On 24 August 2020, Mr Heath issued a part decision, releasing 244 pages with some redactions and determining three further documents were exempt under s31 (legal professional privilege). Redactions were applied to out of scope information and information Council considered potentially exempt under s36 (personal information of a person). It deferred its decision regarding s36, however, as it was undertaking consultation with relevant third parties. Mr Di Falco was advised of his review rights to the Ombudsman regarding the finalised parts of the decision.
- 8 Mr Di Falco emailed Council on 26 August and 15 September 2020 in relation to the information he received, indicating that it contained no mention of meeting at Town Hall and that he sought all of the documentation in relation to the allegation.
- 9 On 20 October 2020, Mr Di Falco sought external review, indicating that he did so as he was particularly concerned that he still did not have the exempt working notes that I was denied last time.
- 10 On 21 October 2020, this Office emailed Mr Di Falco to advise him that his application for external review could not be accepted. This was because the time limit for his application for external review had expired, as it had been more than twenty working days since Mr Heath's part decision dated 24 August 2020 had been delivered.
- 11 On 25 October 2020, Mr Di Falco lodged a further request for information under the Act to Council. He described the general topic of his request as information denied me when I last requested it – Council took months to reply to my request. Council did not contact me 20 days after application.
- 12 He included an attachment to his application, setting out his request:

I wish to resubmit my RTI application.

The original application took months to get a reply and that is why I am reapplying and there is obviously more content that has not been disclosed.

I wish to have all the documentation that has not been disclosed including but not limited to:

Roger Brown's letter that he wrote after being assaulted at a Council function.

All of the briefing notes between Peter Rodwell and Brent Armstrong.

All of the legal advice that the Council received from Craig Green et al and the legal advice regarding the Polygraph Test.

The 3 and ½ redacted pages.

All of Brian Lumbs emails to Peter Rodwell as well as all of the file notes "that he was too scared to give me because of Peter Rodwell.

Also any documentation provided by Ivan Wolf as to why he allowed [Council employee 1], [Council employee 2] and myself to continue to work together if he was told of the allegation.

All other pertinent documentation.

All documentation marked confidential.

- 13 On 25 November 2020, Mr Heath issued a further decision entitled *Final Assessment* concerning Mr Di Falco's application made on 10 March 2020. This found information exempt under s36 and addressed matters raised by Mr Di Falco in his 15 September 2020 email which Mr Heath considered were outside the scope of the right to information process.
- 14 On 26 November 2020, Mr Heath released another decision, this time in relation to the second application submitted by Mr Di Falco on 25 October 2020. He refused this application under s20(a) of the Act, on the basis that it was a repeat of the first application and did not disclose a reasonable basis for seeking the same information again. Both decisions indicated that Mr Di Falco could seek review by the Ombudsman.
- 15 On 30 November 2020, this Office received Mr Di Falco's application for an external review. It was accepted and was initially taken only to relate to the 26 November 2020 decision. It was later clarified that Mr Di Falco sought review of both decisions in his single request. I will issue a separate decision in relation to the external review request regarding Council's 25 November 2020 decision. Mr Di Falco is entitled to external review on both matters, as he was in receipt of decisions made by a principal officer of a public authority and sought review within 20 working days of receiving those decisions.

Issues for Determination

- 16 I must determine if Council is entitled to refuse Mr Di Falco's application as a repeat request under s20(a) of the Act, determining if the information is the same or similar to information sought under a previous application under the Act. If I am satisfied of this, I must then consider whether the application, on its face, discloses any reasonable basis for again seeking access to the same or similar information.

Relevant legislation

17 Relevant to this review is s20 of the Act. I attach a copy of this section to this decision as Attachment 1.

Submissions

Applicant

18 Mr Di Falco sought an external review on 30 November 2020 and his submissions (contained in various emails to my office) are as follows:

30 November 2020

I would like to ask the Ombudsman for an external review. The bundle of documentation that I have previously received from the Council appears to show that there was correspondence that I should have had access to, between the previous General Manager and Peter Rodwell. Also shows that there was correspondence between the Council and Tas Police which I believe denied me natural justice.

14 December 2020

After reading the email from Rodwell to Armstrong, 16 June 2004, it appears that the allegation was teased out of them and the threat of terminating their employment may have been put to them. I had specifically asked for all of the correspondence between Rodwell and Armstrong and between the Police and the Council. This differs from the previous application.

The email also contradicts what they said in court.

I believe the outcome would have been different if I had that email.

Did s30 ii,iii, iv allow me have access to the email if not having it prejudiced my case?

I also believe that the information that I am seeking is in the in the archives office(s) I I). I don't believe that any information was destroyed as there was irrelevant information included that was older.

20 December 2020

I believe that section 20 does not apply in this case as I have asked for all of the rest of the briefing notes between Peter Rodwell and Brent Armstrong following the 16 June 2004 email. This was not provided to me at the time and I have only just been made aware of it. If this is available now 15 years later, all the following emails should be available as well. Section 35 (4) states that subsection 1 ceases to apply after 10 years from the creation of that information referred to in that subsection. I believe that this applies in this case as it is now 15 years after it was created. On that basis I believe that there is an insufficiency in the searching for the information by the General manager Section 45 sub section 1 e.

I have also asked for the reply/replies to the Council from the Police with regards to what information they should release to me. These both differ from the original request.

In the first request, I was sent an email 28th Oct 2020 from the Acting General Manager –Tim Short. That he would write to each third party to receive their input as to releasing their information (redacted notes -3). I was not aware of this personal information until after the release of The [sic] 15 days expired without a reply and as a result I timed out on the time to request a review. Section 45 subsection 1 (f).....may apply to the ombudsman for a review of a decision if – 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.

In his email 26 Nov 2020, the General Manager wrote “ However, I note this does not preclude you from seeking external review of my assessment of your original application – provided you do so within twenty days of receiving the relevant notice of decision. The General Manager has made the invitation to review his decision.

In the original request, I didn’t ask for all the documentation marked confidential and documentation in relation to Ivan Wolf.

Council

- 19 Council did not provide specific submissions in response to this external review, other than the reasoning contained in its decisions. Council’s decision of 26 November 2020 sets out:

I note the information you have requested appears to be the same, or substantially similar to the information you have previously sought pursuant to a right to information application submitted 11 March 2020 (our ref: 17/286-100)(“Original Application”).

In my view, your application does not disclose any reasonable basis for again seeking similar information as to what you have already applied for. On this basis, I refuse your application under section 20 of the Act.

Analysis

- 20 Council’s decision of 26 November 2020 determined that Mr Di Falco’s request for information should be refused under s20(a), as it was the same or similar to his previous request for information under the Act lodged on 10 March 2020. It provided no specific reasoning for this decision, beyond re-stating the test in the Act and setting out that Mr Di Falco’s request was refused on this basis.
- 21 Section 20 of the Act provides:

Repeat or vexatious applications may be refused

If an application for an assessed disclosure of information is made by an applicant for access to information which –

(a) in the opinion of the public authority or a Minister, is the same or similar to information sought under a previous application to a public authority or Minister and the application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information; or

(b) is an application which, in the opinion of the public authority or Minister, is vexatious or remains lacking in definition after negotiation entered into under section 13(7) –

the public authority or Minister may refuse the application on the basis that it is a repeat or vexatious application.

Therefore, I must consider the scope of Mr Di Falco's 10 March 2020 and 25 October 2020 requests and assess the degree of similarity.

Is it the same or similar information?

22 A comparison of the two 2020 applications for assessed disclosure is as follows:

	March 2020		October 2020
1	<i>All the information not supplied to me when I asked in 2004 in relation to an allegation that was put to police in that year.</i>	1	<i>I wish to have all the documentation that has not been disclosed including but not limited to: All other pertinent documentation. All documentation marked confidential</i>
2	<i>The exempt working notes – allegation against C. Di Falco by [Council employee 1] and [Council employee 2] 2004</i>	2	<i>All of the briefing notes between Peter Rodwell and Brent Armstrong</i>
3	<i>Legal advice that the Council sought both before & after – any & all advice or comment regarding the polygraph I provided.</i>	3	<i>All of the legal advice that the Council received from Craig Green et al and the legal advice regarding the Polygraph Test</i>
4	<i>Roger Brown's letter from the incident referred to in the B Lumb memo.</i>	4	<i>Roger Brown's letter that he wrote after being assaulted at a Council function</i>
5	<i>All documents from the "Bennet Review" – refer to "thank you for the reply Glen" Doc</i>	5	<i>The 3 and ½ redacted pages</i>
		6	<i>All of Brian Lumbs emails to Peter Rodwell as well as all of the file notes "that he was too scared to give me because of Peter Rodwell</i>
		7	<i>Also any documentation provided by Ivan Wolf as to why he allowed [Council employee 1], [Council employee 2] and myself to continue to work together if he was told of the allegation.</i>

- 23 The requests for information are not identically worded, but it is clear that there is significant similarity. Mr Di Falco openly indicates that he made the second application due to the slow response of Council to his first request.
- 24 I am generally satisfied that the content of the two requests are similar, as they both seek *all of the information not supplied* or *all of the information that has not been disclosed* regarding the 2004 incident. The detail differs but the all-comprising nature of both requests means that they are substantially the same.

Is there a reasonable basis for seeking this information again?

- 25 The Act recognises that there may be legitimate reasons for seeking the same or similar information by a second application, so I must consider whether there are any changed circumstances or justification for Mr Di Falco's repeat request. In this case, Mr Di Falco indicates that the 244 pages he received from Council did not contain particular information he knew to exist and that his further request was for this information which had not been disclosed. His application indicates this on its face.
- 26 I consider that this is a reasonable basis for Mr Di Falco seeking the information again, though only where the information was not disclosed or considered in the 24 August and 25 November 2020 decisions of Council.
- 27 On this basis, the following parts of Mr Di Falco's request were validly refused under s20(a) and do not require further review:
 - *All documents from the “Bennett Review”* – refer to “thank you for the reply Glen” Doc. This failure to provide or assess this information was covered in Council’s decision of 24 August 2020, as it was not located. Mr Di Falco sought external review of this decision, but did not do so within the required timeframes under the Act;
 - *All of the legal advice that the Council received from Craig Green et al and the legal advice regarding the Polygraph Test* – this information was found to be exempt under s31 (legal professional privilege) on 24 August 2020 by Council. Mr Di Falco sought external review of this decision, but did not do so within the required timeframes under the Act; and
 - *the 3 and ½ pages* – this information was found to be exempt by Council under s36 in its 25 November 2020 decision and is considered in Mr Di Falco’s external review application regarding this decision.

- 28 In relation to the remainder of Mr Di Falco’s 25 October 2020 request, I am not satisfied that Council was entitled to rely on s20(a) of the Act to refuse it. Mr Di Falco’s request for all additional information still in existence relating to the request to be assessed appears reasonable. Council has not provided a clear explanation as to the status of the information Mr Di Falco indicates was not found, such as by a clear statement that all remaining information was assessed as part of the response to his 10 March 2020 request (if that was the case). This is symptomatic of Council’s very limited reasoning provided for its decision, which did not provide clarity for Mr Di Falco about his application. I acknowledge

the likelihood that information not assessed has been destroyed through document management processes in the intervening 19 years, but Mr Di Falco is entitled to a clear response as to whether this is the case or whether the information was omitted for other reasons from Council's assessment.

- 29 Accordingly, I determine that Council was not entitled to refuse these aspects of Mr Di Falco's request under s20(a):

I wish to have all the documentation that has not been disclosed including but not limited to:

Roger Brown's letter that he wrote after being assaulted at a Council function;

All of the briefing notes between Peter Rodwell and Brent Armstrong;

All of Brian Lumbs emails to Peter Rodwell as well as all of the file notes "that he was too scared to give me because of Peter Rodwell"; and

Any documentation provided by Ivan Wolf as to why he allowed [Council employee 1], [Council employee 2] and myself to continue to work together if he was told of the allegation.

Preliminary Conclusion

- 30 For the reasons set out above, I determine that Council was entitled to refuse aspects of Mr Di Falco's request which were repeated from his 10 March 2020 application under s20(a) of the Act.
- 31 Council was not entitled to refuse the remainder of the request, as there was a reasonable basis for again seeking this information. I direct Council to assess these parts of Mr Di Falco's request in accordance with the provisions of the Act.

Conclusion

- 32 As the above preliminary decision was adverse to Council, it was made available to it on 11 December 2023 under s48(1)(a) of the Act, to seek its input before finalising the decision.
- 33 On 21 December 2023, Council advised this office that it will not provide feedback in relation to this decision.
- 34 Accordingly, for the reasons set out above, I determine that Council was entitled to refuse aspects of Mr Di Falco's request which were repeated from his 10 March 2020 application under s20(a) of the Act.
- 35 Council was not entitled to refuse the remainder of the request, as there was a reasonable basis for again seeking this information. I direct Council to assess these parts of Mr Di Falco's request in accordance with the provisions of the Act.
- 36 I apologise to the parties for the inordinate delay in finalising this decision.

Dated: 11 January 2024

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

Richard Connock
OMBUDSMAN

Attachment I – Relevant Legislation

Section 20

Repeat or vexatious applications may be refused

If an application for an assessed disclosure of information is made by an applicant for access to information which –

- (a) in the opinion of the public authority or a Minister, is the same or similar to information sought under a previous application to a public authority or Minister and the application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information; or
- (b) is an application which, in the opinion of the public authority or Minister, is vexatious or remains lacking in definition after negotiation entered into under section 13(7) –

the public authority or Minister may refuse the application on the basis that it is a repeat or vexatious application.



Right to Information Act Review

Case Reference: R2303-012

Names of Parties: Christine Wright and Department of Police, Fire and Emergency Management

Reasons for decision: s48(3)

Provisions considered: s27

Background

- 1 Christine Vita Wright (the Applicant) is an employee of the Department of Police, Fire and Emergency Management (the Department). In recent years Ms Wright has been in various disputes with the Department and spent some time away from the workplace.
- 2 On 19 October 2022, Ms Wright made an application for assessed disclosure to the Department under the *Right to Information Act 2009* (the Act) seeking:
Briefing/information relating to Christine Vita Wright.
- 3 In a decision dated 15 November 2022, Ms Roslyn French, a delegate under the Act for the Department, located and disclosed six pages of information responsive to the application (given the internal reference RTI 402/22). These six pages comprised two briefing notes for the Minister for Police, Fire and Emergency Management with different subject headings. One briefing note was released in full, the second one has the subject: *Christine Wright – Correspondence to Premier and Deputy Premier* and information was claimed to be exempt in two parts of the document. Ms French said:

An exemption has been applied to some of the information pursuant to section 27 of the Act (Internal briefing information of a minister). The exempt information includes advice and opinions prepared by a public officer for the minister's information and consideration in connection with the official business of the public authority (DPFEM) and may not be purely factual.

- 4 Ms Wright was advised of the right, under s43 of the Act, to apply for a review of the decision by writing to the Secretary of the Department *within 20 working days of receiving this letter.*
- 5 Ms Wright did not request an internal review, though she later raised concerns regarding delayed receipt of the Department's decision.

- 6 On 16 January 2023, Ms Wright submitted an application for assessed disclosure under the Act to the Department of Premier and Cabinet, seeking:

Exemptions applied by DPFEM [the Department] under Section 27

- 7 This application was transferred to the Department pursuant to s14 of the Act, as the applicant was seeking the redacted information on the fifth page of the briefing note *Christine Wright – Correspondence to Premier and Deputy Premier* which was assessed by the Department on 15 November 2022. This application was allocated the internal reference RTI 31/23.
- 8 On 3 February 2023, Ms Emma Rogers, a delegate under the Act for the Department, issued a decision. She determined:

I am satisfied that this application is a repeat of a previous application (RTI 402/22 – see attached correspondence and documents) as you seek the same information already disclosed and assessed as exempt by this office.

Having regard to Section 20 of the Act, your application is refused.

- 9 On 11 February 2023, Ms Wright wrote to the Department seeking internal review of this decision under s43 of the Act.
- 10 On 2 March 2023, Detective Inspector Craig Fox, another delegate under the Act, released an internal review decision. He relevantly determined that:

It is my finding that RTI 31/23 is seeking a review of RTI 402/22 and as such should have been submitted within 20 days of your receipt of the outcome notice of RTI 402/22.

RTI 31/23 was deemed a repeat application under Section 27 of the Act and subsequently was refused. Even if the matter has been assessed as a review, your application to review is dated 16 January 2023, well outside the 20 working day timeframe for reviews.

However, even though it is my determination that RTI 31/23 has correctly been refused... I have conducted a review of the information redacted in RTI 402/22 due to the somewhat confusing nature of the two applications.

Having conducted a fresh assessment of the subject to your initial request ... I am satisfied that the exemptions applied, pursuant to Section 27 of the Act, have been applied correctly. The information redacted is based on “opinion” and therefore is classed as ‘exempt information’, and not subject to release.

- 11 On 23 March 2023, Ms Wright sought an external review.

12 On 3 May 2023, Ms Wright's application for an external review was accepted on the basis that at the time of the application, Ms Wright was:

- in receipt of a decision made by a delegate,
- the fee had been paid, and
- a review application had been made within 20 working days of receiving the internal review decision.

Issues for Determination

13 I must determine whether the information not released by the Department is eligible for exemption under s27 or any other relevant section of the Act.

Relevant legislation

14 A copy of s27 is Attachment A.

Submissions

Department

15 The Department made no submissions beyond the reasoning in its decisions, which is extracted in the Background above.

Applicant

16 The Applicant's external review request included submissions, extracts of which are set out below:

The redacted information I seek is government information and I have a legitimate reason to access the opinion of the Department about me. I have a number of ongoing matters before various jurisdictions and efforts to be heard for government accountability.

I believe the “opinion” of the Department will demonstrate in my matters before various jurisdictions the continual campaign against me.

...

I am getting closer to having my matters heard in the courts. ... Part of my matters relate to the redacted information I am seeking. Additionally, by receiving the redacted information about myself will assist in my mental health which is still deteriorating based on the actions within DPFEM.

Analysis

Section 27 – internal briefing information of a Minister

17 Section 27 of the Act provides that:

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

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

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

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

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

—

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

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

...

18 The Department has claimed parts of one briefing note entitled *Christine Wright – Correspondence to Premier and Deputy Premier* is exempt under s27 of the Act. This briefing note contains two sets of redactions which are found on the fifth page under the heading *Current Situation*. The first redaction is the second dot point and the second redaction is the last sentence of the final dot point. There is no dispute that the document in question is 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 and in connection with the Minister's parliamentary duty.

19 As to the meaning of *purely factual information*, I refer to *Re John Edward O'Brien Waterford and the Treasurer of the Commonwealth of Australia* where the Administrative Appeals Tribunal (AAT) observed that the word *purely* in this context has the sense of simply or merely and that the material must be factual in quite unambiguous terms.¹

¹ [1984] AATA 518 at [14].

20 The word *opinion* is not defined in the Act, so I turn to the ordinary meaning of the word. The *Macquarie Dictionary* defines *opinion* as:

1. judgement or belief resting on grounds insufficient to produce certainty.
2. a personal view, attitude, or estimation ...
3. the expression of a personal view, estimation, or judgement ...

The first redaction

21 The sentence that is the subject of the first redaction lists organisations to which it is *understood* the Applicant had made complaints.

22 The word *understood* clearly references a belief in the writer which is something less than certainty and therefore may be considered to be indicative of an opinion. However, one organisation to which the writer understands the Applicant has made a complaint is the Anti-Discrimination Commission. The unredacted dot point immediately following the redaction references this complaint and this confirmation by the writer of the briefing note raises the matter above their mere opinion and I therefore assess it as factual. Moreover, this confirmation of the complaint has already been released to the Applicant and so there is no reason to redact mention of it in the previous dot point.

23 A second complaint is *understood* to have been made to the Head of the State Service. The final dot point of this section begins with the unredacted words:

Ms Wright's complaint to the Head of the State Service has been referred to the Solicitor General for advice who has been consulted in relation to my role in the Deputy Commissioner of Police recruitment process.

24 Again, this is confirmation by the writer of the briefing note of a complaint and I therefore also assess this part of the redacted information as factual. The confirmation of the complaint has already been released and so there is no reason to redact mention of it in another part of the document.

25 The remaining redacted information in this sentence is not confirmed elsewhere in the briefing note, and so the understanding of the writer remains an opinion. This information is therefore exempt information under s27 of the Act and should not be released to the Applicant.

26 The release of mention of these two complaints by Ms Wright does not, on its own, reveal the nature or content of the opinion, advice, recommendation, consultation or deliberations of the briefing because they are mentioned elsewhere in the document and have already been released.

27 I therefore determine that, in the second dot point, the words:

It is understood that Ms Wright has also made complaints to ...

and

... Head of the State Service and Anti-Discrimination Commission.

be released to the Applicant, with the intervening words of this dot point not to be released as they are exempt pursuant to s27.

The second redaction

28 The first (released) sentence of the final dot point confirms that a complaint to the Head of the State Service has been referred to the Solicitor General for advice. The second (redacted) sentence refers to the writer's belief of the contents of that advice. I assess this sentence as containing the writer's and Solicitor General's opinion being conveyed to brief a Minister and, as such, it is exempt under s27 and should not be released to the Applicant.

Preliminary Conclusion

29 For the reasons given above, I determine that exemptions claimed pursuant to s27 are varied.

Conclusion

30 As the above preliminary decision was adverse to the Department, it was made available to it on 25 March 2024 to seek its input before finalisation, pursuant to s48(1)(a) of the Act.

31 On 9 April 2024. Sergeant Jess Walshe of the Department confirmed that *following [the Department's] consideration of the Preliminary Decision the Department does not seek to make any further submissions in relation to this matter.*

32 Accordingly, my findings remain unchanged. I determine that exemptions claimed pursuant to s27 are varied.

Dated: 10 April 2024



Richard Connock
OMBUDSMAN

Attachment A

Relevant Legislation

Section 27 – Internal briefing information of a Minister

- (1) Information is exempt information if it consists of –
- (a) an opinion, advice or a recommendation prepared by an officer of a public authority or a Minister; or
 - (b) a record of consultations or deliberations between officers of public authorities and Ministers –
in the course of, or for the purpose of, providing a Minister with a briefing in connection with the official business of a public authority, a Minister or the Government and in connection with the Minister's parliamentary duty.
- (2) Subsection (1) ceases to apply after the end of the period of 10 years commencing on the date of the creation of the information referred to in that subsection.
- (3) Subsection (1) does not include information solely because it –
- (a) was submitted to a Minister for the purposes of a briefing; or
 - (b) is proposed to be submitted to a Minister for the purposes of a briefing –
if the information was not brought into existence for submission to a Minister for the purposes of a briefing.
- (4) Subsection (1) does not include purely factual information unless its disclosure would reveal the nature or content of the opinion, advice, recommendation, consultation or deliberations of the briefing.
- (5) Nothing in this section prevents a Minister from voluntarily disclosing information that is otherwise exempt information.



Right to Information Act Review

Case Reference: R2309-011

Names of Parties: Clem Newton-Brown and Flinders Council

Reasons for decision: s48(3)

Provisions considered: s31, s36

Background

- 1 Little Dog Island is an 83 hectare island situated in eastern Bass Strait between Flinders Island and Cape Barren Island, northeast of Tasmania. This island is administered by Flinders Council (Council).
- 2 The applicant in this matter, Mr Clem Newton-Brown, submitted a development application (the DA) to Council proposing to build visitor accommodation on Little Dog Island. As part of the application process, Council invited submissions from the public to assist it in determining whether to approve Mr Newton-Brown's proposed development. However, upon receiving a summary of representations to Council illustrating significant public opposition to his proposed development, Mr Newton-Brown withdrew the DA prior to it being considered by Council for approval.
- 3 On 23 June 2023, Mr Newton-Brown applied for assessed disclosure under the Right to Information Act 2009 (the Act) to Council for the following information:
 1. *All independent advice and communications between Council and external consultants, including but not limited to any draft or final documents prepared for the purpose of the Application being considered by the Planning Authority.*
 2. *Copies in full of all Objections made by any party.*
 3. *Copies of communications from or to Council and any third party external to Council in relation to the proposed project on Little Dog Island.*
- 4 After receiving Mr Newton-Brown's application for assessed disclosure, Council attempted to negotiate with Mr Newton-Brown to reduce the scope of his request. However, these negotiations were not successful and on 6 July 2023 it was agreed between the parties that Council would process Mr Newton-Brown's request for information as articulated in his 23 June application for assessed disclosure.

- 5 On 16 August 2023, a decision was issued to Mr Newton-Brown by Council's General Manager, Mr Warren Groves. As part of his decision Mr Groves explained that over 600 documents had been identified as responsive to Mr Newton-Brown's application and that this information could be characterised as:
 - correspondence involving Mr Newton-Brown;
 - correspondence between Council and its consultant, PlanPlace;
 - correspondence involving Council's solicitors;
 - correspondence between Council and various third parties (such as the Crown, Parks and Wildlife, and representors);
 - copies of representations received in response to the public notification of DA 2021/056;
 - various plans and reports associated with DA 2021/056; and
 - planning assessment report prepared by Plan Place regarding DA 2021/056.
- 6 Mr Groves decided that all identified correspondence between Council and its solicitors regarding the DA was exempt from disclosure in full pursuant to s31 of the Act, on the basis of legal professional privilege. Mr Groves also decided that s36 of the Act applied to exempt from disclosure the personal information of people other than the applicant contained in representations made to Council regarding the DA, and in acknowledgment emails Council sent to representors notifying them of receipt of their representation. The balance of the information identified as responsive to Mr Newton-Brown's application was provided to him in full by Council.

Issues for Determination

- 7 I must determine whether the information not released by Council is eligible for exemption under s31 of the Act as being information which would be privileged from production in legal proceedings on the ground of legal professional privilege, or under s36 for revealing the personal information of a person other than the applicant.
- 8 As s36 is contained in Division 2 of Part 3 of the Act, my assessment of Council's application of s36 is subject to the public interest test in s33. This means that, should I determine any of the requested information is *prima facie* exempt from disclosure under s36 of the Act, I must then determine whether it would be contrary to the public interest to disclose it. In doing so I must have regard to, at least, the matters contained in Schedule 1 of the Act.

Relevant legislation

- 9 I attach copies of ss31 and 36 of the Act to this decision at Attachment 1.
- 10 Copies of section 33 and Schedule 1 of the Act are also included at Attachment 1.

Submissions

Applicant

- 11 In applying for external review, Mr Newton-Brown submitted that the names of those who made representations to Council should be made available to him because fraudulent representations had been made:

The importance of the need for this process to be open and transparent was highlighted by one of the documents provided (Appendix 1) which shows that at least two unsupportive representations were made fraudulently, with forged signatures. The purported authors did not object to the Development Application, yet someone has wilfully tried to corrupt the process. If there were two instances of this, how many more are there? (Also, Council has not provided a satisfactory answer as to how the integrity of the planning process was secured when this was discovered, and will be secured moving forward).

- 12 Mr Newton-Brown went on:

I also seek that all representations be provided unredacted. The fact of [sic] that this fraudulent activity occurred under the cloak of anonymity is a compelling public interest reason to release all representations, unredacted.

Council

- 13 Council made no submissions to this external review, beyond the reasoning contained in its 16 August 2023 decision. Council provided the following as part of its decision:

I have determined that the following parts of the identified information are exempt from disclosure for the following reasons:

- (a) *all relevant communications between Council and its solicitors, pursuant to section 31 of the Act; and*
- (b) *personal information contained in representations, and Council correspondence with representors, pursuant to the exemption in section 36 of the Act and having considered and applied the public interest test in section 33 of the Act.*

Analysis

Section 31- Legal Professional Privilege

- 14 Information is exempt from disclosure under s31 of the Act if it is information that would be privileged from production in legal proceedings on the basis of legal professional privilege.
- 15 Legal professional privilege is a common law principle which protects the confidentiality of communications made between a lawyer and their client.¹ It is also codified in Part 10, Division 1 of the Evidence Act 2001 (Tas) as client legal privilege. Legal professional privilege can be characterised as either advice privilege or litigation privilege.
- 16 Advice privilege attaches to confidential communications between a legal advisor and client for the dominant purpose of giving or receiving legal advice.² Legal professional privilege will only apply to communications where they are made for the dominant purpose of the legal advisor providing legal advice.³
- 17 Council identified various emails sent between Ms Jacci Smith of Council, Ms Heidi Goess of town planning firm PlanPlace, and Mr Marc Edwards, Special Counsel at Page Seager Lawyers, as being exempt from disclosure pursuant to s31 of the Act.
- 18 Having reviewed this correspondence, I am satisfied that the bodies of these emails and their subject lines are all exempt from disclosure under s31 of the Act. The emails sent between Ms Smith and Mr Edwards, and Ms Goess and Mr Edwards, would be privileged from production in legal proceedings because they consist of communications sent between a lawyer and client for the dominant purpose of giving or obtaining legal advice. Accordingly, I find this information exempt from disclosure and Council is not required to provide it to the applicant.
- 19 The attachment contained in Ms Smith's email to Ms Goess on 20 February 2023 would also be privileged from production in legal proceedings because it is a restatement of the legal advice Council had received to Ms Goess, who had also engaged the services of Mr Edwards on the same matter.
- 20 The body of the email is not a restatement of the legal advice received by Council, nor an advice request, and therefore cannot be considered exempt under s31 of the Act. Though I do note that this email contains information that could reveal the identity of four individuals. This information is more appropriately assessed for disclosure under s36 of the Act, and I will do so later in my decision.
- 21 Finally, I find that information contained in the address lines, time stamps, signature blocks, salutations and confidentiality disclaimers do not consist of

¹ AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5) [2006] FCA 1234 18 September 2006 [44].

² See note 2 [41].

³ Esso Australia Resources v Commissioner of Taxation [1999] HCA 67 21 December 1999 [61].

information sent between a lawyer and client for the dominant purpose of giving or obtaining legal advice, and so are not exempt from disclosure under s31 of the act. This information should be made available to the applicant.

Section 36- Personal Information

- 22 For information to be exempt under s36, I must be satisfied that it contains information that is the personal information of a person other than the applicant. Personal information is defined in the Act as any information about an individual whose identity is apparent or reasonably ascertainable from that information, and who is alive or has not been dead for more than 25 years.
- 23 Council has applied s36(1) of the Act to exempt from disclosure information that would make the identities of those who made representations regarding the DA reasonably ascertainable. Information revealing the identities of representors are in the representations themselves that were submitted to Council, and in acknowledgment letters that Council sent to representors upon receipt of their representations.

Acknowledgment letters

- 24 I am satisfied that for the most part, Council's redactions are limited to the personal information of representors and I agree that this information is *prima facie* exempt under s36 as their identities are ascertainable.
- 25 However, I do find that Council was incorrect to apply a s36 exemption to the words 'to whom it may concern' and 'no address provided' in acknowledgement letters that did not specify either the names or addresses of individuals. The release of this information would not identify a third party other than the applicant, nor would it leave a third party's identity reasonably ascertainable. Accordingly, this information is not exempt from disclosure pursuant to s36 of the Act and should be released to the applicant.

Representations

- 26 Having reviewed the representations made to Council, I am satisfied that most of the information redacted by Council is *prima facie* exempt from disclosure under s36. This information, if released, would identify a third party other than the applicant or would leave a third party's identity reasonably ascertainable.
- 27 My exception to this finding is Council's use of s36 to exempt from disclosure some of the handwritten comments in representation 138.
- 28 Having reviewed this information, it is not clear why the release of the first 10 words of the handwritten comments would identify a third party other than the applicant or would leave a third party's identity reasonably ascertainable. Accordingly, I find that the first 10 words of the additional handwritten comments before the comma in representation 138 should be made available to the applicant.
- 29 I also find that s36 has been incorrectly applied in relation to representation 174, which was provided by the Department of Natural Resources and

Environment. Other than the name and email address of an employee of that Department which is *prima facie* exempt, I do not consider that any other information removed from this representation could be exempt under s36. It identifies a public authority rather than a person and is not within this category of exemption. All remaining information in representation 174 should be released to Mr Newton-Brown.

Personal information originally claimed to be exempt under s31

- 30 Earlier in this decision I decided that salutations contained in correspondence between Mr Edwards, Ms Goess and Ms Smith were not exempt from disclosure under s31 of the Act. I also found an email from Ms Smith to Ms Goess dated 20 February 2023 was not exempt under s31, which contained the first name of a further individual. These names reveal the personal information of individuals other than Mr Newton-Brown and are *prima facie* exempt under s36.

Public interest test

- 31 There are three categories of information to be assessed in relation to s36, namely the personal information of:
- public servants performing their regular duties;
 - consultants; and
 - people making representations regarding Mr Newton-Brown's DA.
- 32 In relation to public servants performing their regular duties, it has been my consistent position (and the standard Australian position) that this information is not exempt unless unusual circumstances are shown by the public authority. This has not occurred here and I am not satisfied that it is contrary to the public interest to release the work related personal information of Ms Smith and the employee of the Department of Natural Resources and Environment. This is not exempt and should be provided to Mr Newton-Brown.
- 33 In relation to consultants, these are paid individuals performing work for Council and their personal information relates to their professional duties. It is not apparent why it would be contrary to the public interest for their names to be released or why this would harm their interests. This information is also not exempt and should be provided to Mr Newton-Brown.

Representors

- 34 I now turn to consider whether it would be contrary to the public interest to release information relating to representors, which I have found to be *prima facie* exempt under s36 of the Act. This is comprised of the personal information included in representations and information contained in Council's acknowledgment emails relating to those representations.

- 35 In its decision, Council considered that Schedule I matters (a), (b), (c), (d) and (m) were relevant regarding the personal information of representors and *mitigated against disclosure of that personal information*.
- 36 Regarding Schedule I matter (a) - the general public need for government information to be accessible – Council held that *in accordance with the objects of the Act, there is a general public need for government information to be accessible, particularly as it relates to matters of public interest such as DA 2021/056*. However . . . *there is no general public need for access to personal information contained in representations, and Council correspondence with representors*. There is nearly always a general public need for government information to be publicly available. However, in this instance, I agree with Council that this is personal information provided to government and the general public need for access to such information is much lower than in relation to other government information. Accordingly, I find that matter (a) weighs neither for nor against disclosure.
- 37 In considering Schedule I matter (b) - whether the disclosure would contribute to or hinder debate on a matter of public interest – Council held that *the disclosure of personal information contained in representations, and Council correspondence with representors, will not contribute to or hinder debate on any relevant matter, including DA 2021/056*. Whilst I recognise that Mr Newton-Brown's proposed development is a matter of public interest that has drawn media coverage from The Examiner and the ABC,⁴ I note that Mr Newton-Brown has been provided with the substance of representations, either supporting or objecting to, his proposed development. I agree with Council that the release of details identifying individual representors will not significantly contribute to or hinder this debate.
- 38 On Schedule I matter (c) – whether the disclosure would inform a person about the reasons for a decision – Council concluded that *disclosure of personal information contained in representations, and Council correspondence with representors, will not inform any person about the reasons for any relevant decision, noting that DA 2021/056 was withdrawn prior to determination by Council*. I agree with Council that this matter does not weigh in favour of disclosure as Mr Newton-Brown withdrew his application prior to Council having an opportunity to decide whether it should be approved. As such, no decision was ever made by Council on the DA.
- 39 Regarding Schedule I matter (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions – Council asserted that the *disclosure of personal information contained in representations, and Council correspondence with representors, would not provide any*

⁴ Appleton M., *Tension Brews over Little Dog Island Development Application*, The Examiner (5 May 2023), available at <https://www.examiner.com.au/story/8183149/strong-cultural-connection-to-island-with-proposed-retreat-sparks-concern/>, accessed 30 November 2023; Champ M., Crowdsource-funded Retreat Proposed to Develop Tasmania's Remote Little Dog Island in Bass Strait (2 May 2023), available at <https://www.abc.net.au/news/2023-05-02/crowdsource-funded-proposed-retreat-little-dog-island/10228788>, accessed 30 November 2023.

relevant contextual information. Again, as no decision was made by Council, either in support of his development application or otherwise, I agree that this matter cannot weigh in favour of disclosure.

- 40 Council held that Schedule I matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – weighed against disclosure because *disclosure of personal information contained in representations, and Council correspondence with representors, has at least the potential to harm the interests of the individuals who could be readily identified were the personal information to be disclosed. Such harm could come in the form of, for example, unsolicited contact that may be interpreted as harassing or threatening in nature.*
- 41 I agree with Council that matter (m) is relevant and weighs against disclosure. As part of his application for external review, Mr Newton-Brown set out that after he withdrew his application, he *sought a copy of the objections in full so that I could consider their contents and communicate with authors where appropriate in the spirit of open consultation [sic] that this project has been developed.*
- 42 Though I do not suggest that Mr Newton-Brown intends to threaten or harass those who objected to his proposal, I cannot disregard the fact that Mr Newton-Brown has, as described above, communicated to my office that he intends to contact those who object to his proposal. This is presumably to understand why they objected to his proposal and to make some sort of attempt at convincing them to support any future development application. I agree with Council that such unsolicited contact is likely to be unwelcome and has the potential to harm the interests of such individuals. While the release of the information would favour Mr Newton-Brown’s interests, on balance I consider that this matter weighs heavily against disclosure.
- 43 I also find that Schedule I matter (h) - whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government – and (n) – whether the disclosure would prejudice the ability to obtain similar information in the future – are relevant and weigh against disclosure. When Council received representations from the public on Mr Newton-Brown’s DA it was Council’s policy to publish such representations, including the names of those who made representations on proposed DA’s, in Council meeting agenda documents which were put online. It was also Council’s normal process to send representors acknowledgement correspondence upon receipt of representations which noted that their name would be published publicly alongside their representation in Council meeting agenda documents. Indeed, having reviewed the acknowledgment correspondence sent to those who made representations on Mr Newton-Brown’s DA, I can see that such advice was provided by Council to those who made representations on Mr Newton-Brown’s DA.
- 44 However, as I have mentioned, Mr Newton- Brown withdrew his DA prior to Council being required to make a decision on whether to approve it. As the requested representations were made to Council for the sole purpose of

assisting Council in deciding whether to approve Mr Newton-Brown's DA, representors would not have expected their names and contact information to be made publicly available, or otherwise be provided to Mr Newton-Brown, without that decision having to be made by Council. Accordingly, I find that matters (h) and (n) weigh against the disclosure of information which would reveal the identity and contact details of those who made representations to Council regarding Mr Newton-Brown's withdrawn DA.

- 45 Overall, I am satisfied that it would be contrary to the public interest to make publicly available the information I found to be *prima facie* exempt which reveals the identity of those who made representations to Council. This information is exempt under s36 and should not be released.

Preliminary Conclusion

- 46 In accordance with my reasoning set out above, I determine that exemptions claimed by Council pursuant to ss31 and 36 are varied.

Conclusion

- 47 As the above preliminary decision was adverse to Council, it was made available to it on 7 June 2024 to seek its input prior to finalisation in accordance with s48(1)(a) of the Act.
- 48 On 24 June 2024 Council advised that it did not wish to make a submission responding the preliminary decision, as such my findings remain unchanged.
- 49 Accordingly, for the reasons set out above, I determine that exemptions claimed pursuant to ss31 and 36 are varied.

Dated: 25 June 2024 (re-issued to make minor correction pursuant to s48(2) of the Act on 10 July 2024)



Richard Connock
OMBUDSMAN

Attachment I

Relevant Legislation

Section 31 Legal Professional Privilege

Information is exempt information if it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.

Section 36 Personal Information of a Person

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

(2) If –

- (a) an application is made for information under this Act; and
- (b) the information was provided to a public authority or Minister by a third party; and
- (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party – the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –
- (d) notify that person that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information that has been applied for; and
- (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
- (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.

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

- (a) until 10 working days have elapsed after the date of notification of that person; or
- (b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or
- (c) until 20 working days after notification of an adverse decision under section 43 ; or

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

Section 33 Public Interest Test

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

Schedule 1 – Matters Relevant to the 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;
 - (l) whether the disclosure would promote or harm the environment and or ecology of the State;
 - (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;

- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

**Right to Information Act Review****Case Reference:** R2203-016**Names of Parties:** Clive Stott and Hydro Tasmania**Reasons for decision:** s48(3)**Provisions considered:** s30, s36, s37, s39, s45(1)(e)

Background

- 1 Basslink Pty Ltd (Basslink) operated a high-voltage direct current (HVDC) interconnector between transmission network substations in Tasmania and Victoria. The interconnector includes a subsea power cable in Bass Strait. This was operated under a service agreement with Hydro Tasmania (Hydro).
- 2 On 20 December 2015, there was a major fault with the cable that took until 14 June 2016 to be fully resolved.¹ With Tasmania unable to import electricity during this period alternatives, such as diesel power generation, were used. It was a matter of significant community and media interest in Tasmania, amidst concern about the impact of the fault and uncertainty about the duration of the required repair.
- 3 Mr Clive Stott, the applicant, is a member of the public with a background in the energy sector and is concerned about the failure of the cable.
- 4 On 2 November 2016, Mr Stott submitted an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to Hydro seeking a range of information in relation to the cable and the fault that occurred. That application request progressed to external review and I delivered a decision in relation to it on 18 February 2021 (2021 Decision).² Relevant to this external review, I determined that:

Hydro has not complied with the requirements of s19 and Part 3 of Mr Stott's request is returned to Hydro to reassess under the Act.

- 5 The balance of the historical matters relating to the original application are complex and set out in the Background of the 2021 Decision. It is not necessary to repeat that information here.

¹ Energy in Tasmania Report 2015-2016, page 35, available at www.economicregulator.tas.gov.au/electricity/reports/performance-reporting/performance-reports

² *Clive Stott and Hydro Tasmania* (18 February 2021), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

- 6 This decision, therefore, relates only in part to Mr Stott's original application for assessed disclosure (Paragraph 3):

Hydro had an observer on the Ile-De Re cable layer during the Basslink subsea interconnector fault location and repair process. Could you please provide me with copies from your databases, emails, diary entries, reports, notes, photography, pertaining to:

...
3) *The fault.*
...

- 7 According to Ms Sharlene Brown of Hydro, following the 2021 Decision, Hydro contacted Mr Stott on 3 March 2021, *with a view to narrowing the scope of Paragraph 3 and removing s.19 of the Act as a basis for refusal. Those negotiations did not result in any change to Paragraph 3, and Hydro proceeded to make a fresh decision.*
- 8 On 19 March 2021, Ms Laura Harle, Graduate Legal Counsel at Hydro and a delegate under the Act, issued a decision to Mr Stott. Relevantly extracted from the *Determination and Reasons for Determination of the Request*.

3.1. *To date, Hydro Tasmania has identified approximately 10,300 documents and photos as potentially relevant to your Request.*

3.2. *Section 19(1) of the RTI Act allows a request for information to be refused if a public authority is satisfied that the work involved in providing the information requested would substantially and unreasonably divert the resources of the public authority from its other work. As detailed above, at paragraph 144 of the Decision the Ombudsman accepted that the volume of information and time required to assess the information responsive to your Request under the RTI Act would require an unreasonable diversion of Hydro Tasmania's resources if the request was not refined.*

3.3. *In accordance with Section 19(1)(c) of the RTI Act, Hydro Tasmania has had regard to the matters specified in Schedule 3. A comprehensive response to these matters was provided to you by email on 5 March 2021.*

3.4. *Section 19(2) of the RTI Act requires that a public authority may not refuse to provide information under Section 19(1) without first giving an applicant a reasonable opportunity to consult the public authority with a view to the applicant being helped to make an application in a form that would remove the ground for refusal. Hydro Tasmania has given you reasonable opportunity to consult, namely:*

- *Phone calls on 3 and 9 March*
- *Emails on 24 February and 3, 5, 9, and 16 March*

3.5. *I note that unsuccessful phone calls were followed up with requests for you to advise a time convenient to you for a return call. You did not do so and on 12 March indicated you wished to correspond by email only. Email correspondence between us has not resulted in any indication of your willingness to meaningfully engage with Hydro Tasmania to narrow the scope of your Request.*

3.6. *Hydro Tasmania considers that the Ombudsman's suggestions for what a section 19(2) consultation process could include (mentioned at paragraphs 44 and 146) have been provided to you. You have been provided with comprehensive information about the original grounds for refusal to assist you in understanding, per paragraph 44, the 'potentially substantial and unreasonable nature' of your Request. You have been provided with a high level breakdown of the sources of information, namely that they include:*

- *Approximately 1,000 photographs taken on the repair vessel or as part of the fault investigations;*
- *Approximately 500 reports and file notes related to the repair process or fault investigations;*
- *The remaining balance predominantly emails between more than 20 Hydro Tasmania employees and former employees as well as seeking external advice.*

Hydro Tasmania disagrees with your opinion that this is not a high level breakdown of the documents.

3.7. *I reiterate in brief points previously made to you via email that Hydro Tasmania no longer has access to the database that was collated for the purposes of the arbitration process related to the fault. A significant fee in the order of \$7000 is required in order to reactivate it, and due to the sensitivities surrounding disputes about the cause of the fault all documents will have to be assessed [sic] for potential privilege and confidentiality constraints. I note that both of these considerations also apply to the production of a 'high level categorised index', as any printout of the database will need to be assessed for privilege and confidentiality constraints just as the full documents would be. Without any additional guidance from you, it has not been possible to assess what can be usefully provided to you.*

3.8. *Hydro Tasmania considers it has given you a reasonable opportunity for consultation, which has not resulted in any narrowing of your Request.*

3.9. I therefore refuse your Request under Section 19(1) of the RTI Act.

- 9 Ms Harle concluded:

Alternatively, if you are able to identify an area of interest that narrows the scope of your Request I encourage you to submit a new Right to Information request to Hydro Tasmania.

- 10 On 23 March 2021, Mr Stott applied for internal review of that decision.
- 11 On 3 March 2022, Ms Brown of Hydro and a delegate under the Act, released the internal review decision to the applicant.
- 12 Ms Brown set out Hydro's summary of what had occurred during this time, including that the parties had entered a period of *extended consultation...with a view to narrowing the scope of Paragraph 3*.
- 13 According to the internal review decision, the parties agreed to the following scope for the assessed disclosure request on 28 September 2021:

"any forensic analysis report and non-destructive (x-ray) report including x-rays (if in existence) of the damaged section of cable, inc any relevant photographs"

*(here referred to as **Revised Paragraph 3**).*

(emphasis original)

- 14 For the avoidance of doubt, I accept the *Revised Paragraph 3* as being the request for information that is the subject of this external review decision.
- 15 The internal review was conducted on a different basis to Ms Harle's decision because the parties had settled on the *Revised Paragraph 3*, and s19(1) was no longer in issue.
- 16 In relation to the *Revised Paragraph 3*, Ms Brown wrote that:

Broken into its constituent parts, the request seeks the following information:

forensic analysis reports of the damaged section of cable;

forensic non-destructive (e.g. x-ray) reports of the damaged section of cable (including any x-rays); and

any photographs of the damaged section of cable relating to the above.

- 17 Ms Brown set out that she had *caused Hydro's records to be searched for information that falls within the scope of Revised Paragraph 3 as at 28 September 2021* (footnote omitted).

- 18 The information that Hydro identified from the searches included *a total of 23 documents, 5 of which are photographs*. This is referred to as the *Identified Information* by Hydro and for convenience I adopt that phrase in this decision.
- 19 Further, Ms Brown found that:
- ...with the exception of certain photographs, all of the Identified Information is comprised of technical reports concerning investigations related to the Basslink cable and why the Basslink cable failed in December of 2015.*
- 20 The photographs were released but exemptions were applied to the remaining 18 documents, under ss30, 36, 37 and 39 of the Act. A table of these documents claimed to be exempt by Hydro is set out under Identified Information below.
- 21 On 19 March 2022, Mr Stott applied for external review. He also posted a USB drive with supporting information which was received by my office on 21 March 2022. The external review application was accepted by this office on the basis that Mr Stott had received an internal review decision and sought external review within 20 working days of that decision. Mr Stott also raised concerns about the sufficiency of the search for information by Hydro, and his review request was also accepted pursuant to s45(1)(e), in order to assess the adequacy of the search.
- 22 On 30 September 2022, some additional video files were released by Hydro to Mr Stott. He did not wish to seek review of the redaction of some personal information from this content.
- 23 Since the assessed disclosure application was lodged with Hydro in 2016, there has been litigation related to the Basslink failure between Basslink and Hydro that resolved by way of arbitration. This is relevant to this external review because some of the information responsive to the request was created for the purpose of those legal proceedings. Hydro was represented by Clayton Utz and Ashurst Australia, and Basslink by DLA Piper in relation to the arbitration.
- 24 I note that after the application for assessed disclosure was lodged, KPMG was appointed as administrator for Basslink. In October 2022, Hydro announced that Basslink had been purchased by APA Group and on 21 October 2022 a *network services agreement* was entered into between Hydro and Basslink.³

Issues for Determination

- 25 I must determine whether the information is eligible for exemption under ss30, 36, 37, 39 or any other section of the Act.

³ See Hydro Tasmania ‘Updated Basslink agreement,’ 24 October 2022 available at: [Updated Basslink agreement \(hydro.com.au\)](http://hydro.com.au)

- 26 As ss36, 37 and 39 are contained in Division 2 of Part 3, they are subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under any of these sections, I must then determine whether it is contrary to the public interest to disclose it. In doing so, I must have regard to (at least) the factors listed in Schedule 1 of the Act.
- 27 I must also determine whether there was an insufficiency in the searching for information responsive to the request pursuant to s45(1)(e) of the Act.

Relevant legislation

- 28 Hydro has relied on ss30, 36, 37 and 39 in its decision and I attach a copy of these sections at Attachment 1.
- 29 Copies of s33 and Schedule 1 of the Act are included in Attachment 1.
- 30 A copy of s45 is also attached.

Identified Information

- 31 For the purposes of my decision, I am satisfied that there is no issue arising from identifying the various reports. In the discussion below I include the title, the requesting party and other general identifying features such as date and author and size of the document.
- 32 It is convenient therefore to list the 18 documents that form the Identified Information which is the subject of this review and assessed in Analysis below. I have followed the indexing of (a) to (r) as adopted by Hydro:

(a) CCI Report ER795

Basslink KP199.256 Failure Examination 27th to 29th April 2016

(b) CCI Report ER808

Basslink KP199.256 Failure Examination 7th to 9th June 2016

(c) Materials Technology G11863

Report on Thermal Analysis (DSC) of Samples From 400KV Basslink Cable Fault

(d) Materials Technology G9748

Report on Analysis of Samples From 400kV Basslink Cable Fault

(e) CCI Report ER833

Basslink Cause of Failure 2016-12-2

(f) CCI Report ER990

Basslink Interconnector – A Response to Three DNV GL Reports

(g) CCI Report ER1112

Basslink Interconnector – Electrical Modelling, Failure Mode Conclusions and Mitigation Measures

(h) CCI Report ER1125

Basslink Interconnector – Response to Reports 20-2598, 20-2650 & Ash01

(i) CCI Report ER1127

Basslink Interconnector – Korean HVDC MI Cable Thermal Resistivity and Cable Design Rules

(j) DNV GL 16-2443

Expert Report Fred Steennis: Basslink outage 2015 – Root cause analysis of the failed HVDC power cable

(k) DNV GL 20-2598

Expert Report Fred Steennis: Basslink outage 2015 – Reply to CCI report ER1112

(l) DNV GL 20-2078

Expert Report Fred Steennis: Basslink outage 2015 – Root cause analysis of the failed HVDC power cable

(m) SINTEF 2020:00318

Report: Determination of the Radial Thermal Resistivities of the Basslink HVDC Mass Impregnated Non-Draining Cable

(n) Expert report: Thomas Worzyk

Review of the SINTEF measurement of thermal properties of the Basslink cable

(o) NPL Report Eng (Res) 027 (September 2020 version)

Critical Review of Basslink HVDC Cable Thermal Resistivity Report from SINTEF

(p) NPL Report Eng (Res) 027 (August 2020 version)

Critical Review of Basslink HVDC Cable Thermal Resistivity Report from SINTEF

(q) DNV GL 20-2764

Expert Report Frank De Wild: Second supplementary report regarding the Basslink interconnector

(r) Exp.500.025.0001_R

Discipline: Thermal and Electrical modelling and Cause of Failure

Submissions

Applicant

- 33 Mr Stott provided submissions in support of his application for external review.
- 34 After setting out the background to the application and summarising the consultation to refine the scope between the parties, Mr Stott wrote (verbatim):

4. SEARCH OF RECORDS

The identified information indicates why the Basslink cabled failed in 2015

If something fails it is more often than not because of a ‘fault’. This is particularly true in relation to electrical equipment. This is what was requested in my initial application back in November 2016.

Hydro has identified 5 photographs. As a former professional photographer and someone who also worked in the power industry I find this claim amazing.

Just on these 5 photographs alone not all were taken during the forensic processes. So how many photographs (and X-rays) were taken at these times? Many more than Hydro is prepared to identify and release, but it is not just about the photographs. These photographs could have come from anywhere.

This is consistent with Hydro failing to release information and why my request has gone on for 5 years. Despite other delays with my RTI Application Hydro has had this full time to identify information.

5. Third Party Consultation

This was based on a revised Paragraph 3 without any help from Hydro as to what information was being held. Therefore the responses were insignificant.

Further, I provided Hydro with extra ample time for 3rd party consultation when I asked their Decision

6. Assessment of Exemptions

Right from the outset it shows Hydro has set about to release the minimum amount of information in connection with this most serious of all power failures where dam levels were at record low levels, five lots of polluting diesel generators had to be installed and run for approximately

six months to keep the lights on and the Tamar valley gas power station had to be used.

The total information released to date in connection with this RTI request is insignificant.

This goes against the objects of the current version of our Right to Information Act 2009...[s3 omitted]

I felt I was bullied into changing the RTI documents I asked for. Hydro had access to technical expertise to assess this information. At no time has anyone from Hydro helped me refine my request as per the Act. I was not, and never have been, informed, "...which information it [Hydro] would most easily and usefully provide him [me]. Ombudsman's Determination.

Section [19(2)] of the Act: Hydro was meant to help me refine my request in a form that would remove the grounds for refusal. Had I been provided with help or a detailed index of the information being held by Hydro I may have requested something different I simply just do not know.

For example I may have requested information in relation to the state-of-the-art Siemens Win-TDC control and protection report which was generated at the instant of the fault indicating the nature and location of the fault.

I find it inconceivable Hydro had earlier dismissed my request for this information when they are fully aware of, and use their own fault reporting protection equipment.

...
Hydro did not want timeframes. It just kept asking for unreasonable extensions. After approximately 12 months and remembering my RTI Application was dated 2nd November 2016, this simply could be no more time extensions given and I asked Hydro to provide the internal review determination by 28th February 2022.

...
Section 36 (Personal information of a person)

This is inconsistent. Hydro made a decision to previously release personal information in its latest version of document 'B'.

Section 37

I disagree with the reasoning for refusal throughout Section 37 and in particular summary (t)i., ii., iii. I feel it be insufficient just to release 5 photographs (which could be technically meaningless and appeared to be culled

excessively) when my request relates to the release of photographs, X-rays and technical reports.

Section 39

The scenarios (and that is all they are) put forward in relation to ‘the fault’ have been dealt with. There is no ongoing or proposed commercial arbitration. Basslink is now in receivership. An application for assessed disclosure should not be ruled out simply because confidentiality “...may have survived...”

7. EXEMPTION NOT SUBJECT TO PUBLIC INTEREST

Section 30 It is not sufficient to exempt all the requested documents save for 5 photographs which are also documents. Photographs are meaningless if not attached to the forensic reports.

- 35 Mr Stott’s submissions go on to address the Schedule 1 factors in reply to the internal review decision. I have had regard to those submissions with respect to factors (a) to (n), (s), (w) and (x) as addressed. For the purposes of this decision it is not necessary to repeat them in full here.
- 36 The applicant’s submissions conclude as follows (verbatim):

In 2015 the undersea power cable between Tasmania and the mainland was turned off and Tasmania was plunged into a 6 month energy crisis.

A Right to Information Application was submitted to Hydro Tasmania and accepted on 2nd November 2016 requesting information in relation to the cable.

...
Interest out there in the community in finding out exactly why the power was turned off for 6 months has not diminished after all these years; it has only grown stronger over time with talk of the second interconnector.

Full diagnosis of the fault has been kept under wraps. It has never been made public and this goes against the public’s right to information.

I have explained how I do not believe all documents have been identified in connection with my refined request.

...
All documents pertaining to my refined request (not just the few identified) should be released in full for the cable fault section, i.e. non-destructive forensic report, X-rays and photos; destructive forensic report and photos.

Hydro

- 37 As outlined in the Background, there was a departure between the approach taken in Hydro's original decision and the internal review decision, on the basis of the refinement to the request and the Revised Paragraph 3. I therefore have only had regard to the internal review decision, as set out below, for the purposes of my decision.
- 38 Additionally, there was an exchange of correspondence between my office and lawyers for Hydro, which contained clarification in relation to this external review. This included letters from Mr Marc Edwards, Special Counsel, Page Seager Lawyers representing Hydro, which are relevantly extracted as follows:
- (i) On 6 May 2022, in which he reiterated the reliance of Hydro on ss30(1)(a)(ii), 37(1)(b) and 39(1)(b) as follows:
- S.30(1)(a)(ii) is applied to all of the Identified Information – see the analysis set out on page 6 of the Review Determination, paragraph (h).*
- S.37(1)(b) is applied to all of the Identified Information in that it is comprised of technical reports investigating the reasons why the Basslink cable failed in December of 2015 – see the analysis set out on pages 7 and 8 of the Review Determination, paragraphs (l) to (t) (inclusive).*
- S.39(1)(b) is applied to:*
(a) those parts of the Identified Information supplied by Basslink Pty Limited and the State of Tasmania to HT; and
(b) those parts of the Identified Information prepared by HT that respond or refer to the information supplied by Basslink Pty Limited, which HT has assessed as applying to all of the Identified Information. I refer you to the analysis set out on pages 8, 9 and 10 of the Review Determination, paragraphs (u) to (z) (inclusive).
- (ii) On 1 August 2022, Mr Edwards further addressed the Identified Information and, in detail, the searching undertaken by Hydro (discussed below).
- (iii) On 30 September 2022, in which it was confirmed that:
- Of the 18 reports...(i.e. a) to r)), HT's position is that all of the reports are, in their entirety, exempt from disclosure by operation of the exemption in s.39(1)(b) EXCEPTING the following which are exempt in part only [a, b, c and d].*

Sufficiency of search

- 39 Ms Brown, in her internal review decision, advised that she had caused *Hydro's records to be searched for information that falls within the scope of Revised Paragraph 3 as at 28 September 2021*. The Identified Information included a total of 23 documents, five of which were photographs.
- 40 In the letter of 1 August 2022, Mr Edwards asserted that Hydro *did conduct a thorough search of its records for any and all information in its [sic] possession* and set out in detail the steps taken. In summary this included:
- a. an initial search relevant to paragraph 3 that resulted in *18,200 potentially responsive documents*;
 - b. searches *performed using a secure discovery database associated with commercial arbitration regarding the Basslink cable fault that was managed by Clayton Utz for a fee*;
 - c. identification and collation of documents responsive to Revised Paragraph 3;
 - d. *two more targeted searches* were undertaken by the solicitor with familiarity of the file:
 - i. for photos held on *relevant file shares and usb drives and hard drives which may have held relevant material*; and
 - ii. for relevant reports within *352 identified reports*;
 - e. *further searches of the subset of the documents identified as being within scope*; and
 - f. the searches were undertaken by Hydro officers Ms Naomi Allchin and Ms Laura Harle *with the assistance of Clayton Utz, and the exercise took overall approximately 10 hours to perform with the assistance of the discovery database*.

Section 30 - information relating to enforcement of the law

- 41 Ms Brown, in the internal review decision, considered the application of s30 to the Identified Information. The first three points made favour disclosure. Namely, that:
- *...the exemptions in s.30(1) of [the] Act do not apply to any of the Identified Information merely because it is subject to ongoing confidentiality obligations imposed by the Commercial Arbitration Act 2011 (Vic); and*

- as the arbitration has concluded...disclosure of the Identified Information at this stage would not result in any relevant prejudice to specifically the arbitration process, this being the relevant matter contemplated [by] s.30(1) of the Act; and
 - certain obligations of confidentiality set out in a contract may have limited relevance to consideration under s30 by virtue of s51, protection against actions for defamation or breach of confidence.
- 42 The fourth point made by Ms Brown, however, relied on the exemption under s30(1)(a)(ii) of the Act:
- Fourthly, I have considered whether disclosure of the Identified Information will “prejudice... the enforcement or proper administration of the law in a particular instance”. This is due to ongoing matters of disagreement between Hydro Tasmania and BPL [Basslink] and a legitimate prospect that these matters may be the subject of future formal dispute resolution processes (for example arbitration or court proceedings). Accordingly, I have determined that disclosure of the Identified Information (except for certain photographs) would, or would be reasonably likely to, prejudice the proper administration of the law (i.e. the disclosure of information not yet in evidence or in the public domain which may be relevant to a future dispute has the potential to prejudice such process) thus the exemption in s.30(1)(a)(ii) of the Act applies under the circumstances to the Identified Information (except for certain photographs).*
- 43 Noting that the s30 exemption is not usually subject to the s33 public interest test, Ms Brown wrote:
- ...my determination with respect to section 30 is sufficient to exempt all of the Identified Information from disclosure in response to the Application with the exception of certain photographs.*
- 44 Although finding that the s30 exemption applied to the 18 documents, Ms Brown did go on to consider other relevant exemptions under the Act.
- 45 Given the conclusion reached in relation to s30, I take the consideration of further exemptions, pursuant to ss36, 37 and 39, to be Hydro's position in the alternative.

Section 36 - Personal information of person

46 After setting out the definition of *personal information* Ms Brown determined, in relation to s36, that:

- i. *the Identified Information contain [sic] personal information in the form of the names and contact details of various individuals; and*
- ii. *the exemption set out in section 36(1) of the Act applies to that specific information.*

That being said, this determination does not turn upon the release of the relevant personal information.

47 There was no further discussion about the application of s36 to the Identified Information in either the internal review decision or the further correspondence from Hydro to my office.

Section 37 - Information relating to business affairs of third party

48 After outlining the general operation of s37 and relevant case law, Ms Brown wrote:

(o) For the purposes of this determination, I am proceeding on the basis that the exemption in s.37 is not intended to protect against commercial disadvantage in a general sense, i.e. the protection is concerned with the likely creation of commercial disadvantage in the context of market competition.

(p) Third parties consulted regarding the Application submitted that the Identified Information:
i. is related to the business affairs of those entities;
ii. includes certain trade secrets; and/or
iii. if disclosed, would be likely to expose those parties to competitive disadvantage in their relevant markets.

(q) As noted earlier, the Identified Information is comprised of technical reports investigating the reasons why the Basslink cable failed in December of 2015 and related matters and photographs. It is claimed that these reports contain specialist and commercially sensitive proprietary methodologies (i.e. not otherwise available to market competitors) regarding:

- i. the operation of high voltage direct current (HVDC) cables;*
- ii. designing or modelling HVDC cables; and*
- iii. marine recovery and repair operations for HVDC cables.*

On their face, these claims hold considerable merit.

No specific feedback from third parties was directed towards the photographs.

(r) I accept that the technical reports forming part of the Identified Information relates [sic] to business affairs, and that there is a relevant competitive market for the operation, design, modelling, marine recovery and repair of HVDC cables. I also accept that disclosure of the technical reports comprising the Identified Information will be of interest to other operators in that market, will facilitate access to commercially sensitive information that would not otherwise be available, and such information could likely be used to establish a competitive advantage in the relevant marketplace over the relevant third parties.

(s) On balance, I have determined that disclosure of any of the technical reports comprising the Identified Information is likely to result in competitive disadvantage for these third parties. For the sake [sic] of completeness, I do not consider that disclosing certain photographs that form part of the Identified Information will result in any such disadvantage, nor am I satisfied that any of the Identified Information necessarily amounts to 'trade secrets' for the purposes of s.37(1)(a) of the Act, but I cannot completely discount this.

(t) In summary, I determine that:

- i. disclosure of certain photographs that form part of the Identified Information is unlikely to expose relevant third parties to competitive disadvantage in the manner contemplated by s.37(1)(b) of the Act;
- ii. disclosure of the technical reports comprising the Identified Information is likely to expose relevant third parties to competitive disadvantage in the manner contemplated by s.37(1)(b) of the Act; therefore
- iii. the exemption set out in section 37(1)(b) of the Act applies to all of the Identified Information with the exception of certain photographs.

- 49 Relying on s37(1)(b) of the Act Ms Brown, therefore, found that all of the Identified Information, except for certain photographs, was *prima facie* exempt.

Section 39 - Information obtained in confidence

50 After setting out the operation of s39(1)(b), Ms Brown wrote:

(v) The following scenarios arise when considering the application of s.39(1)(b) to the Identified Information:

i. ongoing confidentiality obligations imposed by the Commercial Arbitration Act 2011 (Vic), which apply to most of the Identified Information; and

ii. confidentiality obligations imposed by the recently terminated contract between Hydro and Basslink Pty Ltd.

(w) In both scenarios, where the Identified Information is communicated in confidence by or on behalf of a person to a public authority; the question is whether or not disclosure is reasonably likely to impair Hydro's ability to obtain similar information in the future.

51 Ms Brown then considered each scenario separately. In regards to the first scenario, she wrote (at point (x)):

...the majority of the Identified Information was supplied to Hydro (i.e. not by Hydro) in the context of a commercial arbitration conducted pursuant to the Commercial Arbitration Act 2011 (Vic), and is therefore subject to confidentiality obligations imposed by that legislation.⁴ These confidentiality obligations are subject to certain exemptions, including disclosure "authorised or required by a relevant law", which includes the Act. The Identified Information was prepared and supplied by [sic] on a voluntary basis under the protections afforded by the arbitration. For the purposes of s.39(1)(b) of the Act, I consider that disclosure of those parts of the Identified Information supplied by Basslink Pty Limited or the State of Tasmania will be reasonably likely to impair Hydro's ability to secure information of a similar nature in any future commercial arbitration Hydro may engage in; indeed, it may hinder Hydro's ability to require commercial arbitration as a means of dispute resolution. Turning to those parts of the Identified Information prepared and supplied by Hydro in the context of commercial arbitration, I have determined that s.39(1)(b) of the Act only applies to that information to the extent that it is incorporating or responding to information supplied to Hydro in the arbitration.

⁴ Footnote 8 of the internal review decision: *Commercial Arbitration Act 2011*, s.27E

- 52 In relation to the second scenario, Ms Brown wrote (at point (y)):

...I have determined that the obligations of confidentiality set out in the recently terminated contract between Hydro and Basslink Pty Limited may have survived termination (thus the information was communicated to Hydro in confidence and that confidentiality persists). Disclosure of that information is reasonably likely to impair Hydro's ability to obtain similar information in the future, as commercial entities will be reluctant to rely upon confidentiality provisions that can be defeated by an application for assessed disclosure, and are therefore likely to withhold information they may otherwise supply, but for that ability.

- 53 Ms Brown determined that (at point (z)):

...s.39(1)(b) of the Act applies to:

i. those parts of the Identified Information prepared and supplied by Basslink Pty Limited and the State of Tasmania; and

ii. those parts of the Identified Information prepared by Hydro that respond to refer to [sic] the information prepared and supplied by Basslink Pty Limited,

which represents the vast majority (i.e. in excess of 80%) of the Identified Information. It does not include certain photographs.

- 54 Given it was unclear exactly what of the Identified Information Ms Brown found to be exempt under s39(1)(b) my office sought clarification. In correspondence of 30 September 2022, it was confirmed by Mr Edwards that this exemption was relied on with respect to all of the Identified Information in full, except documents labelled j), k), l) and q), which Hydro held were exempt under s39(1)(b) in part.

Section 33 - Public interest test

- 55 Ms Brown undertook a global public interest test assessment in relation to the three statutory exemptions subject to the public interest test: ss36, 37 and 39.

- 56 The matters she found to be relevant in Schedule 1 were (a), (b), (c), (d), (h), (j), (k), (m), (n), (s), (w) and (x). I have considered the matters addressed in the internal review decision and so it is not necessary to repeat them here.

- 57 The conclusion reached was that disclosure would be contrary to the public interest.

- 58 Much of the focus of Ms Brown's reasoning was on the application of the factors to the release of personal information in relation to s36.
- 59 Ms Brown concluded the internal review decision as follows:
- (a) *with the exception of certain photographs, all of the Identified Information is exempt from disclosure by application of section 30(1)(a)(ii) of the Act on the basis that disclosure would, or would be reasonably likely to, prejudice the proper administration of the law (i.e. the disclosure of information not yet in evidence or in the public domain which may be relevant to a future dispute has the potential to prejudice such process) thus the exemption in section 30(1)(a)(ii) of the Act applies under the circumstances to the Identified Information (except for certain photographs); and*
- (b) *on balance, with the exception of certain photographs all of the Identified Information is exempt from disclosure pursuant to the combined application of section 37(1)(b) and/or 39(1)(b) of the Act and, having considered all relevant factors applicable to the public interest test, I consider it contrary to the public interest to disclosure [sic] that Identified Information in response to the Application. For completeness, I consider the personal information of any person who is not an employee of Hydro to also be exempt from disclosure.*

Other submissions

- 60 On 6 May 2022, my office received a letter from Mr Peter Gothard, of KPMG, as one of the receivers appointed for Basslink Services Pty Ltd.
- 61 This was presumably in response to a copy of the Determination being provided to Basslink as proposed in the internal review decision under next steps.
- 62 In that letter, Mr Gothard, with reference to the list of documents labelled a) to r), requested that:
- (a) KPMG be given the opportunity to make submissions in relation to the External Review; and
- (b) pursuant to s48(1)(b) be provided with a copy of the decision if I determine information should be released to the applicant.
- 63 The letter contains submissions with respect to Competitive Disadvantage, to which I have had regard.
- 64 I note, however, that those submissions were received prior to the acquisition of Basslink by APA Group and the new network services agreement between Basslink and Hydro of 21 October 2022.

Consequently, I have not sought the input from KPMG in relation to this external review.

Analysis

Sufficiency of Search

- 65 The applicant has raised concerns, pursuant to s45(1)(e), that he believes, on reasonable grounds, that there is an insufficiency in the searching for the information by Hydro.
- 66 The question of reasonable grounds is an objective one, that requires consideration of the relevant facts and circumstances of the application made under the Act.
- 67 The Ombudsman's [Guideline in Relation to Searching and Locating Information](#)⁵ (the Guideline) provides general guidance on the requirements and procedures for searching. In relation to the sorts of searches required, the Guideline provides that it will depend upon the information being requested:

The information which is subject to search includes electronic records in the possession of the Minister or public authority, such as material retained on data management systems, and in email records.

...

The scope of the search is determined by the terms of the application for assessed disclosure. Where the terms of the application are unclear or too general in nature, you should negotiate immediately with the applicant to refine or redirect their application (negotiations must be completed within no more than 10 working days from receipt of the application). At the initial stage, all of the information which is thought to be covered by the application for assessed disclosure should be identified and located. An assessment should then be made as to exactly what information falls within the scope of the application, and within the right given to the applicant by s7 of the Act.

...

Your decision on the application for assessed disclosure should include details of the searches you undertook, as this promotes openness and transparency, and it may reduce the likelihood that the applicant will seek review on one of the grounds mentioned.

⁵ The revised edition, 24 January 2013, available at: [Guideline in Relation to Searching and Locating Information](#).

- 68 I accept that, in the absence of substantive information being released to the applicant in response to his request, that he was concerned about the nature and extent of the searches undertaken by Hydro. I am satisfied that he raised reasonable grounds to question the sufficiency of search.
- 69 As summarised by Ms Harle in the original decision, the initial search results returned an extremely high volume of information. Hydro, in responding to the Revised Paragraph 3, then identified, collated and assessed 23 documents in total which included the photographs and various engineering reports. The Identified Information, for the refined scope, is still significant in volume as it exceeds 1,000 pages.
- 70 Having regard to the requirements for undertaking a search, the overview provided by Hydro of the searches made and the suitability of the staff tasked with the searching, to the volume of information assessed, and, with the benefit of reviewing the Identified Information, I find that Hydro did take appropriate steps in conducting the search of its records.
- 71 Although Mr Stott has expressed a view about the quality and quantity of photographs produced in response to his request, I am satisfied that Hydro has searched sufficiently for relevant information and the photographs appearing in the various reports respond to his request.
- 72 In relation to Mr Stott's request for x-rays, none have been provided by Hydro in the course of this external review. I do not consider that this is indicative of insufficient searching for relevant information and am satisfied that the significant volume of technical and expert information produced comprises the relevant information responsive to his request.
- 73 I am, therefore, satisfied that Hydro has undertaken a sufficient search for the information responsive to the Revised Paragraph 3.

Assessing the Information

- 74 As set out previously, I have followed Hydro's labelling of the documents as a) to r).
- 75 I identified that the documents a) to r) fell into three categories, being:
1. information that was prepared as a consequence of, and in response to, the fault and the subsequent repair; and
 2. information that was prepared for Basslink for the purpose of litigation, including the arbitration; and
 3. information that was prepared for Hydro and the State of Tasmania for the purpose of litigation, including the arbitration.
- 76 I have consequently proceeded to assess the information on the basis of these three categories.

- 77 For the avoidance of doubt, where reference is made to a page number it is to the pdf page number of documents a) to r).

Category 1 – information relating to the fault and repair

78 I am satisfied that documents a), b), c), d) and e) were prepared as a consequence of the cable fault and the subsequent repair.

79 Documents a), b) and e) are marked as *Confidential and Privileged*. Documents c) and d) are marked *Privileged and Confidential*. As I have addressed in prior decisions,⁶ the label applied to a document is not determinative under the Act, although it is a matter to which regard may be had.

80 Document a) is entitled *CCI Report ER795, Basslink KP199.256 Failure Examination 27th to 29th April 2016* and is an engineering report prepared by Cable Consulting International Ltd for Basslink (79 pages), dated 27 May 2016 – marked *Confidential & Privileged*.

81 Page 1 of this report provides that:

This report provides a factual account of the features found during the layer by layer visual inspection of the failed cable sample.

82 Document b) is entitled *CCI Report ER808, Basslink KP199.256 Failure Examination 7th to 9th June 2016* is an engineering report prepared by Cable Consulting International Ltd for Basslink (41 pages), dated 27 June 2016 – marked *Confidential & Privileged*.

83 Page 1 of this report provides:

This report provides a factual account of the features found during the further visual inspection of the above components.

84 Document c) is entitled *Materials Technology G11863, Report on Thermal Analysis (DSC) of Samples From 400KV Basslink Cable Fault*.

85 Page 1 of this report provides:

CCI conducted the independent failure inspections in the presence of other representatives and their findings were reported in ER795 and ER808. Various samples from the failure site were then shipped back to CCI in the UK for continued inspection work.

Materials Technology Ltd were instructed by DLA Piper Australia to carry out some further analysis on various

⁶ See Cassy O'Connor MP and the Department of Natural Resources and Environment Tasmania (14 April 2022) at paragraph 23 and Graham Murray and City of Hobart (10 June 2023) at paragraphs 129 – 131, both available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

components of this cable which was reported in G9748. Following this work some additional thermal analysis was requested on the polyethylene sheath component. This report details the additional investigations conducted by Materials Technology Ltd.

86 Document d) is entitled *Materials Technology G9748, Report on Analysis of Samples From 400kV Basslink Cable Fault*.

87 Page 1 of this report provides:

This report was commissioned by DLA Piper Australia to independently review various samples and components taken from a high voltage HVDC cable. The cable in question was a 400kV interconnector known as the Basslink Interconnector which failed on 20th December 2015.

Materials Technology Ltd conducted a variety of inspections and further testing of selected samples taken from this cable including the lead sheath, polyethylene sheath and steel reinforcing tapes. As part of this work, Materials Technology also reviewed existing inspection reports produced by Cable Consulting International (CCI).

88 Document e) is entitled *CCI Report ER833, Basslink Cause of Failure 2016-12-2*.

89 Page 1 of this report provides:

Independent examinations of the failed Basslink cable were performed by CCI at the Prysmian and CCI laboratories. Metallurgical and Materials examinations were performed by Materials Technology.

The findings are:

- *The fault occurred within the cable. The fault was not at a location of a joint, or a lead sheath to armour bond.*

In the absence of surviving evidence it was not possible to determine the cause of failure as:

- *there was no evidence of any pre-existing mechanical damage to the cable.*
- *The electrical fault was a ‘radial, short path’ type. The path extended through the paper tape insulation between the conductor at high voltage and the lead alloy sheath at low voltage.*

- *There was no evidence of any incipient electrical activity connected with the fault site or present elsewhere in the cable.*
 - *The point of initiation within the fault path and the direction of propagation of the electrical failure could not be determined due to the severity of the damage.*
- 90 Each of these documents are sufficiently of a similar type that I can deal with the assessment of this information together.
- Documents a), b), c), d) and e) – Section 30(1)(a)(ii)*
- 91 In relation to these documents, Hydro relies on the s30(1)(a)(ii) exemption, which provides that information is exempt if it *would, or would be reasonably likely to...prejudice...the enforcement or proper administration of the law in a particular instance*. Hydro makes this claim on the basis that disclosure of the information would reveal *information not yet in evidence or in the public domain which may be relevant to a future dispute or have the potential to prejudice such [a] process*.
- 92 I do note that the legal proceedings between the parties have concluded, and the relevant fault occurred almost nine years ago, although this is not determinative as to whether the exemption is made out.
- 93 The meaning of *prejudice* is not defined in the Act and is therefore given its ordinary meaning. The *Macquarie Dictionary* relevantly defines it as meaning *an unfavourable opinion...disadvantage resulting from some judgement or action on another...to affect disadvantageously or detrimentally*.⁷
- 94 The information must be of a kind that, if disclosed, can be characterised as prejudicial and related to the administration of the law. The section is not subject to the public interest test and consequently requires a high threshold for satisfaction that it is applicable, in order to comply with the object of the Act encouraging the release of the *maximum amount of official information*.
- 95 I find that these reports were prepared for the purpose of investigating and responding to the fault, rather than being prepared for the purpose of litigation or some other legal proceeding contemplated by s30(1)(a)(ii). The information may have been relied on in the litigation, but I am able to assess the reports without turning to how they may have been utilised at some other point in time after production.
- 96 I am therefore not satisfied that either report falls within the requirements of s30(1)(a)(ii).

⁷ *Macquarie Dictionary* online, www.macquarie.com.au, Macquarie Dictionary Publishers 2023, accessed 1 August 2024.

Documents a), b), c), d) and e) – Section 36

- 97 With regard to s36, the exemption applies when disclosure under the Act *would involve the disclosure of the personal information of a person other than the applicant*. If I am satisfied the information is *prima facie* exempt under s36, I must then have regard to the s33 public interest test.
- 98 Documents a) and b) include the names and photographs of those people who attended inspections of the faulty cable. Some of the attendees, but not all, were Hydro staff. Documents c) and d) include the name of an employee of the relevant law firm which commissioned the report.
- 99 I therefore am satisfied that, *prima facie*, these reports contain nominal personal information of persons other than the applicant.
- 100 In relation to individuals who were not Hydro staff, I consider that the public interest factors that favour disclosure of the information are (a) *the general need for government information to be accessible*; (b) *whether the disclosure would contribute to or hinder debate on a matter of public interest*; and (f) *whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation*. On balance, however, I do not find that they outweigh factor (m) *whether the disclosure would promote or harm the interests of an individual or group of individuals*.
- 101 I have had particular regard to the circumstances of the photographs being taken and also that Hydro staff in attendance at the inspections were performing their regular duties.
- 102 I am satisfied, having regard to the personal information in these reports that it would be contrary to the public interest to disclose the following information:
- the names of the participants who attended the visual inspection as listed on page 3 of report a) and pages 3 to 4 of report b), with the exception of the two named Hydro staff in the table and the authors of the report; and
 - the faces shown in the images on the pages 15, 20, 29, 30 and 31 of report a); and
 - the name of the law firm employee contained on page 1 of documents c) and d).
- 103 I find differently in relation to the names of Hydro staff performing their regular duties and the authors of the reports. It is not contrary to the public interest to release this information and it should be provided to Mr Stott.
- 104 The decision to release the names of Hydro staff is in line with prior decisions in relation to s36 and public officers performing their regular

duties, in which I have consistently found that this type of information is not exempt unless specific and unusual circumstances have been made out.

- 105 In relation to the report authors, these are established professionals in the cable consulting industry, and it is unclear why the release of their names in relation to their professional work product would cause any harm to their interests.
- 106 In summary, I am therefore satisfied that, due to its factual content and focus on responding to the fault, documents a), b), c), d) and e) are distinguishable from the other reports in Category 2 and Category 3, that were prepared for the purpose of litigation. The Category 1 documents are to be released, subject to the s36 exemptions outlined.

Documents a), b), c), d) and e) – Section 39(1)(b)

- 107 Hydro and Basslink were subject to confidentiality obligations set out in a now terminated contract and I accept that those obligations survived the termination of the contract. Accordingly, I accept that the reports were provided in confidence and that there is a reasonable likelihood that their release may impair Hydro's ability to obtain similar information in the future, as commercial entities could be less forthcoming with information regarding contracted services they provide. As such, I find that documents a), b), c), d) and e) are *prima facie* exempt from disclosure pursuant to s39(1)(b) of the Act
- 108 Having identified these reports as being *prima facie* exempt from disclosure pursuant to s39(1)(b) of the Act, I now turn to assess whether it would be contrary to the public interest for this information to be released.
- 109 Having reviewed documents a), b), c), d) and e) I can see that Schedule 1 matters a) - the general public need for government information to be accessible - is relevant and weighs in favour of disclosure, and b) - whether the disclosure would contribute to or hinder debate on a matter of public interest - are both relevant and weigh in favour of disclosure. There is always a general need for government information to be accessible and the release of this information would inform the Tasmanian public about how the fault occurred.
- 110 I disagree with Hydro that Schedule 1 matters h) – whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government – and j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law, are relevant and weigh against disclosure. Hydro sets out its view that third parties would have an expectation that this information would remain confidential and that the release of this information would hinder

commercial dealings or arbitration with the Tasmanian government in the future.

- 111 I cannot agree with this position. All government held information is potentially disclosable as part of the right to information process in Tasmania. Third parties should understand that information they provide to public authorities as part of services provided under contract is potentially disclosable under the Act. Being subject to the Act is part of the cost of doing business with public authorities in Tasmania, with similar information access provisions being applicable in all Australian jurisdictions.
- 112 Similarly, I only accept that matter n) – whether the disclosure would prejudice the ability to obtain similar information in the future, weighs very slightly against disclosure. To give major weight to this matter would stymie the operation of the Act and effectively allow third parties to contract out of their right to information obligations when providing services to government.
- 113 I accept that Schedule 1 matters w) – whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person, and x) - whether the information is information related to the business affairs of a person which is generally available to the competitors of that person, are relevant and weigh against disclosure. The release of these reports would reveal some highly technical information about Basslink cables, and this information could be of value to its competitors and may result in anti-competitive practices. However, the reports are mainly factual assessments regarding a known fault and are 9 years old, rendering any potential harm to Basslink much reduced. Hydro or Basslink also have not raised specific concerns regarding actual harm which is anticipated in these documents. Accordingly, I do not weight these factors as significantly against disclosure in the circumstances.
- 114 Overall, there is a difficult balance to strike, however I am satisfied that it would not be contrary to the public interest for this information to be released. Though the release of this information may reveal sensitive information that may be of interest to Basslink's competitors, I find that this consideration is outweighed by the value of this information in informing the public about the fault that occurred, an event that was a major matter of public interest and debate.
- 115 Accordingly, I find that these reports are not exempt pursuant to s39(1)(b) of the Act and should be released to the applicant.

Category 2 – Basslink information prepared for the purpose of litigation

- 116 Hydro has advised my office that documents f) – i) and m) were reports obtained by Basslink and provided to Hydro as part of the commercial arbitration. However, on 28 November 2024 Ms Madeleine Farrar, a

delegated officer under the Act at Hydro, and Ms Naomi Allchin, Special Counsel at Hydro, wrote to my office to advise that the previous correspondence from 30 September 2022 was inaccurate, and that documents c), d), and e) were more appropriately considered Category 1 documents. As I have also considered it appropriate to consider documents a) and b) under Category 1, the Identified Information within this category includes documents f) to i) and m).

- 117 On my assessment of the information, I am satisfied that the documents f), g), h), i) and m) were reports and supplementary reports obtained by Basslink and provided to Hydro in the course of the commercial arbitration and central to the matters litigated.
- 118 Hydro has relied on s30(1)(a)(ii) with respect to the information within this category.
- 119 This exemption provision cannot be applied to information simply because it has been produced in relation to or as part of legal proceedings, its disclosure must also prejudice the enforcement or proper administration of the law.
- 120 I have considered whether there are matters relevant to *the enforcement or proper administration of the law* in the circumstances that existed between the parties as a consequence of the fault. In doing so I have had regard to the information and the submissions received and I note the following:
 - (i) Hydro advised that the arbitration was conducted consistent with *Commercial Arbitration Act 2011* (Vic) and that it attracted *confidentiality obligations*;
 - (ii) Hydro did not argue that the right to information under the Act was displaced by the arbitration;
 - (iii) Hydro accepts that because *the arbitration has concluded...the disclosure of the Identified Information at this stage would not result in any relevant prejudice to specifically the arbitration process*;
 - (iv) Hydro argues that prejudice would arise due to *the ongoing matters of disagreement between Hydro Tasmania and BPL [Basslink] and a legitimate prospect that these matters may be the subject of future formal dispute resolution processes (for example arbitration or court proceedings)*;
 - (v) that the expert witnesses provided their technical reports consistent with obligations under the *Expert Witness Code of Conduct issued by the Supreme Court of Tasmania*;
 - (vi) the objections raised by KPMG;
 - (vii) that the proceedings involve a matter of significant interest to the community;

- (viii) that the integrity of the subsea cable is an ongoing concern that is of state significance; and
 - (ix) it is foreseeable that it may be subject to future litigation between the parties.
- 121 Document f) *CCI Report ER990 Basslink Interconnector – A Response to Three DNV GL Reports* is an engineering report prepared by Cable Consulting International Ltd for DLA Piper (213 pages), dated 29 November 2018 – marked *Confidential & Privileged*.
- 122 At paragraph 49, the authors wrote they:
- ...have both read the Expert Witness Code of Conduct issued by the Supreme Court of Tasmania on 05 January 2016 and agree to be bound by it.*
- 123 Document g) *CCI Report ER1112 Basslink Interconnector – Electrical Modelling, Failure Mode Conclusions and Mitigation Measures* is an engineering report prepared by Cable Consulting International Ltd for DLA Piper (108 pages), dated 19 June 2020 – marked *Confidential & Privileged* and states *Prepared solely for the purpose of litigation*. It has the following separate appendices:
- Appendix A Biography of CCI author (2 pages), dated 1 February 2020
- Appendix B DLA Piper letter of instruction (35 pages), dated 3 June 2020
- 124 At paragraph 18, the author wrote:
- I have read the Expert Witness Code of Conduct issued by the Supreme Court of Tasmania on 05 January 2016 and agrees [sic] to be bound by it.*
- and at paragraph 19:
- I have read and agree to be bound by the IBA rules on the Taking if [sic] Evidence in International Arbitration, 29 May 2010.*
- 125 A declaration of independence was included at paragraph 20.
- 126 Document h) *CCI Report ER1125 Basslink Interconnector – Response to Reports 20-2598, 20-2650 & Ash01* is an engineering report prepared by Cable Consulting International Ltd for DLA Piper (52 pages), dated 28 July 2020 – marked *Confidential & Privileged* and states *Prepared solely for the purpose of litigation*.
- 127 At paragraph 6, the author wrote:
- I have read the Expert Witness Code of Conduct issued by the Supreme Court of Tasmania on 05 January 2016 and agrees [sic] to be bound by it.*

and at paragraph 7:

I have read and agree to be bound by the IBA rules on the Taking if [sic] Evidence in International Arbitration, 29 May 2010.

- 128 A declaration of independence was included at paragraph 8.
- 129 Document i) *CCI Report ER1127 Basslink Interconnector – Korean HVDC MI Cable Thermal Resistivity and Cable Design Rules* is an engineering report prepared by Cable Consulting International Ltd for DLA Piper (6 pages), dated 27 August 2020 – marked *Confidential & Privileged* and states *Prepared solely for the purpose of litigation*. It has the following separate appendix:

Appendix A DLA Piper letter of instruction (5 pages), dated 26 August 2020

- 130 At paragraph 5, the author wrote:

I have read the Expert Witness Code of Conduct issued by the Supreme Court of Tasmania on 05 January 2016 and agree to be bound by it.

and at paragraph 6:

I have read and agree to be bound by the IBA rules on the Taking if [sic] Evidence in International Arbitration, 29 May 2010.

- 131 A declaration of independence was included at paragraph 7.
- 132 Document m) *SINTEF 2020:00318 Report: Determination of the Radial Thermal Resistivities of the Basslink HVDC Mass Impregnated Non-Draining Cable* is an engineering report prepared by SINTEF for Basslink Pty Ltd (13 pages), dated 13 May 2020 – marked *Confidential* and *First version*. It has the following separate appendices:

Attachment A Test specification (4 pages), undated – marked *Confidential and Privileged*

Attachment B Measurement equipment and two Certificates of Calibration (4 pages), various dates

Attachment C Three Certificates of Calibration (6 pages), various dates

Attachment D Heat run 1 dated 27 February 2020

Attachment E Heat run 2 dated 1 March 2020

Attachment F Heat run 3 dated 3 March 2020

Documents f), g), h), i) and m) – Section 30(1)(a)(ii)

- 133 These are reports and supplementary reports produced as evidence exchanged in the course of the arbitration.
- 134 I am satisfied that, in all the circumstances, the requirements of s30(1)(a)(ii) are met in relation to all of these documents. I am

persuaded that, if disclosed, the information could be prejudicial to the proper administration of the law. That is, the disclosure of information that was exchanged for the purposes of proceedings related to the abovementioned arbitration, which attracted confidentiality, and where there is an ongoing and significant commercial relationship. Hydro is only in possession of this information due to the arbitration.

- 135 In summary, other than the description of the documents that I have provided for the purposes of this analysis, I am otherwise satisfied that documents within Category 2 are exempt in full from disclosure pursuant to s30(1)(a)(ii).
- 136 Given that I have found this information exempt, it is not necessary for me to consider the alternative exemptions under the Act proposed by Hydro in relation to these documents.

Category 3 – Hydro and the State of Tasmania’s information prepared for the purpose of litigation

- 137 This category of information includes the reports prepared for Hydro and the State of Tasmania for the purposes of the litigation with Basslink. This includes documents from j) to l) and from n) to q). The final document r) is a joint expert report which straddles both Category 2 and 3, but I consider it appropriate to deal with it under this category as information of a public authority.
- 138 Hydro has claimed these documents to be exempt pursuant to s30(1)(a)(ii) or s39 in the alternative.

Documents n), o) and p) – Section 30(1)(a)(ii)

- 139 Document n), *Expert report: Thomas Worzyk Review of the SINTEF measurement of thermal properties of the BASSLINK cable*, is an engineering report prepared by Thomas Worzyk for Ashurst (38 pages), dated 19 August 2020.
- 140 The author declares his independence on page 3 and on page 2:
 - *I have read and understood the Article 5.2 of the International Bar Association’s Rules on the Taking of Evidence in International Arbitration (IBA Rules) and the Supreme Court of Tasmania’s Expert Witness Code of Conduct as contained in Practice Direction No 1 of 2016 (Code)*
 - *I agree to be bound to the IBA Rules and the Code.*
- 141 This report responds to document m), the SINTEF report, which I found to be exempt in Category 2 above.
- 142 Document o), *NPL Report Eng (Res) 027* (September 2020 version) *Critical Review of Basslink HVDC Cable Thermal Resistivity Report from SINTEF*, is an engineering report prepared by National Physical

Laboratory for Ashurst Australia (68 pages), dated 10 September 2020. It is marked with *Reissued with corrections to Table 33 on 10 September 2023* and *This report is NPL – Commercial and must not be exposed to casual examination. It is not for general distribution and should not be cited as a reference other than in accordance with the contract.*

- 143 The authors declare their independence at paragraph 6 and:

7. We have been provided with a copy of Article 5 of the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules) in relation to adducing expert evidence. We have read and agree to be bound by the IBA Rules.

8. We have been provided with a copy of the Supreme Court of Tasmania Practice Direction ‘Expert opinion evidence – expert evidence code of conduct’ 2016. We have read and agree to be bound by this Direction.

- 144 A marked-up copy of this report was provided showing the corrections made to Table 33. It is otherwise identical. This was accompanied by a single page letter, dated 10 September 2020, setting out that:

In the course of review [sic] our own report, I have found four minor terminological errors in Table 33...

- 145 Document p), *NPL Report Eng (Res) 027* (August 2020 version) *Critical Review of Basslink HVDC Cable Thermal Resistivity Report from SINTEF*, is an engineering report prepared by National Physical Laboratory for Ashurst Australia (68 pages), dated August 2020. It is marked with *This report is NPL – Commercial and must not be exposed to casual examination. It is not for general distribution and should not be cited as a reference other than in accordance with the contract.*

- 146 It is the same report as document p), prior to the correction to Table 33.

- 147 Accordingly, documents o) and p) respond to the SINTEF report obtained by Basslink.

- 148 In summary, I am satisfied that these three reports and versions of them were prepared for Hydro exclusively for the purposes of the litigation and respond to a Basslink commissioned report I have found to be exempt. I consider that it would be inconsistent with my determination that document m) is exempt from disclosure if this information was then disclosed.

- 149 I am, therefore, satisfied that documents n), o) and p) are exempt under s30(1)(a)(ii) of the Act.

Documents j), k), l) and q) – sections 30(1)(a)(ii) and 39

- 150 I turn then to the documents j), k), l) and q), in relation to which Hydro seeks to rely on s30(a)(ii) or in the alternative s39 (information obtained

in confidence). I note that for each document Hydro has provided a clean copy and a marked-up copy containing proposed s39 redactions.

- 151 Before considering s39, I must first consider whether s30(1)(a)(ii) can apply in part or in full to the information.
- 152 Document j), *DNV GL 16-2443 Expert Report Fred Steennis: Basslink outage 2015 – Root cause analysis of the failed HVDC power cable*, is an engineering report prepared by DNV-GL for Clayton Utz, (180 pages), dated 15 December 2017. It is marked *No distribution (confidential)* and *Final report*.
- 153 Document k), *DNV GL 20-2598 Expert Report Fred Steennis: Basslink outage 2015 – Reply to CCI report ER1112*, is an engineering report prepared for Clayton Utz and Ashurst Australia, (21pages), dated 13 July 2020. It is marked *No distribution (confidential)* and *Final report*.
- 154 Document l), *DNV GL 20-2078 Expert Report Fred Steennis: Basslink outage 2015 – Root cause analysis of the failed HVDC power cable*, is an engineering report prepared for Clayton Utz and Ashurst Australia (225 pages), dated 18 June 2020. It is marked *No distribution (confidential)* and *Final report*.
- 155 Document q), *DNV GL 20-2764 Expert Report Frank De Wild: Second supplementary report regarding the Basslink interconnector*, is an engineering report prepared for Clayton Utz (59 pages), dated 17 August 2020. It is marked *No distribution (confidential)*.
- 156 I find that, despite these four documents making reference to information that I have identified above as being exempt under s30(1)(a)(ii), the information they contain does not meet the threshold to also be exempt under that section. The content of these reports, commissioned by Hydro, does not respond to the Basslink report with sufficient specificity to be considered exempt from disclosure pursuant to s30(1)(a)(ii). Rather the content of these reports relates more generally to the fault and its cause. I consider that the alternative exemption proposed under s39(1) is the more appropriate exemption.

Section 39

- 157 I now turn to assess the application of the s39 exemption to the documents j), k), l) and q).
- 158 Section 39 requires that, for information to be exempt, its disclosure *would divulge information communicated in confidence by or on behalf of a person or government, and it would be exempt if generated by Hydro or the disclosure would be reasonably likely to impair the ability of Hydro to obtain similar information in future.*
- 159 Under s39(2), s39(1) is excluded where the information was acquired from a *business, commercial or financial undertaking; and relates to*

trade secrets or other matters of a business, commercial or financial nature; and was provided...pursuant to a requirement of any law.

- 160 I do not consider that the s39(2) exclusion is applicable, as while Basslink's provision of information was governed by the *Commercial Arbitration Act 2011* (Vic), it was not specifically required to provide that information under a particular legislative provision.
- 161 I must have regard to both parts of s39(1) when assessing information that, on its face, was obtained by Hydro in confidence.
- 162 While much of the information may be marked confidential and privileged, that does not lead to automatic exemption. Each document must be assessed with a view to releasing the maximum information. As far as is possible, this should be done on a line-by-line basis. Otherwise the object of the Act and the intention to facilitate the *provision of the maximum amount of official information* could be subverted simply by marking documents confidential or privileged.
- 163 Hydro considered each of these documents, (j), (k), (l) and (q), with respect to the alternative exemption of s39 and provided the documents in a clean form and with proposed redactions. Given the highly technical nature of the information and the interaction between the reports prepared for Hydro and those in Category 2 this has been particularly helpful when undertaking this assessment. I am satisfied with the line-by-line approach adopted by Hydro as being consistent with the objects and requirements of the Act, and that the proposed redactions are limited to references to confidential information provided by Basslink.
- 164 I considered each of the four documents in turn and I am satisfied that the information proposed to be redacted by Hydro is *prima facie* exempt under s39.

Public interest test

- 165 Having regard to the factors in Schedule 1, and disregarding those that are irrelevant as listed in Schedule 2, I have considered whether, or not, disclosure would be contrary to the public interest.
- 166 I found that the information relates to a matter of significance to the Tasmanian community and that the relevant factors heavily favouring disclosure included:
 - (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; and
- (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation.
- 167 In assessing the factors weighing against disclosure I had particular regard to:
- (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
- (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
- (k) whether the disclosure would promote or harm the economic development of the State;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation; and
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person.
- 168 Without particularising the information, I can outline that my consideration here was centred on the interests of the applicant and the community to have the maximum access to the technical and expert opinion about the cable link failure that is contained in the reports and supplementary reports. That was carefully balanced against the commercial interests of the related parties, including Hydro and Basslink, as is provided for in Schedule 1. I also considered the context in which the information was exchanged and the relevance of the passage of time.
- 169 On the basis of that careful consideration, I am satisfied that the exemptions proposed by Hydro, in reliance on s39, were appropriate with limited variation. The variations outlined largely relate to matters which I consider are inconsequential in terms of disclosure, primarily headings within the reports.
- 170 The following information is not exempt under s39 and would not be contrary to the public interest to release:

Document j):

- the labels of all tables and pictures entitled figures, even where the figure itself is exempt;
- on page 42, the sentence starting *There were arbitrations...*;
- on page 47, the headings 5.3.8.2, 5.3.8.3 and 5.3.8.4;
- on page 48, the heading 5.3.9;
- on page 141, the information following from the heading *Attachment 1 – Background* until and including the image;
- on page 160, from the heading word *Operators* to *United States*;
- on page 162, the heading *Attachment 2 – Documents* to the last words *B. Background*; and
- on pages 165 to 170, the headings from point F to K.

Document k):

- on page 4, the names of reports which appear in the index of Identified Information I have included in this decision; and
- on page 20, the heading for Appendix B.

Document l):

- the labels of the tables and pictures entitled Figures 10, 11, 12, 17 and 23;
- on pages 61 and 62, the headings 4.7.1.2, 4.7.1.3 and 4.7.1.4;
- on page 74, the heading 4.8.2.4;
- on page 163, the information following the heading *Attachment 1 – Background* until and including the image; and
- on pages 184 to 185, the text following the word *Operators* to last word in paragraph *United States*.

Document q):

- on pages 6 to 18, the headings 2 to 2.9.

171 I otherwise find that the proposed redactions by Hydro are correct and this information is exempt under s39 (except where this is identical to information found not to be exempt in documents a) – d)).

Document r) – Sections 30(1)(a)(ii) and 39

- 172 The final document for assessment is the joint expert report that was prepared for the purposes of the arbitration.
- 173 Hydro again provided a clean copy and proposed redacted version, pursuant to s39.
- 174 Document r), Exp.500.025.0001_R *Discipline: Thermal and Electrical modelling and Cause of Failure*, is a joint expert report prepared by David Notman (CCI), Laurence Trim (CCI), Fred Steennis (DNV GL) and Frank de Wild (DNV GL) (133 pages), dated 7 September 2020. It is marked *FINAL form* and *It has been agreed by all authors*.
- 175 Hydro advised, in its letter dated 30 September 2022, that:

...this document was prepared by all of the parties' respective experts during the course of the arbitrations at the joint request of HT [Hydro], BPL [Basslink] and the State of Tasmania during, and for the purposes of, commercial arbitration;

the document was authored jointly and supplied by the four experts named on page 1 of the report;

HT therefore concluded that the document should be treated as having been supplied by a third-party, and is thus subject to the exemption in s.39(1)(b); and

Should the Ombudsman take a different view, in this external review we note this document should at least in part be treated exempt, in a similar manner to the documents the subject of paragraphs 4.1.i and ii of our 1 August 2022 letter and would therefore need to be carefully reviewed to discern which parts the exemption applied to.
- 176 This is a stand alone report that represents the joint efforts of the experts and it includes information from both Category 2 and Category 3, some of which is exempt.
- 177 Although I accept the position taken by Hydro that s39(1)(b) may apply, I find that it is not possible to assess the information in a manner consistent with Category 3. Rather I find that it is appropriate to consider it in the way I have approached Category 2.
- 178 I am satisfied that, in all the circumstances, the requirement of s30(1)(a)(ii) are met in relation to this report. I am persuaded that, if disclosed, the information could be prejudicial to the proper administration of the law. I do not find that it is possible to extricate the different parts of the information on a line-by-line basis.

179 Hydro and Basslink were required to prepare this joint report in the course of the arbitration and so I find that this report was prepared for the purposes of the litigation.

180 I therefore find that this report is exempt from release by virtue of s30(1)(a)(ii).

Hydro's reliance on s37

181 Hydro relies on s37(1)(b) of the Act in the alternative to justify the non-disclosure of all information identified as responsive to Mr Stott's application, *in that it is comprised of technical reports investigating the reasons why the Basslink cable failed in December of 2015*, on the basis that the release of this information would be likely to cause a third party a competitive disadvantage.

182 Given the highly factual and analytical nature of each of the reports identified as responsive to Mr Stott's application, I am not satisfied that their release would be likely to expose the third party to competitive disadvantage. I am not satisfied that Hydro has discharged its onus under s47(4) of the Act to establish that s37(1)(b) of the Act applies to exempt any of the requested information.

Preliminary Conclusion

183 For the reasons set out above, I determine that:

- exemptions claimed pursuant to ss30 and 39 are varied;
- exemptions claimed pursuant to s36 apply;
- exemptions claimed pursuant to 37 are not made out; and
- Hydro's search for information was sufficient.

Submissions to the Preliminary Decision

184 As the above preliminary decision was adverse to Hydro, it was made available to it on 5 December 2024 under s48(1)(a) of the Act to seek its input prior to finalisation. On 17 December 2024, my office received submissions from Hydro responding to my preliminary decision.

185 First, Hydro submitted that s30(1)(a)(ii) applies to all information subject to this external review, on the basis that Hydro would be in contempt of Court for releasing information the Federal Court had ordered remain confidential:

. . . we consider s30(1)(a)(ii) is the relevant exemption and that it applies to all the identified information because of the orders as disclosure of information contrary to Court orders has the potential to prejudice the proper administration of justice. We are of this view because, by its very nature, contempt of Court is act or omission which

shows disregard for the authority or dignity of a Court of law and a failure to obey a Court order is a contempt of Court.

- 186 Second, Hydro's submission contained copies of correspondence Hydro had previously received from DNV-GL, a European firm who prepared reports identified by Hydro as responsive to Mr Stott's application. Specifically, this correspondence contained DNV-GL's view that information contained within *DNV GL report 20-2078 (Basslink outage 2015 – Root cause analysis of the failed HVDC power cable)* dated 18 June 2020 (Document (I)) should be considered exempt from disclosure pursuant to s37 and/or s39 of the Act:

DNV submits that this Report contains information that ought to be exempt pursuant to sections 37(1) and 39(1) of the Freedom of Information Act ('the Act').

The information is contained within pages 18 and 212 of the Report and consists of, respectively:

- (a) *references to cable operators that the author of the Report acted on behalf of in relation to failure investigations; and*
- (b) *references to cable operators, cable connection names, commission year and operating voltage levels. To confirm, DNV is not seeking an exemption in relation to the summary contained within the final six bullet points on page 212.*

Section 37(1) of the Act

DNV submits that the Information referred to above is information relating to the business affairs of a third party and ought to be exempted from disclosure. The source of the Information originates from cable operators who can be considered 'third parties' for the purposes of the Act because they are not the person making an application pursuant to section 13 of the Act.

- (a) *With regards to section 37(1)(a) of the Act, the Information consists of trade secrets because the cable operators have disclosed the details of how they operate their HVDC MIND power cables, specifically with the view to avoiding power failures. It is DNV's submission that it is possible for a technical expert with knowledge in this field to link the cable operators to the cable connection name and commission year. Once this link is identified, it is further possible for a technical expert to identify how the cable operator operates its specific HDVC MIND power*

cable by studying the conclusions with respect to voltage level, operating temperature etc.

(b) Further and in the alternative, with regards to section 37(1)(b) of the Act, DNV submits that the disclosure of the Information would likely expose the third party to competitive disadvantage because the operation of cables by a cable operator is proprietary information that can inform significant purchasing decisions in the market. The value of those purchases potentially constitutes multi-million dollar contracts for the cable operators and those cable operators who have provided the Information may be at a competitive disadvantage because purchasers may choose not to engage with a cable operator based on the Information in the Report.

Section 39(1) of the Act

Further and in the alternative, it is DNV's submission that the Information referred to above is information obtained in confidence and ought to be exempted from disclosure.

(a) As part of preparing the Report, the author approached on a confidential basis his contacts at several cable operators to request their input. It was understood by the author and the cable operators that this input would be disclosed in the context of arbitral proceedings only and would therefore remain confidential by virtue of the arbitral process. The Information was therefore disclosed by the cable operators to the author of the Report on this basis.

(b) With regards to section 39(1)(b) of the Act, disclosure of this Information would reasonably impair the ability of the public authority to obtain similar information in the future. It is DNV's submission that this impairment meets the 'reasonably likely' threshold as set out in the Act because cable operators would not ordinarily consent to providing the Information as it is not available in the public domain.

- 187 Hydro's submissions also detailed that Hydro had brought my preliminary decision to the attention of Basslink, and that Basslink continued to have concerns about the release of information related to the cause of the fault. Hydro advised that Basslink was concerned that it had limited opportunity to respond to my preliminary decision but was aware it needed to contact this office to raise concerns. No communication from Basslink has been received.
- 188 Finally, Hydro requested that I correct my characterisation of certain documents responsive to Mr Stott's application in my preliminary

decision, and to clarify that Hydro does not consider future litigation between the State of Tasmania, Hydro and Basslink related to the fault to be foreseeable.

Further Analysis

The orders

- 189 Hydro has raised concerns regarding the impact of court orders imposed by Justice Anderson of the Federal Court of Australia on 15 June 2022. These orders related to short-lived court proceedings between the parties which were dismissed by consent in October 2022. The court orders, which do not permit the release of certain affidavits and submissions of the parties, do not name the Identified Information. However, Hydro submits that it was all attached to affidavits submitted to the court which are subject to the orders. I have not been able to verify this, due to the orders.
- 190 Hydro claims that the effect of the orders is to make all of the Identified Information exempt pursuant to s30(1)(a)(ii), as it would prejudice the proper administration of the law in a particular instance by rendering Hydro in contempt of court if it complied with my proposed findings. I am not persuaded that this is an appropriate use of the exemption.
- 191 Mr Stott had applied for this information prior to the orders being made and Ms Brown's internal review decision pre-dated them. The information was in existence well prior to the relevant litigation and was prepared for another purpose.
- 192 Hydro made no attempt to ensure the orders did not impinge on Mr Stott's live application for information under the Act and has made no subsequent attempt to have the orders lifted or varied. It has not even sought clarification from the court as to whether its view that it would be in contempt of court for releasing the Identified Information in response to an Ombudsman decision under the Act is correct. The litigation was dismissed by consent and the release of this information could not prejudice any live court action. Hydro has advised that no further court action is foreseeable.
- 193 To make a finding that s30(1)(a)(ii) applied to exempt all of the Identified Information from release, I would need to be satisfied that there was a clear likelihood of prejudice to the administration of the law. Due to the lack of clarity from Hydro, I am not sufficiently satisfied. At its highest, this appears to be an unintended consequence of court orders made for another purpose which would be remedied by an application to the court. It would be unfair to Mr Stott to find the information exempt on this basis, given the lack of action by Hydro to clarify whether any genuine prejudice to the administration of the law would occur.

DNV-GL's submissions

194 Having reviewed these submissions and reviewed document I) as a whole, I am satisfied that references to:

- a. cable operators that the author of the Report acted on behalf of in relation to failure investigations; and
- b. cable operators, cable connection names, commission year and operating voltage levels.

contained within all pages of document I) are *prima facie* exempt from disclosure pursuant to s37(1)(b) of the Act as being information, which if released, would cause the named cable operators a competitive disadvantage.

195 I accept that this is proprietary information, which if released, would be reasonably likely to negatively influence the willingness of purchasers to engage with relevant cable operators, as the above-mentioned information in document I) reveals that their cables have been previously investigated after a fault.

196 Further, I am satisfied that in these circumstances, on balance, the release of the above-mentioned information would be contrary to the public interest. Its release has the potential to harm the interests of the relevant cable operators and would provide little insight into what caused the Basslink fault, which is the focus of document I). The above-mentioned information is included in document I) to simply illustrate the credentials of the author and to compare and contrast with the Basslink cable.

197 Further, having reviewed document I), it is apparent that the type of information referred to in DNV-GL's correspondence to Hydro is found throughout the document. Though DNV-GL's submissions specify that it objects to the release of the above-mentioned information *contained within pages 18 and 212 of the Report*, I am satisfied that it would be contrary to the public interest for the abovementioned information contained anywhere in this report to be released.

198 Accordingly, I find that any reference to:

- a. cable operators that the author of document I) acted on behalf of in relation to failure investigations; and
- b. cable operators, cable connection names, commission year and operating voltage levels.

contained anywhere in document I) is exempt from disclosure pursuant to s37(1)(b) of the Act. Hydro is under no obligation to provide this information to Mr Stott.

- 199 As I have found the abovementioned information exempt from disclosure pursuant to s37(1)(b) of the Act, it is not necessary for me to consider whether s37(1)(a) or s39 applies to this information, as submitted by Hydro.
- 200 At this stage I think it necessary to clarify why I have come to the conclusion that s37(1)(b) of the Act applies to the above-mentioned information, while maintaining my finding that Hydro had not discharged its onus under s47(4) to show that s37(1)(b) applied to any other information responsive to Mr Stott's application.
- 201 First, the correspondence DNV-GL provided to Hydro, which was in turn provided to my office in response to my preliminary decision, was comprehensive and provided sufficient detail as why 37(1)(b) should apply to specific pieces of information contained in document I). Hydro's submissions as to why s37(1)(b) should apply to information identified as responsive to Mr Stott's application were too broad and did not identify the specific pieces of information in these reports it believed were exempt from release under s37(1)(b) or adequately justify its exemption in full.

Correct characterisation of documents and future litigation

- 202 Finally, Hydro requested some minor changes to my decision to ensure the correct characterisation of documents subject to this external review. Where I have found it appropriate to do so, I have changed my decision to correctly characterise the documents.
- 203 I also reiterate that it is Hydro's view that future litigation between the State, Hydro and Basslink in relation to the fault is not foreseeable by Hydro and I do not seek to advance any opinion on this point.

Conclusion

- 204 Accordingly, for the reasons set out above, I determine that:
- exemptions claimed pursuant to ss30 and 39 are varied;
 - exemptions claimed pursuant to s36 apply;
 - exemptions claimed pursuant to 37 are varied; and
 - Hydro's search for information was sufficient.
- 205 I apologise to the parties for the significant delay in finalising this external review.

Dated: 23 December 2024 (re-issued to make a correction pursuant to s48(2) of the Act on 29 January 2025)

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

Richard Connock
OMBUDSMAN

Attachment 1 – Relevant legislation

Section 30 Information relating to enforcement of the law

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

- (a) prejudice –
 - (i) the investigation of a breach or possible breach of the law; or
 - (ii) the enforcement or proper administration of the law in a particular instance; or
 - (iii) the fair trial of a person; or
 - (iv) the impartial adjudication of a particular case; or
- (b) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law; or
- (c) disclose methods or procedures for preventing, detecting or investigating, or dealing with matters arising out of, breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
- (d) endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person; or
- (e) disclose information gathered, collated or created for intelligence, including but not limited to databases of criminal intelligence, forensic testing or anonymous information from the public; or
- (f) hinder, delay or prejudice an investigation of a breach or possible breach of the law which is not yet complete.

(2) Subsection (1) includes information that –

- (a) reveals that the scope of a law enforcement investigation has exceeded a limit imposed by law; or
- (b) reveals the use of an illegal method or procedure for preventing, detecting or investigating, or dealing with a matter arising out of, a breach or evasion of the law; or
- (c) contains a general outline of the structure of a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or
- (d) is a report on the degree of success achieved in a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or
- (e) is a report prepared in the course of a routine law enforcement inspection or investigation by a public authority with the function of enforcing and regulating compliance with a particular law other than the criminal law if the inspection or investigation is complete; or
- (f) is a report on a law enforcement investigation, if the substance of the report has been disclosed to the person or the body that is the subject of the investigation –
if it is contrary to the public interest that the information should be given under this Act.

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

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

Section 33 Public interest test

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

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

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

Section 36 Personal information of person

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

(2) If –

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

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

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

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

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

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

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

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

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

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

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

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

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

- (ii) the authority to which the application for review can be made; and
- (iii) the time within which the application must be made.

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

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

Section 37 Information relating to business affairs of third party

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

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

(2) If –

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

- (3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f), decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party of the decision.
- (4) A notice under subsection (3) is to –
- (a) state the nature of the information to be provided; and
 - (b) if the decision was made on behalf of a public authority, state the name and designation of the person who made the decision; and
 - (c) inform the third party of –
 - (i) its right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.
- (5) A public authority or Minister must not provide the information referred to in a notice given to a third party under subsection (3) –
- (a) until 10 working days have elapsed after the date of notification of the third party; or
 - (b) if during those 10 working days the third party applies for a review of the decision under section 43, until that review determines that the information should be provided; or
 - (c) until 20 working days after notification of an adverse decision under section 43; or
 - (d) if during those 20 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or
 - (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 39 Information obtained in confidence

- (1) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –
- (a) the information would be exempt information if it were generated by a public authority or Minister; or
 - (b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.
- (2) Subsection (1) does not include information that –
- (a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and
 - (b) relates to trade secrets or other matters of a business, commercial or financial nature; and
 - (c) was provided to a public authority or Minister pursuant to a requirement of any law.

Section 45 Other applications for review

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

- (a) the decision which may otherwise be the subject of an application for an internal review under section 43 has been made by a Minister or principal officer of a public authority and as a consequence the applicant cannot make an application under section 43 ; or
- (ab) the decision relates to an application made to a Minister in accordance with section 13 and is a decision in relation to which a written notice must be given under section 22 ; or
- (b) a Minister or public authority has made a decision that the information requested was not in existence on the day the application was made; or
- (c) a Minister or public authority has made a decision to give access other than in the form requested by the applicant, except where to do so would breach copyright; or
- (d) a Minister or public authority has decided that the information requested is not in the possession of the Minister or public authority; or
- (e) following a decision being made by a Minister or public authority, the applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the Minister or public authority; or
- (f) notice of a decision on an application under section 13 has not been received by the applicant and the period specified in, or calculated under, section 15 has elapsed.

(1A) A person who is an external party may apply to the Ombudsman for a review of –

- (a) a decision if the decision, which may otherwise be the subject of an application for an internal review under section 43(2) or (3) , has been made by a Minister or principal officer of a public authority and as a consequence the external party cannot make an application under section 43 ; or
- (b) a decision to provide, in accordance with an application made to a Minister in accordance with section 13 , information –
 - (i) relating to the personal affairs of the person; or
 - (ii) that is likely to expose the person to competitive disadvantage.

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

- (a) a Minister or public authority has decided not to consult the person under section 36(2) or section 37(2) and the person believes that he or she is a person who was required to be consulted; or
- (b) a decision has been made on a review under section 43 and a person, other than the person who applied for the review, is adversely affected by the decision.

(3) If a notice of a decision has been given under this Act, an application referred to in subsection (1) must be made within 20 working days of the day on which the applicant received notice of the decision.

(4) If a notice of a decision to which subsection (1A) relates has been given under section 36(3) or section 37(3) to an external party, the external party may only make an application under subsection (1A) in relation to the decision within 20 working days of the day on which the external party received the notice.

Schedule 1 Matters Relevant to Assessment of Public Interest

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

- (a) the general public need for government information to be accessible;
- (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
- (c) whether the disclosure would inform a person about the reasons for a decision;
- (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
- (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
- (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
- (g) whether the disclosure would enhance scrutiny of government administrative processes;
- (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
- (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
- (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
- (k) whether the disclosure would promote or harm the economic development of the State;
- (l) whether the disclosure would promote or harm the environment and or ecology of the State;
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;

- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.



Right to Information Act Review Case Reference: R2211-013

Names of Parties: Daniel Winston and City of Hobart

Draft reasons for decision: s48(3)

Provisions considered: s36

Background

- 1 Mr Daniel Winston (the Applicant) is a resident of the City of Hobart (Council) local government area.
- 2 On 1 June 2022, Council sent Mr Winston a letter advising that a complaint had been received regarding lighting at his property causing a nuisance at a neighbouring residence. Council advised it had not verified the complaint but requested that Mr Winston ensure that any light fixtures shining directly onto neighbouring properties were adjusted, replaced or removed within 14 days of the letter.
- 3 Mr Winston requested Council advise which property suffered the nuisance and from where the complaint had come. Council declined to provide this information.
- 4 On 7 June 2022, Mr Winston made an application for assessed disclosure to Council under the *Right to Information Act 2009* (the Act) seeking the complainant's details, specifically:

I refer to your reference C22/002456. It appears that a vexatious complaint has been made and I request the name of the complainant.

- 5 On 16 June 2022, Council emailed Mr Winston to advise that his application had been received. It does not appear that Council ever sought to arrange payment of the application fee or its waiver.
- 6 The information requested was the personal information of a person other than Mr Winston. Pursuant to s36(2) of the Act, Council decided that the disclosure of the requested information may be reasonably expected to be of concern to this person and sought their views on whether it should be disclosed.
- 7 In a decision dated 30 August 2022, Mr Paul Jackson, a delegate of Council under the Act, determined that the information in question was *prima facie* exempt under s36 of the Act. Mr Jackson then applied the public interest test in s33 and determined that release of the information would be contrary to the public interest.

- 8 Mr Winston sought internal review by email on 30 August 2022. On 26 October 2022, Ms Kelly Grigsby, the principal officer of Council, issued an internal review decision which affirmed the original decision. On 17 November 2022, Mr Winston sought external review.
- 9 On 7 March 2023, Mr Winston's application for external review was accepted on the basis that at the time of the application Mr Winston was:
 - in receipt of an internal review decision made by a principal officer; and
 - the application was made within 20 working days of receiving the decision.

Issues for Determination

- 10 I must determine whether the information not released by Council is eligible for exemption under s36, or any other section of the Act. As s36 is contained within Division 2 of Part 3 of the Act, my assessment is made subject to the public interest test in s33.
- 11 This means that, should I determine that the requested information is *prima facie* exempt from disclosure under s36, or any other exemption provision contained within Division 2 of Part 3 of the Act, I must then determine whether it would be contrary to the public interest for it to be disclosed. In making this assessment I must have regard to, at least, the matters contained in Schedule 1 of the Act.

Relevant legislation

- 12 I have included copies of s36, s33 and Schedule 1 of the Act with this decision at Attachment 1.

Submissions

Applicant

- 13 In his application for internal review, Mr Winston submitted:

The complaint was vexatious in its nature, lacking any substance and completely false, to which I would have thought that disclosure of such an act would be acceptable.

- 14 In his application to my office for external review, Mr Winston submitted (verbatim):

A complaint was made by a neighbour to the Hobart City Council. After an initial request and subsequent review, which were both refused, I request that the Ombudsman review my application, as I do not agree with the rationale and reasons for non-disclosure. If it is the neighbour I suspect, they are currently under consent orders not to harass or intimidate me, and by making false and vexatious complaints

to Council and hiding behind a “screen” I have every right to know who is making false complaints about me.

Council

15 As part of the original decision, Mr Jackson reasoned:

I have formed the view this information is exempt under section 36 of the Act.

This exemption is subject to the public interest test set out in section 33 of the Act. As part of this test, I am required to consider all relevant matters (including twenty five factors contained in Schedule 1 of the Act).

Having considered all relevant matters I am of the view it is contrary to the public interest to disclose the requested information. Some of the factors from Schedule 1 I found particularly persuasive are:

- (i) “whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;”
- (ii) “whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;”
- (iii) “whether the disclosure would promote or harm the interests of an individual or group of individuals; and
- (iv) “whether the disclosure would prejudice the ability to obtain similar information in the future.”

16 As part of the internal review decision, Ms Grigsby reasoned:

Having considered all relevant matters, I am of the view it is contrary to the public interest to disclose the requested information. Some of the factors from Schedule 1 I found particularly persuasive are:

- (a) *disclosing the personal information would not promote the administration of justice (in particular procedural fairness). I note that as part of the investigation that prompted your application you were afforded a reasonable opportunity to put your case to the investigating officer. Also, I understand that the*

investigating officer has since determined that no further action will be taken on this matter at this time;

(b) disclosing the personal information of third parties is likely to harm the interests of these individuals; and

(c) disclosing the personal information of third parties may prejudice the ability to obtain similar information in the future.

17 Council made further specific submissions to this external review, seeking to expand its reasoning for finding the name of the complainant exempt. Council specifically considered:

- s30 – Information relating to the enforcement of the law; and
- s39 – information obtained in confidence

18 Council considered the operation of s30(1), which provides:

30. Information relating to enforcement of the law

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

...

(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

...

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

19 Council submitted:

[I]t is axiomatic that disclosure under the RTI Act in this instance would not merely reveal the complainant's name in isolation from context. Disclosure would reveal the complainant as the author of the complaint. This would be revealed to the applicant, in circumstances where it is apparent from the nature of the intrusive lighting complaint that the two are neighbours, and apparent from the RTI application that the applicant considers the complaint vexatious. Furthermore, because release under the RTI Act would make the disclosure, in law, a matter of public record, it would enable the applicant to further publish the complainant's name (including, for example, on social media) as a complainant...

A member of the public submitting a complaint online can ... do so in reliance on the [Council's] privacy statement. As such, they are entitled to assume that, "... The City of Hobart will take the necessary steps to ensure that the personal information that members of the public share with us remains confidential. ..."

The above makes the complainant, in submitting their personal information subject to the above assurance, a confidential source of information in relation to the enforcement or administration of the law for the purposes of s 30(1)(b). The relevant law is EMPCA [Environmental Management and Pollution Control Act 1994], as noted under Council's website summary regarding intrusive lighting.

*...
We add that we request you please also consider s 30(1)(d)...*

In our submission, speaking generally without making any allegations against this RTI applicant, disclosure under the Act of a complainant's name, on application by a neighbouring resident subject to a complaint under EMPCA, would be reasonably likely to ... increase the likelihood of harassment ... of a person for s 30(1)(d) – that person being the complainant.

In this instance the RTI application alleged that the complaint was 'vexatious'. Again, without making any allegations against the applicant, we submit that you could infer from the face of an RTI application alleging a complaint to be vexatious that the likelihood of harassment of the complainant from disclosure of their name is higher than the likelihood from an RTI application which did not allege the complaint to be vexatious.

20 Council also considered s39, which provides:

39. *information obtained in confidence*

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

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

21 Council submitted:

Section 39(1)(b) applies in that it is reasonably likely that some future complainants would be deterred from complaining (including in circumstances where the matter warrants investigation by Council as the relevant law enforcement body) if the confidentiality promised in Council's privacy statement no longer applied – which would be the effect if a complainant's name were to be disclosed under the RTI Act in this instance. Fear of recriminations and/or retribution, or even reluctance to complain for lesser reasons, would be a real concern for some potential complainants. This would prevent some matters warranting investigation being drawn to Council's attention.

For example, smoke, like lighting, is a pollutant under EMPCA, and hence a potential environmental nuisance. It is in the public interest that people be able to call in smoke (which might be early stages of a fire) from any neighbour, without worrying first about whether the neighbour will be able to obtain the complainant's 'personal information'...

Other Council examples abound, including beyond EMPCA for other matters where councils are the relevant authority: dangerous dogs, etc.

Analysis

22 As Council's primary argument relates to s36, I commence my analysis with this exemption. For information to be exempt under s36 of the Act, I must be satisfied that it contains the personal information of a person other than the applicant.

23 Section 5 of the Act defines personal information as:

... any information or opinion in any recorded format about an individual –

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

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

24 The information which Council identified as responsive to the request is one name contained within a two page record of a received complaint regarding an alleged lighting nuisance. The first section of the form gives Mr Winston's address with the remainder dedicated to the nature of the nuisance as well as information regarding the complainant. The details are sufficient to identify the complainant and their place of residence. This information is clearly personal information, and I am satisfied that it is *prima facie* exempt under s36.

Public interest test

- 25 I now turn to the assessment of whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt, and in doing so I will have regard to the matters in Schedule 1 which are relevant to this review.
- 26 Schedule 1 matter (a) - the general need for government information to be accessible. Council's internal review did not consider this matter, however it is always relevant and weighs in favour of disclosure.
- 27 Schedule 1 matter (j) - whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law. This was considered by Council to be relevant and I agree, in that in the absence of complete information regarding the allegations in the complaint, Mr Winston is less able to pursue his interests by questioning the motivation of a named complainant regarding any breach of consent orders.
- 28 However, the internal review decision notes that Mr Winston was afforded a reasonable opportunity to put his case to the investigating officer, as evidenced by an email to Mr Winston on 6 June 2022 from Environmental Health Officer Madeleine Fleming, who advised ... *no action is required at this time*. Ultimately no action was taken by Council, indicating that no nuisance was identified or that any nuisance that did exist had been rectified. It is important to note that Mr Winston could in fact raise an issue with Council regarding the motivation of the complainant by providing the particulars of the neighbour who is the subject of the consent order, along with details of that order. In any case, Mr Winston did not suffer any detriment and on balance this factor does not weigh in favour of disclosure. Council also noted that the release of names of complainants under the Act may have a chilling effect on others coming forward to report breaches of the law, and I agree that this could harm the administration of justice and hamper the enforcement of the law.
- 29 Schedule 1 matter (m) - whether the disclosure would promote or harm the interests of an individual or group of individuals – was considered by Council to weigh against disclosure. I agree with this assessment. Mr Winston *suspects*, albeit on uncertain grounds, that the complainant is the same neighbour who is bound by a consent order to not harass or intimidate him. There are avenues by which this suspicion may be pursued which do not require the release to him of personal information of a complainant. One avenue is to report a suspected breach to Tasmania Police and an investigation could occur, if appropriate, into whether any harassment was occurring.
- 30 However, while I accept that it would promote Mr Winston's interests to receive the name of the complainant, I consider this is outweighed by the harm to the interests of complainants which could occur. Neighbourhood disputes and nuisance concerns are inherently difficult, due to the parties living in close proximity to each other. Reporting in the media and criminal courts attest to the fact that the escalation of such disputes not infrequently results in aggression

and violence, even murder in very extreme cases. While I do not suggest that this is standard, the risk of reprisal against a complainant is not fanciful and the release of the name of a complainant into the public domain has the potential to harm the interests of that person. Overall, I consider this matter weighs against disclosure.

- 31 Schedule 1 matter (n) - whether the disclosure would prejudice the ability to obtain similar information in the future – was considered by Council to weigh against disclosure. I agree with this assessment because Council's enforcement of laws in many areas of their responsibility depends upon the willing co-operation of the public to inform Council of areas of concern without fear of their identity being released to the subject of the complaint.
- 32 The form which Council uses to enable the community to report lighting nuisances has a link to Council's *Privacy Statement*. The first paragraph of this statement reads:

The City of Hobart is committed to upholding the right to privacy of all individuals who have dealings with us. The City of Hobart will take the necessary steps to ensure that the personal information that members of the public share with us remains confidential.

Members of the community who wish to share with Council their concerns regarding environmental or other issues impacting the community may well be reluctant to do so, in spite of Council's assurances of confidentiality, if they fear their personal details will be released into the public domain and possibly expose them to retaliation. This will undoubtedly prejudice Council's ability to obtain similar information from the community in the future. The public interest in encouraging the community to lawfully participate in regulating nuisance behaviour is undeniable, and so this factor strongly weighs against disclosure.

- 33 Schedule 1 matter (u) – whether the information is wrong or inaccurate – was not considered by Council, however I believe it is also relevant. When a person reports an alleged nuisance to Council, they are required to nominate an email address and a telephone number, but there is nothing before me to indicate that these details have been checked and confirmed as belonging to the person named as the complainant. Consultation pursuant to s36(2) of the Act is required to be in writing (email), not by telephone. This cannot eliminate the possibility that the details provided in the complaint may be false, or of a person totally unconnected with the complainant, which would expose the interests of that person to harm. This factor weighs against disclosure.
- 34 The assessment of the various factors set out in Schedule 1 which are relevant to the public interest test involves a consideration of competing factors. On balance, I have determined that in this case the release of the relevant information would be contrary to the public interest.

- 35 Given that I have found that the most relevant exemption is s36 and the requested information is exempt in its entirety under this section, there is no need to consider Council's further submissions regarding ss30 and 39 in detail.
- 36 Council's concerns regarding the confidentiality of the complainant's details and the possible detrimental effects of disclosure of their name have been addressed in the public interest test, specifically in matter (m). Likewise, concerns regarding the ability to obtain confidential information in similar circumstances in the future is addressed by matter (n).

Preliminary Conclusion

- 37 For the reasons given above, the exemption claimed by Council pursuant to s36 is affirmed.

Response to the Preliminary Conclusion

- 38 On 18 June 2024, my preliminary decision was made available both to Mr Winston and Council to seek their input before finalisation pursuant to s48(1)(b) of the Act.
- 39 On 25 June 2024, Council made brief comments on two aspects. Firstly:

It is highly unlikely Council's decision-makers would have been aware [of consent orders], unless advised by Mr Winston.

We would not wish knowledge of the orders to be presumed of Council... but beyond that we have no issue with the paragraph [29] analysis.

- 40 Secondly, regarding paragraph 33 of my decision:

I have checked with the Environmental Health Officer who investigated this complaint and can advise they received an email (to which they replied) and took a phone call from the complainant. So those contact details were checked in investigating the alleged nuisance...

Council has no reason to believe that the contact details provided in the complaint were incorrect. While we agree with you that one cannot eliminate the possibility that contact details provided in a complaint may be false, we note that would be an offence under s43A of the Environmental Management and Pollution Control Act 1994.

- 41 Mr Winston made no submissions.
- 42 I note Council's comments. As there were no submissions concerning the substance of my decision, I have not altered my proposed findings.

Conclusion

- 43 Accordingly, for the reasons set out above, I determine that the exemption claimed by Council pursuant to s36 is affirmed.
- 44 I apologise to the parties for the delay in finalising this decision.

Dated: 28 June 2024

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

Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 36 - Personal information of person

- (1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13 .
- (2) If –
- (a) an application is made for information under this Act; and
 - (b) the information was provided to a public authority or Minister by a third party; and
 - (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party – the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –
 - (d) notify that person that the public authority or Minister has received an application for the information; and
 - (e) state the nature of the information that has been applied for; and
 - (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.
- (3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f) , decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.
- (4) A notice under subsection (3) is to –
- (a) state the nature of the information to be provided; and
 - (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
 - (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.
- (5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) –
- (a) until 10 working days have elapsed after the date of notification of that person; or
 - (b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or
 - (c) until 20 working days after notification of an adverse decision under section 43 ; or
 - (d) if during those 20 worksings days the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or
 - (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

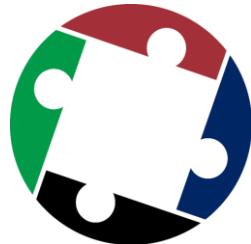
Section 33 - Public interest test

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

Schedule 1 - Matters Relevant to Assessment of Public Interest

1. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:
 - (a) the general public need for government information to be accessible;
 - (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
 - (c) whether the disclosure would inform a person about the reasons for a decision;
 - (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
 - (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
 - (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
 - (g) whether the disclosure would enhance scrutiny of government administrative processes;
 - (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
 - (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
 - (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
 - (k) whether the disclosure would promote or harm the economic development of the State;
 - (l) whether the disclosure would promote or harm the environment and or ecology of the State;
 - (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
 - (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
 - (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
 - (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
 - (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.



Right to Information Act Review

Case Reference: R2202-033

O2012-104

Names of Parties: Graham Murray and City of Hobart

Reasons for decision: s48(3)

Provisions considered: s35, s37, s39, s45(1)(e)

Background

- 1 The Mount Wellington Cableway Company Proprietary Limited (MWCC) sought approval to construct and operate a cable car on kunanyi/Mount Wellington. The proposed cable car project (the project) was of considerable interest to the Tasmanian community. The City of Hobart (Council), the public authority responsible for the assessment of the project, ultimately refused it on 27 July 2021.¹ MWCC appealed that decision to the Tasmanian Civil and Administrative Tribunal (TASCAT) but the appeal was refused on 3 November 2022.² Mr Graham Murray, the applicant, is a supporter of the project who sought information from Council regarding the assessment process it undertook prior to the refusal. A previous appeal by MWCC to the Resource Management Planning Appeals Tribunal (RMPAT), the predecessor to TASCAT, for a ruling regarding Council's request for more information also occurred in 2020.
- 2 On 2 November 2020, Mr Murray made an assessed disclosure application to Council under the *Right to Information Act 2009* (the Act) and the fee was paid. The information sought was (verbatim):
 - [1] *All information pertaining to the independent expert panel, including but not limited to,*
 - [a] *contract, engagement documentation, selection process, procurement documentation, internal selection documentation and deliberations, file notes and e-mails. This includes both the panel selection (showing skills and expertise) plus the*

¹ Media release dated 27 July 2021, 'Non-compliant cable car application refused,' City of Hobart, Tasmania Australia available at www.hobartcity.com.au/Council/News-publications-and-announcements/Media-centre, accessed on 3 April 2024.

² *Mount Wellington Cableway Company Pty Ltd v Hobart City Council & Others [2022]* TASCAT 128.

- process of selecting [ERA Planning and Environment] for this particular engagement.
- [b] Payment schedules and records for any consultants engaged under the independent expert panel, including copies of invoices.
 - [c] The terms of reference associated with the independent expert panel
 - [d] A list of meetings, meeting notes/minutes, all correspondence with, and instructions directed to/from the independent expert panel
 - [e] the list of the questions generated by the independent expert panel to the Proponent, including all workings, examples, research, precedents, and clearly showing how the Council internal experts and previous decisions are included in the independent expert panel's deliberations
- [2] All information prepared for the RMPAT hearing on 5 November 2020.
- [3] All information regarding the development and publication of the HCC's cable car information web site, including all process and approval documents and any feedback from any party including observations from elected officials or cable car opponents.
- [4] All information relating to any interactions, written, phone calls or meetings, with any of the Council's elected officials on PLN-19-345 or the cable car generally from June 2019 to current.
- [5] The odour report for the current public toilets on the pinnacle of kunanyi/Mt Wellington
- [6] Information regarding the cancellation of the burn off in the Southern McRobies Gully where the notices went up but the burn off was cancelled without any notice (about a year ago) – including any representations made regarding this burn off.
- [7] Any cable car related RTI responses provided to other parties since June 2019.

I consider that “information” must not be limited to records within the Council’s records management system and should be interpreted as per the definition in the RTI legislation.

- 3 On 17 December 2020, Mr Nick Heath, Council’s then General Manager and its principal officer under the Act, released a decision to Mr Murray (Decision part 1). This assessed the majority of the application and indicated that a staged response was required. Mr

Heath advised the following regarding each Item, which is summarily described for convenience:

- Item 1a (procurement information), s37 of the Act (information relating to the business affairs of a third party) applied and therefore consultation with third parties was required;
- Item 1b (payment records), s37 of the Act (information relating to the business affairs of a third party) applied and therefore consultation with third parties was required;
- Item 1c (tender material), was incorporated in Item 1a and did not need to be considered separately;
- Item 1d (meetings and independent expert information):-
 - a list of meetings responsive to the application for information was released with the decision;
 - 16 documents were exempt from release under s31 of the Act, because the *nature* of the information *would be privileged from production in legal proceedings on the grounds of legal professional privilege*;
 - 22 emails were *consultations between Council Officers as part of the deliberative process related to the official business of the Council and exempt from disclosure under section 35 of the Act*. Consideration was given to s33, the public interest test, and some relevant factors under Schedule 1;
- Item 1e (questions), *the details of a number of questions that were provided to the proponent* was released with the decision;
- Item 2 (RMPAT), two emails were identified and exempted pursuant to s31, legal professional privilege;
- Items 3 (website matters) and 4 (elected official communications), further time was required to complete the assessment, a further fourteen days;
- Item 5 (odour report), Council advised it was *not in possession of any odour report*;
- Item 6 (burnoff cancellation), no information was held that was responsive to the request but advised:
 - *... as a show of good faith I can confirm the burn off for McRobies Gully that was scheduled to occur in spring 2019 was withdrawn as an operational decision to reallocate resources for the major Knocklofty Reserve burn off.*

- *After the Knocklofty Reserve burn off was completed, the strategic benefit of treating the McRobies Gully site was greatly reduced with no burn off to be conducted of the McRobbies [sic] Gully until the landscape sequencing of fuel reduced areas suggests it is required.*
 - Item 7 (RTI requests), *five information request assessments that were made by Council in relation to applications for assessed disclosure between June 2019 and the date of the application were released with exemption applied under s36, personal information of a person other than the applicant.*
- 4 On 18 December 2020, Council released some further information responsive to Item 1d.
 - 5 On 21 December 2020, Mr Murray wrote to Council raising concerns over the delay in the handling of his assessed disclosure application and responding to Decision part 1. A copy was provided to this office, received on 22 December 2020.
 - 6 The copy of the email to Council was accepted as an application for external review because the applicant was in receipt of a decision made by Council's principal officer, the fee had been paid, and the review request was made within 20 working days of receiving the decision, and he was dissatisfied with the part decision.
 - 7 On 22 December 2020, Mr Heath released to the applicant part 2 of his decision (Decision part 2), in relation to Items 3 and 4, along with some information. Mr Heath found:
 - a. Item 3 (website matters), six emails, *generally about the preparation of information that is to be published on the Council's website*, were exempt under s35 (internal deliberative information) after consideration of s33 the public interest test; and
 - b. Item 4 (elected official communications), released further information in response to the request for PLN-19-345 (planning) correspondence and finding that six documents *generally about legal advice obtained by the Council* about the assessment of the planning were exempt under s31 (legal professional privilege). Twenty other documents, being *correspondence between the Council and members of the community*, were released in part subject to s36 (personal information of other person) exemption with some regard to s33 the public interest test.
 - 8 On 6 January 2021, Mr Murray provided further information in support of his external review application addressing Decision part 2. In his email, sent to this office and Council, Mr Murray raised

concern about the exemptions relied upon and the reasoning provided.

- 9 On 15 January 2021, following Council's third party consultation, made under s37, Mr Heath released the third part of Council's decision in relation to Items 1a and 1b (Decision part 3). Mr Heath found:
 - a. Item 1a (procurement information),
 - i. of the *fourteen (14) documents that generally relate to the procurement of the "independent expert panel"* (amounting to 743 electronic pages) four documents were exempt from disclosure under s37 of the Act on the basis that *disclosure would likely expose a third party to competitive disadvantage*. Consideration was given to the s33 public interest test; and
 - ii. as a *goodwill gesture* the applicant was provided with the *template contract that was made publically [sic] available as part of the Council's request for tender process for the formation of the Panel for Providers of Consultancy Services – Design, Engineering, Surveying, Project Management, Planning and Access – Category 11 – Planning. This template forms the basis of the agreement with one of the third parties* (75 pages); and
 - iii. the remaining ten documents proposed to be released were, under the Act, subject to Council notifying the third parties of the decision to release the information and affording them a right of reply; and
 - b. Item 1b (payment records), the information comprised thirteen invoices (32 electronic pages with two cover pages). Council found this information to be exempt in full pursuant to s37 of the Act, as *the information relates to the business affairs of third parties*. Consideration was given to the public interest test, under s33.
- 10 On 2 February 2021, at the expiration of the ten day appeal period, Council contacted this office to confirm whether there had been any correspondence received from any of the third parties consulted by Council under s37.
- 11 As no third party external review application had been lodged with my office, Council proceeded to release the fourth part of its decision (Decision part 4) on 2 February 2021. Mr Heath advised

that no external review requests had been received from third parties in response to the s37 consultations.

- 12 Released with Decision part 4 were ten documents responsive to Item 1a. One document was subject to partial redaction, under s37.
- 13 Between 15 February 2021 and 23 February 2021, correspondence was exchanged between the parties regarding Item 6.
- 14 Between 20 August 2023 and 3 December 2023, correspondence was exchanged between this office and Mr Murray regarding the scope of the external review. The applicant confirmed that he:
 - was seeking external review of Items 1, 3 and 6;
 - was not pursuing review of information *exempt under the legal advice criteria*;
 - remained dissatisfied with Council exempting whole documents; and
 - was frustrated with Council not complying with statutory timeframes.
- 15 On 14 December 2023 my office sought some further assistance from Council.
- 16 On 17 January 2024, supplementary submissions from Council were received in response to those enquiries from my office.

Issues for Determination

- 17 I must determine whether the following information, that Council found to be responsive to the assessed disclosure request, is eligible for exemption under ss35 or 37 or any other relevant section of the Act in relation to:
 - a. Item 1 for [a]/*information pertaining to the independent expert panel*, including 1a (procurement information), 1b (payment records), 1c (procurement information) and 1d (meeting and independent expert information); and
 - b. Item 3 (website matters).
- 18 As ss35 and 37 are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33, including consideration of the matters listed in Schedule 1 and excluding those matters in Schedule 2. Should I determine that the information is *prima facie* exempt, I must then determine whether it is contrary to the public interest to disclose it.
- 19 I must also determine, pursuant to s45(1)(e), whether Council undertook a sufficient search for relevant information responsive to Item 6.

Relevant legislation

- 20 I attach copies of ss33, 35, 37, 39 and 45 to this decision at Attachment 1.
- 21 Schedule 1 of the Act is also attached.

Submissions

Applicant

- 22 In the course of the assessed disclosure application progressing to external review Mr Murray has made a number of submissions, to which I have had regard.
- 23 In response to Council's Decision part 1, on 21 December 2020, Mr Murray raised concerns about the approach taken by Council to assessing the information, to delay and to the staged decision making. Extracted below are the submissions in reply, relevant to this review, that he made to the Decision part 1 (verbatim in italics):

Item 1a (procurement information)

I would anticipate that sensitive information would be redacted rather than whole records exempted. I wrote a letter to Council as to why and how it selected relevant consultants which was simply ignored in the response from Council. If HCC had abided by the required 20 day assessment period then we would have an answer, but attempting to have the Council acquit its legislative responsibilities seems too much to ask?

Item 1b (payment records)

I would anticipate that sensitive information would be redacted rather than whole records exempted. I wrote a letter to Council as to why and how it selected relevant consultants which was simply ignored in the response from Council.

Item 1c (tender material)

the terms of reference is a Council document, So why it is holding up providing a standard operational document beggars belief!

Item 1d (meetings and independent expert information)

Council deliberately and strategically outsourced its assessment responsibilities. It is surely in the public interest to understand the discussions between the Council and Consultant, not just the final product? I can easily reference two items where the MWCC was asked to fulfil requests that were contrary to previous Council precedents. So where was Council in this process and who was completing due

diligence on the Consultant? Where is the probity? I would anticipate that sensitive information would be redacted rather than whole records exempted. It's a pity that the HCC [Council] can't persuade itself to be accountable and transparent.

Item 3 (website matters)

I would anticipate that sensitive information would be redacted rather than whole records exempted. Given the Council is already at 7 week's elapsed of a 20 working day legislative requirement I can't understand why a further wait is required.

Item 6 (burnoff cancellation):

I do not accept that the Council can organise a planned burn to the point it is scheduled with signage then suddenly removed from existence without one shred of information in any form (as defined by the RTI Act). In my opinion the Council is either incompetent or at worse corrupt.

- 24 Some of the concerns initially raised were variously addressed as the further Decision parts 2, 3 and 4 were released by Council, to which Mr Murray made further submissions.
- 25 On 6 January 2021, following Decision part 2 being released, relevantly to Item 3 (website matters), Mr Murray submitted (verbatim):

I seek Ombudsman's review regarding this item I wrote to the Council on 10 September 2020 asking for details regarding the City of Hobart maintaining a blow-by-blow website on the cable car issue. I asked for the statutory authority the Council was relying on (in its planning role with a live DA on its books) to enable its ongoing commentary, details of the probity advice it was receiving, and examples of other planning matters that it kept a web site for that could be viewed for precedence. I asked if the Council had completed a risk assessment about name dropping potentially controversial subjects without context and how that may have fitted in with procedural fairness and natural justice.

The Council responded on 15 September 2020 that "Recognising that this planning application is high profile and has a significant level of public interest, I <Nick Heath> have taken the view it is appropriate to provide the community with regular, timely and appropriate information regarding the progress of the assessment".

Based upon silence in the response, there was no probity advice sought or obtained, no risk assessment completed, no consideration of the impact of Council commentary, no consideration of procedural fairness nor natural justice. There appears to be no substantive advice upon which the General Manager, Mr Nick Heath, formed a view to publish ongoing commentary about a live planning matter that the Council has made no attempt to hide its opposition for.

I find it perverse that the HCC decides to hide behind consideration that releasing information would on one hand “hinder debate on a matter of public interest” on a matter it claims it published information on due to it being “high profile and has a significant level of public interest”.

- 26 On 20 August 2023, Mr Murray made the following further submissions:

I note the first point of my review was related to the fact that the Council did not respond within the timeframes required under the Act, in my opinion did not provide me with an adequate response, and in particular was not able to identify the provisions it relied on when delaying that response. I have had multiple interactions with the Council and in every instance I can recall the Council has failed to respond within the required timeframe. In my most recent dealing the Council failed to abide by the Ombudsman’s direction and had to be reminded to release the information. I do not wish to make a big deal of this issue. However, the Council is required to operate consistent with the Act. If the Ombudsman has identified that training or a change in Council operations is required then I would seek that the Ombudsman rely this to the Council’s CEO.

Item 1

I seek review of my first point where I requested information regarding the Council’s panel. The Council selected the principal consultant who was then provided with the autonomy to select a panel of sub consultants (one who then went on to select someone they knew). Given the high public interest, the weight the Council put on the panel as part of its assessment process and the fact the Council as land owner blocked the project and was actively hostile to it, I believe there is a strong public interest for the Council to actively disclose all of its operational decision so that they are fully transparent – as the Council in this instance has a dual and competing Statutory role as the planning authority. I believe that

particularly sensitive information could be redacted instead of whole documents being made exempt. This request extends to items identified in correspondence under 1a procurement information and 1d meetings and meeting notes. I do not wish to pursue any documents exempted on the “legal” grounds.

Item 3

HCC Website update. I seek review of the decision to decline access to the Website documents. I proposed there is a strong public interest in how the Council went about communicating its decisions on a live planning matter, particularly when the Council was openly hostile against the project as land owner and the Council had an onus to approach the planning application fairly and transparently in its competing Statutory planning role. The Council’s RTI decision claims it could not be in the public interest sighting two reasons. I disagree with these reasons and how the Council handled its communications about the project with such a high public interest goes directly to how it decided to communicate with the public – and to fairness and natural justice for the proponent and those interested in the outcome. There appears to be no external probity engaged for the project and I find this to be an area where Councils could improve particularly when assessing projects where they hold multiple roles.

Item 6

*I requested information about a burn off at McRobies Gully. The information was removed without notice, including signs taken down and information removed from GIS maps. The question that I have is to whether the Council identified documents as per the information required under RTI. I do not accept *prima facie* that a Government body can make such an important change as foregoing a fuel reduction burn and remove all traces that it existed in the first place without a single document. I would like confirmation that the Council did indeed examine all documents it is required to under RTI in making its response and I would like to see this in writing.*

- 27 On 3 December 2023, in response to correspondence from this office, Mr Murray confirmed in reply that:

As expressed in my email to the Ombudsman on 20 August 2023, I do not wish to pursue any items identified as exempt under the legal advice criteria. I do note in this request that the Council did provide some correspondence relating to sub consultants (and sub sub consultants) that included

hourly rates, but refused to do so for the prime consultant. I would like to reinforce my opinion that rather than exempting whole documents another option, as seems contemporary practice in FoI/RTI, would be to release documents but redact portions considered exempt.

28 In a further brief email, on the same day, Mr Murray wrote:

In requesting this I reiterate that it is my belief that the burnoff information was not correctly assessed under the full breadth of documents required under RTI. I reiterate that the burn was planned, GIS updated to include the burn, notices posted around the area advertising the burn – all of which disappeared without notice and without, according to the HCC, not a single document, email or system note. ... However, I personally walked through the area and saw the signs posted with my own eyes and have proof that the HCC GIS had the burn registered.

In addition to the above, I would appreciate if the Ombudsman could review the timeframes the HCC observes when responding to RTI requests. Although this is not a massive deal, it is frustrating that the HCC does not abide by legislated timeframes. As you have seen, the Ombudsman is my only opportunity for review – and this is my third review and all of them have taken 3-4 years.

Council

29 Council's primary reasoning is contained in the Decision Parts 1, 2, 3 and 4 as outlined in the Background above. Additionally, on 17 January 2024, Mr Hutchinson made brief submissions for the Council in response to questions from my office. Relevantly he noted that:

- *the information for item 1(c) was assessed as part of the information for item 1(a);*
- *the Principal Officer deemed the disclosure of the information for items 1(a)-(c) may reasonably be expected to be of substantial concern to the relevant third parties. Accordingly, the Council undertook the section 37(2) consultation process and received responses that generally opposed the release of the information;*
- *some of the information from item 1(a) was released to the applicant ... Part of this document was redacted as it was deemed to be exempt ... In accordance with section 37...;*
- *the balance of the information for items 1(a)-(b) was deemed to be exempt under section 37 of the Act; and*

- it is worth noting that the methodology for counting documents for this application appears to be that an email with several attachments was deemed to be counted as one document. I think this will be useful to know when overlaying the notice of assessment with the information that was exempt; and
- In respect of your query regarding item 6, I can see from the file that it was deemed that Mr Murray sought information regarding the cancellation of the burn off and therefore no information existed in response to this request given this was an operational decision. Put another way, any information regarding the scheduling of the burn off was deemed to be outside of scope (except to the extent that Mr Murray was seeking any representations about the burn off). On the latter point I can only assume that no representations were received based on the correspondence of the officer who was assisting the principal officer at the time. However, I note further that in these circumstances the Council endeavoured again to go beyond its obligations of the Act to include an explanation in its assessment to Mr Murray about how and why the burn off was cancelled.

Analysis

Preliminary matters

Schedule of Documents

- 30 Unfortunately, Council did not provide either a schedule of documents containing the information identified and assessed as responsive to the applicant's assessed disclosure request or a full index of information provided to my office. This has made the external review assessment challenging and time consuming, particularly in relation to Item 1a.
- 31 Best practice, as I have reiterated in prior decisions,³ is outlined in the *Ombudsman's Manual*⁴ (the Manual) and should be followed as far as possible in relation to the preparation of a *Schedule of Documents* (at page 56):

Where there are numerous documents, [the statement of reasons] should use a Schedule of Documents to better explain the decision with respect to each document.

³ See for example, *Alexandra Humphries and Department of Health* (June 2023), at [79]-[85], available from [Ombudsman Tasmania](#).

⁴ Ombudsman Tasmania, *Right to Information Act 2009, Tasmania: Ombudsman's Manual*, July 2010. Available at www.ombudsman.tas.gov.au/right-to-information.

- 32 Then at 8.5 of the Manual:

In all but the simplest cases, decision makers will usually find that it is helpful to prepare a Schedule of Documents at the earliest possible opportunity and to use this in conjunction with the decision making process. When the decision is made, the final Schedule can be attached as part of the decision notice.

The precise form of a schedule is not important so long as it contains all the information necessary for the applicant to identify and understand the nature of the relevant information and to be aware of all relevant exceptions or exemptions claimed as a basis for refusal, and to locate full, detailed reasons for each refusal decision.

- 33 A schedule serves multiple purposes including aiding the applicant to understand the information held (even if it is described in general terms because of exemptions applied), providing an index, allowing efficiency for managing voluminous information, and importantly transparency of the process undertaken by the public authority.
- 34 In future, Council is encouraged to prepare a schedule consistent with the recommended practices in the Manual when the relevant information is voluminous.
- 35 Noting the age of the application and that the principal officer responsible for making the decision has since left Council, I decided to proceed without returning to Council at this late stage to require a schedule of documents to be prepared. In the interests of progressing the external review application an index was prepared by my office and is included at Attachment 2.

Exemption assessment approach

- 36 Mr Murray complains of the approach taken by Council to exempt whole documents, rather than apply the minimum exemption for the maximum release of information consistent with the spirit and requirements of the Act. I agree. Council is required as far as is practicable to assess documents on a line-by-line basis. This is to avoid non-disclosure where disclosure should occur.
- 37 I strongly encourage Council to adopt different processes in future to more carefully assess which information is genuinely relevant to an exemption provision. This is in accordance with the object of the Act which requires public authorities to exercise their discretions to release the maximum amount of official information.

Section 35 – *internal deliberative information*

- 38 For information to be exempt from disclosure under s35(1)(a) of the Act, I must be satisfied that it consists of an opinion, advice or recommendation prepared by an officer of a public authority. I must also be satisfied that the opinion, advice or recommendation was made in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister, or of the Government.
- 39 The exemption does not apply to the following:
 - *purely factual information* (s35(2));
 - *a final decision, or order or ruling given in the exercise of an adjudicative function* (s35(3)); or
 - information that is older than 10 years from its creation (s35(4)).
- 40 As to the meaning of ‘purely factual information’ in s35(2), I refer to *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*⁵ (*Re Waterford*) where the Commonwealth Administrative Appeals Tribunal observed that the word ‘purely’ in this context has the sense of ‘simply’ or ‘merely’ and that the material must be ‘factual’ in quite unambiguous terms.
- 41 Associate Professor Moira Paterson, in her text, *Freedom of Information and Privacy in Australia 2.0*,⁶ refers to the decision in *Re Waterford* and concludes that, regarding factual information, *it must be capable of standing alone. The material must not be so closely linked or intertwined to the deliberative process as to form part of it.*
- 42 The meaning of the phrase *in the course of, or for the purpose of, the deliberative processes* has also been considered by the Administrative Appeals Tribunal. In *Re Waterford and Department of Treasury (No 2)*⁷ it adopted the view that these are an agency’s *thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.*

Item 1d meetings and independent expert information

- 43 Council identified and collated 22 emails of 174 pages as being responsive to Item 1d, meeting and independent expert information, to which s35 was applied.

⁵ (1984) AATA 518 at 14.

⁶ LexisNexis Butterworths Australia, 2nd edition 2015 at 7.30.

⁷ (1985) 5 ALD 588.

44 Mr Heath found that, pursuant to s35(1)(b), the emails were *consultations between Council Officers as part of the deliberative process related to the official business of the Council* and that *it is contrary to the public interest to disclose this exempt information*.

45 In relation to Item 1d, the applicant was advised that:

This exemption is subject to the public interest test set out in section 33 of the Act. As part of this test, I am required to consider all matters relevant to your application (including twenty five factors contained in Schedule 1 of the Act).

Having considered all matters relevant to your application, I am of the view it is contrary to the public interest to disclose this exempt information. Some of the factors from Schedule 1 I found particularly persuasive are:

- (i) “whether the disclosure would contribute to or hinder debate on a matter of public interest”; and
- (ii) “whether the disclosure would provide the contextual information to aid in the understanding of government decisions”.

- 46 The information responsive to Item 1d comprises emails between employees of Council and Ms Emma Riley of ERA Planning Pty Ltd (ERA), an environmental and planning consultancy firm contracted by Council. The emails attach letters and other information Council has either sent to or received from MWCC.
- 47 MWCC is an external body and communication with it would not be considered internal and able to be covered by this exemption. It is not apparent why s35 would be applicable and I do not consider that the correspondence between Council and MWCC could be exempt under this section. Council has not discharged its onus under s47(4) to show why this information should be exempt and it should be released to Mr Murray.
- 48 As I have found in past decisions,⁸ consultants engaged by public authorities and external parties are not officers of that public authority and it is similarly not apparent why communication with Ms Riley would be exempt under s35(1)(b).
- 49 Council has not made any argument regarding an alternative exemption, such as under ss37 or 39, and it is not otherwise apparent that any other provision would be applicable. This information should be released to Mr Murray.

⁸ See *Robert Hogan and the University of Tasmania* (23 October 2023), *Graham Murray and City of Hobart* (10 June 2022) and *Camille Bianchi and Department of Health* (4 November 2021) available at www.ombudsman.tas.gov.au/right-to-information

Item 3 website matters

- 50 Item 3 contains the information that Council decided on 22 December 2020 was exempt from disclosure under s35(1)(b) of the Act, as consultations between public officers. The decision identified six emails responsive to the request for information, which contain attachments and other emails in the email chain. The emails relate to content to be uploaded to Council's website.
- 51 The first two emails, including an attachment, consist of a communication from the General Manager of Council to the Acting Supervisor, Communications of Council and consist of consultation regarding the website information.
- 52 Accordingly, I am satisfied that this information is *prima facie* exempt under s35(1)(b) of the Act.
- 53 The third, fourth, fifth and sixth emails are from the Acting Supervisor, Communications and were sent to other Council officers and a third party Communications consultant – Leigh Arnold Communications. Other Council officers have replied to this email and have made alterations and suggestions. The consultant has not made any comment.
- 54 In spite of this, I am satisfied that the information in these is *prima facie* exempt under s35(1)(b) of the Act. The information does not lose its internal flavour in this instance merely because Mr Arnold is a party to the email. My position may well have been different had he not been contracted to undertake work for Council or been an active participant in the discussion.

Public interest test

- 55 Council provided very limited reasoning for its finding that the release of this information would be contrary to the public interest. It indicated that the matters in Schedule 1 which it found most persuasive were (a) – the general public need for government information to be accessible, (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest, and (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions.
- 56 Council did not explain in what way these factors were considered to weigh for or against disclosure.
- 57 I agree that matter (a) – the general public need for government information to be accessible – is always relevant and will inevitably weigh in favour of the release of information in any public interest assessment.

- 58 I also agree that matters (b) and (d) are relevant, but consider that these weigh in favour of disclosure. It does not appear that Council weighed them in this way, as it concluded that the release of the information would be contrary to the public interest. I cannot agree, though I accept that the information I have found to be *prima facie* exempt is not of significant importance in relation to debate or government decisions. It contains minor administrative consultations regarding the finalisation and upload of information to Council's website.
- 59 I also consider that the following matters are relevant in this instance:
- c) *whether the disclosure would inform a person about the reasons for a decision;*
 - 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.*
- 60 I do not consider that any matters in Schedule 1 weigh against disclosure, though this is often the case in relation to s35. The information I have found to be *prima facie* exempt does relate to early discussions to finalise material for publication, however, and I have previously considered that it is sometimes contrary to the public interest to release early drafts of documents.
- 61 I accept that the attachments to emails four and five are exempt from disclosure pursuant to s35(1)(b), as these are marked up draft versions of text to be uploaded to Council's website. As I have found previously, it is valid for early drafts of information to be exempt and the final version to be released. There is little utility in many slightly different versions of a document being released and I am satisfied that to do so would be contrary to the public interest in these circumstances.
- 62 I am not satisfied that Council has discharged its onus regarding the remainder of the information and that the release would be contrary to the public interest and find therefore that it should be released to Mr Murray. It is innocuous internal discussion and it is not apparent why its release would be contrary to the public interest.

Section 37 – information relating to business affairs of third party

- 63 Section 37(1) arises where disclosure under the Act would disclose information related to business affairs acquired by a public authority...from a person or organisation other than the applicant and, according to s37(1)(b), it would be likely to expose the third part to competitive disadvantage.
- 64 As to the meaning of competitive disadvantage, in the matter of *Forestry Tasmania v Ombudsman* [2010] TASSC 39, Porter J held at [52]:

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

- 65 The Court further held at [59]:

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

- 66 At [41] the Court interpreted the meaning of 'likely' to be a *real or not remote chance or possibility, rather than more probable than not*.
- 67 I note here that in the New South Wales Supreme Court decision of *Kaldas v Barbour*⁹ it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts in New South Wales. I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to s33 of the *Ombudsman Act 1978*, and that I am also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.
- 68 Accordingly, the value of *Forestry Tasmania v Ombudsman* as precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree.

⁹ [2017] NSWCA 275 (24 October 2017).

Items 1a procurement information and 1c tender material

- 69 As noted above the absence of a schedule of information made assessing the 743 pages of responsive information difficult. It was necessary for an index (Attachment 2) to be prepared because it was not immediately apparent how the Council identified some of the documents, or where there were differences between versions of documents, and some pages were disordered.
- 70 Council claimed four documents were exempt in full under s37, however copies of this information provided to my office showed that significantly more information had actually not been released. I strongly encourage Council to be more accurate in its descriptions of information in future. As extracted from the index my office has prepared, this information is:
- Document C, pages 6-11 – Letter dated 18 June 2019, subject fee proposal Enfield Acoustics;
 - Document L, pages 34-41 – Letter dated 14 June 2019, subject visual impact assessment fee proposal Orbit Visualization;
 - Document N, pages 50-53 – Letter dated 20 June 2019, subject engineering traffic and servicing requirements proposal for provision of services Pitt & Sherry;
 - Document O, pages 54-79 – Council Memorandum dated 27 June 2019, title *Tender Reference No P19/11* (with attachments);
 - Document P, pages 80-153 – Council example documents titled, *Contract No P19/11: Panel of providers and Response to RFQ*, pages 123-145 completed by ERA Planning Pty Ltd;
 - Document Q, pages 154-157 – Part of signed Contract between Council and ERA Planning Pty Ltd for provision of consultancy services dated 19 August 2019 attaching:
 - Letter of acceptance dated 1 July 2019 (pages 158-165);
 - Notice of Addendum Number 2 issued 4 June 2019 (page 160);
 - Notice of Addendum Number 1 issued 3 June 2019 (page 161);
 - Conditions of contract (162-195);

- Document S, pages 200-203 – Letter from Pitt & Sherry dated 20 June 2019, subject proposal for services;
 - Document V, pages 207-220 – Council Document issued 22 May 2019, title *Request for tenders*;
 - Document W, pages 221-242 – Tender application by ERA Planning Pty Ltd dated 22 May 2019;
 - Document X, pages 242-346 – Duplicate Council document titled, *Standing Contract*;
 - Document Y, pages 347-353 – Duplicate copy of part of signed contract between Council and ERA Planning Pty Ltd dated 19 August 2019;
 - Document Z, pages 354-355 – Internal Council emails, 4 and 6 November 2020, regarding Mr Murray's RTI request;
 - Document AA pages 356-364 – ERA Planning Pty Ltd's Statement of coverage and insurance information;
 - Document BB pages 365-371 – ERA Planning Pty Ltd's Work Health and Safety Manual extract;
 - Document CC pages 372-491 – Part of signed contract between Council and ERA Planning Pty Ltd dated 19 August 2019;
 - Document DD pages 492-543 – Council Memorandum regarding tender process dated 27 June 2019 (repeated twice); and
 - Document EE pages 544-743 – Full signed contract between Council and ERA Planning Pty Ltd dated 19 August 2024 titled, *Contract No P19/11: Panel of providers*.
- 71 Of the information released for Items 1a and 1c, the only exemption applied was to one dollar figure on page 5 of the bundle of disclosed information. This was applied to an hourly rate on the basis that *it would likely expose a third party to competitive disadvantage. This information shows the commercial rates offered by one of the third parties...I am satisfied that this information is prima facie exempt under s37, as its release may expose the provider to competitive disadvantage.*
- 72 Council relied on s37 to exempt the balance of Items 1a and 1c in full.

- 73 Having regard to the requirements of s37 and the nature of the information, being procurement information and tender material, I agree with Council that the release of this information would *disclose information related to business affairs* of third parties.
- 74 Consistent with s37(2) Council consulted with six relevant third parties. Council did not rely on any submissions which may have been provided by any of these third parties in its decision.
- 75 I now turn to consider s37(1)(b) and whether disclosure of the third party information acquired by Council *would be likely to expose the third party to competitive disadvantage*.
- 76 The release of the names of businesses which have been successful in tender processes and public authority assessments of their tender proposals will generally not expose a third party to competitive disadvantage. This is because this does not disclose operational information but information about contracts entered into by public authorities, as considered in the decision of *Lake Maintenance Pty Ltd and Homes Tasmania*.¹⁰ The decision of *Ari Zaetz and City of Hobart*¹¹ is similarly illustrative of the approach to be taken when assessing details in signed contracts for services following a tender process in a manner consistent with the Act. I am mindful that Council's decision in this external review pre-dates those decisions, however.
- 77 After reviewing the documents, it is clear that many are not of a type which could expose a third party to a genuine risk of competitive disadvantage. This is particularly the case with Council's own documents, such as uncompleted template contracts, details of the tender process and internal emails relating to Mr Murray's application under the Act which are clearly not exempt under s37.
- 78 It is not apparent why the release of signed contracts for services in their entirety would expose a third party to competitive disadvantage, as it only shows that it has been contracted to undertake its business activities. Or why the release of information such as a Work Health and Safety (WHS) policy of a third party would expose them to such disadvantage. The entry into contracts for services and the development of workplace policies is expected and not competitively disadvantageous. Council has not discharged its onus under s47(4) to show why, with limited exception, the majority of the information could be exempt under s37 and it should be released to Mr Murray.

¹⁰ (6 July 2023) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

¹¹ (31 October 2022) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

- 79 The exception to this relates to the following types of information:
- third party fees and rates in contracts;
 - tender applications and service proposals;
 - sensitive business information such as banking and insurance details; and
 - details of unsuccessful tender applicants.
- 80 Accordingly, I find that the following information is *prima facie* exempt under s37:
- Documents C, L, N, S and AA;
 - details of unsuccessful tender applicants in O (and as repeated in Document DD):
 - the list commencing on page 55 and any further references to the names of these companies in the document;
 - the final dot point in the *Bona Fide Tender – Comment Observation* section on page 73; and
 - the first sentence of the second paragraph relating to the penultimate unsuccessful tenderer on page 75 in the *Clarification* section;
 - pages 123-145 of Document P;
 - pages 376-471, 483-491 of Document CC; and
 - pages 594-612, 614-616, 675-723, and 735-743 of Document EE.

Item 1b payment records

- 81 In response to Mr Murray's request for payment records, Council identified thirteen invoices in 32 electronic pages.
- 82 Mr Heath found all the invoices:
- ...exempt from disclosure under section 37 of the Act as their disclosure would likely expose a third party to competitive disadvantage.*
- 83 I have reviewed the information and find that Council did not discharge its onus under s47(4) to show why it would be justifiable to exempt the payment records in full, as these show payments to businesses contracted to provide services to government. It is not apparent why it would cause competitive disadvantage for it to be known that a business was paid for its services.
- 84 I accept that there are different considerations regarding the breakdown of the rates charged and the banking details of the third parties, which are not usually known to competitors and may cause

disadvantage. I agree that this invoice information is *prima facie* exempt pursuant to s37(1), namely:

- hourly rates; and
- banking institutions, BSB and account numbers.

Public interest

- 85 I now turn to assess the s33 public interest test and whether it would be contrary to the public interest to release both categories of information.
- 86 Mr Heath provided only the following by way of the consideration given to the public interest test, s33:

Having considered all matters relevant to your Application, I am of the view it is contrary to the public interest to disclose this exempt information. Some of the factors from Schedule 1 I found particularly persuasive are:

- a. “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” [factor (w)];
 - b. “whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation” [factor (s)]; and
 - c. “whether the information is information related to the business affairs of a person which is generally available to the competitors of that person” [factor (x)].
- 87 I agree with Council that factors (s), (w) and (x) are relevant to the information in question.
- 88 I, however, also considered the following factors relevant when assessing the public interest test:
- (a) *general public need for government information to be accessible*, this applies to the procurement and contracting processes of Council and weighs in favour of disclosure;
 - (b) *disclosure would contribute to or hinder debate about a matter of public interest*, this applies in relation to decision making about the development application for kunanyi/Mt Wellington and the selection of contractors for the assessment of this application; and
 - (f) *disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation*, this also supports disclosure regarding details of the procurement and contracting processes undertaken by Council.

- 89 On balance I am persuaded that it would be contrary to the public interest to release the information that I have assessed under s37 and found to be *prima facie* exempt. This is because it is likely to cause harm to the competitive position of a person in business with Council (w), may cause harm to the business or financial interests of a third party (s), and that it is not information generally available to competitors (x).
- 90 The only information for which I am not persuaded relates to Item 1a and 1c, the details of the work to be undertaken in the contract between ERA and Council, as it is in the public interest for details of this to be made available. This is contained on pages 127-145 and 594-612. This is not exempt under s37 and should be released to Mr Murray.
- 91 I determine that the remainder of the information is exempt pursuant to s37(1) and is not to be disclosed.

Section 45(1)(e) – sufficiency of search

Item 6 burnoff cancellation

- 92 Section 45(1)(e) of the Act provides that an applicant, who has sought information in accordance with s13, may apply to the Ombudsman if following a decision they believe *on reasonable grounds, that there is an insufficiency in the searching for the information by the public authority.*
- 93 The *Guideline in relation to searching and locating information* (No 4/2010)¹² (Search Guideline), was released by this office to assist *public authorities and Ministers to conduct a search in response to an application for assessed disclosure in a thorough, documented and disciplined manner.*
- 94 On 17 December 2020, Council advised Mr Murray that:
- *Council is not in possession of any information for this item. However, as a show of good faith I can confirm the burn off for McRobies Gully that was scheduled to occur in spring 2019 was withdrawn as an operational decision to reallocate resources for the major Knocklofty Reserve burn off.*
 - *After the Knocklofty Reserve burn off was completed, the strategic benefit of treating the McRobies site was greatly reduced with no burn off to be conducted of the McRobbies [sic] Gully until the landscape sequencing of fuel reduced areas suggests it is required.*

¹² Revised 24 January 2013, available at www.ombudsman.tas.gov.au/right-to-information/rti-publications.

- 95 Mr Murray has raised questions about information being withheld, which gives rise to a ground for review under s45(1)(e) of the Act, regarding whether Council conducted a sufficient search for information responsive to his request.
- 96 On 22 December 2020, Mr Murray provided this office with a photograph of an undated Hazard Reduction Burn sign for McRobies Gully subtitled: *The City of Hobart is planning to conduct a bushfire hazard reduction burn in McRobies Gully this season.*
- 97 Furthermore, the sign outlined:
- *The burn has been scheduled as part of the City's bushfire management program to protect Hobart's community, visitors and the natural environment from the risk of destructive wildfire.*
 - *The burn will be implemented when wind and temperature conditions are suitable. It is expected that some smoke will be produced during and after the burn. The City will make every effort to minimise the impact of the smoke on nearby areas. The public are requested to stay clear of the burn site during the burn and for the following few days.*
 - *We apologise for any inconvenience this may cause.*
- 98 The sign provided contact details for Council, including an email address and phone number, and was authorised by Mr Heath, General Manager for Council at the time.
- 99 I accept the photo as evidencing the basis for Mr Murray's belief that Council may hold information about the burn off or subsequent decision made for it not to proceed.
- 100 In his email of 21 December 2020, Mr Murray refuted that:
- Council can organise a planned burn to the point it is scheduled with signage then suddenly removed from existence without one shred of information in any form (as defined by the RTI Act).*
- 101 On 17 December 2023, Council submitted that Mr Murray sought information regarding the *cancellation* of the burn off. Mr Hutchinson repeated Council's position that *any information regarding the scheduling of the burn off was deemed to be outside of scope.*
- 102 I find that, in the circumstances where Council is involved in managing a burn off including to the extent of posting public notices and being the contact for community enquiries, Mr Murray holds a legitimate expectation that Council would hold relevant records about changes to the arrangements including cancellation of the proposed burn off.

- 103 It appears that there may be an inadequacy in record keeping regarding the cancellation of the burnoff and Council in 2019 did not have a practice of communicating changes of plans regarding such events to the community.
- 104 On balance, however, I am satisfied that in response to the further enquiries made to Council that there are no records held relevant to this part of the assessed disclosure request. There is no evidence to suggest that further searching will reveal more information than the explanation provided. I find, therefore, that Council has undertaken the searches required.
- 105 I note that the record of search undertaken at the time of the original decision was not consistent with my Search Guideline and Council is encouraged to adopt the practices recommended in future.

Preliminary Conclusion

106 For the reasons given above, I determine that:

- Exemptions pursuant to ss35 and 37 are varied; and
- The searching undertaken in relation to Item 6 was sufficient.

Submissions to the Preliminary Conclusion

- 107 As the above preliminary decision was adverse to the public authority, a copy of it was made available to Council on 5 June 2024 under s48(1)(a) of the Act, for further input before it was finalised.
- 108 On 18 June 2024, Dr Tom Baxter provided initial input from Council. This included a copy of a submission dated 12 January 2021 addressed to Council's then CEO Mr Nick Heath from lawyers acting for ERA, Mr Dayne Johnson and Ms Emily Page (ERA's 2021 submission).
- 109 Dr Baxter also sought, and was granted, an extension of time in order to engage with the third parties consulted when Council made its initial decisions.
- 110 On 9 July 2024, I received Council's further input dated 8 July 2024 from Dr Baxter. This included Council's response to my preliminary decision and feedback obtained from Council's compliance manager and consultation with one of the third parties initially consulted by Council, ERA. In summary, the matters raised by Council were:
- ERA's hourly rate should not be disclosed;
 - Negative commentary about Council projects may impact upon Council's ability to obtain similar planning services in future;

- Some of the verbatim quotes in the preliminary decision were queried;
 - The terms of the contract should not be disclosed;
 - Section 39 is enlivened and *it should be considered in relation to the documents listed at paragraph 70*;
 - Section 39 is also relevant to *the third party's Work Health and Safety policy, and the invoices considered under the paragraph 81 heading Item b payment records*, because they were communicated in confidence by a third party to Council;
 - Schedule 1 factor (n) whether the disclosure would prejudice the ability to obtain similar information in the future should be applied to paragraph 89 of the decision because similar information which councils need to obtain going forward is confidential tender bids from multiple planning consultants, so as to obtain the best value for ratepayers through a competitive tender process.
- 111 Council provided a further response in relation to its current burnoff practices, in part advising that:

Changes to proposed seasonal burning are communicated via the What's Burning Now website, at the start of every spring and autumn where possible. Furthermore, as that website states ... :

Fuel Reduction burns are only conducted when it is safe and smart to do so. Therefore the schedule of burns may change daily, based on the weather. This helps to ensure that fuel reduction burns remain under control and that the effect of smoke on the community is reduced.

Further Analysis

- 112 There are some preliminary matters that arise from the further input received from Council which it is convenient to address in a summary way at the outset.
- 113 First, although ERA's 2021 submission was not previously provided to me for the purposes of the external review and it was not directly referred to in Council's Decision Parts 1 to 4, I accept that Council engaged in third party consultation and considered the views received in reaching its decisions.
- 114 I have considered the matters raised in the ERA 2021 submission but afforded it nominal weight as events, including Council's Decision Parts 1 to 4, my proposed findings and Council's

submissions to this decision, have overtaken those earlier submissions.

- 115 Second, the submissions from Dr Baxter raise objections on behalf of ERA to hourly rates being released. However, given that I had already determined this information was not to be released, as discussed at paragraphs 84 and 89 above, it is not necessary for me to address this part of the submissions.
- 116 For the avoidance of doubt, the expenditure by Council on services is a matter of public record and consistent with accountable government the invoice totals are information that is not *prima facie* exempt. I maintain my finding that the hourly rate and financial institution details are exempt pursuant to s37.
- 117 It is preferable and consistent with the objects of the Act for the release of the maximum amount of information which may, on occasion, include documents that are quite heavily redacted. Even if only a small amount of information is not exempt in a document, there is still value in that information being released.
- 118 Third, Council incidentally raises s40 but did not rely on this exemption at any stage. It is unclear why it was referred to and, again for the avoidance of doubt, I find that Council has not discharged its onus in relation to this exemption provision and no information is exempt as being *information on procedures and criteria used in certain negotiations of a public authority*.
- 119 Fourth, Council's further response about the burnoff practices does not go directly to the assessed disclosure request or the practices at the relevant time. My position in relation to the record keeping and searching undertaken remains unchanged.
- 120 Fifth, I carefully considered the remainder of Council's submissions and implemented some minor drafting suggestions but did not agree with the remainder or did not consider that they directly related to this decision other than as discussed below.

Section 39

- 121 In reliance on the consultation with ERA and Council's compliance manager, Dr Baxter asserts that s39 is relevant:

In our submission, this enlivens s39(1)(b) and it should be considered in relation to the documents listed at paragraph 70, in addition to their analysis under section 37. Section 39(2)(c) does not apply because third parties are not required by law to apply for statutory planning work such as that for which ERA successfully tendered then performed in this case.

Similarly, the third party's Work Health and Safety policy, and the invoices considered under the paragraph 81 heading Item b payment records, were communicated in confidence by a third party to Council.

The above quotes also add factor (n) whether the disclosure would prejudice the ability to obtain similar information in the future to the public interest factors applicable at paragraph 89 of the decision. The similar information which councils need to obtain going forward is confidential tender bids from multiple planning consultants, so as to obtain the best value for ratepayers through a competitive tender process.

It is not the mere fact of a third party having a WHS policy, entering a contract to provide services to government, (paragraph 78) or being paid for its services (paragraph 83) which is at issue here. The questions are whether:

- *the contents of these documents would divulge information communicated in confidence by a third party to Council; and*
- *disclosure of the contents would be reasonably likely to impair the ability of a council to obtain similar information (for example, similar number and quality of tenders) in the future (s39(1)(b) and factor (n)).*

We are less concerned with Council's own documents unless they trigger s35 or s40. However, the comments by ERA and Council's compliance manager suggest that imposing an extra regulatory burden of disclosure of commercial information provided by third parties who may otherwise seek to tender for a Council's planning panel is likely to deter some from doing so – at the expense of competition, and undermining Council's ability to negotiate future consultancies to provide best value for ratepayers. This is even more likely in the current market, as the evidence of ERA and Council's compliance manager attests.

We therefore think the preliminary decision may have concerning implications for the City and other councils, in terms of our future capacity to retain the services of experts such as ERA. We consider this over-arching public interest would be harmed by disclosure after the event of:

- *a third party's WHS Manual (Document BB);*

- Document EE pages 544-743 – Full signed contract between Council and ERA Planning Pty Ltd dated 19 August 2024 [sic] titled, Contract No P19/11: Panel of providers; and
 - invoices at para 83, even allowing for para 84.
- I22 Council has not previously claimed that information was exempt under s39 and has not now provided appropriately detailed reasoning for its contention that this information is now exempt under this section. Accordingly, I am not satisfied that Council's onus under s47(4) has been discharged.
- I23 When undertaking my own assessment of the information, for the purposes of the external review, I considered whether there were other exemption provisions that may apply and I did not find that s39 arose.
- I24 Further having regard to the requirements of s39, I am not satisfied that it is relevant to the information in the three bullet points noted by Council, namely (i) the extract of the WHS manual that includes the policy, table of contents and blank incident report form; (ii) the executed contract; and (iii) the invoices.
- I25 The WHS manual extract is a policy that is required to be provided under the tender process. I cannot agree that s39(1)(a) or (b) arise in relation to it. This is not information that would be exempt information if generated by Council and I reject that disclosure would be reasonably likely to impair the ability of Council to obtain similar in the future. There is an expectation that successful tenderers would have a WHS policy for delivery of services to or on behalf of a public authority.
- I26 I do not find that s39 is relevant to the contract. Council could not generate a contract in similar terms with itself therefore s39(1)(a) is irrelevant and I reject that the release of the contract would impair the ability of Council to obtain similar information as particularised in a successful tender contract (s39(1)(b)).
- I27 For similar reasoning, I reject that s39(1)(a) or (b) is relevant to the invoices which I have already addressed.
- I28 The proper application of the section requires each step in s39 be considered and satisfaction reached in relation to each item of information being assessed. It was the absence of such reasoning from Council, at the decision making stages or in connection with this external review, that satisfied me that Council's onus under s47(4) regarding the s39 exemption had not been discharged.

- I29 Where information does not meet the initial threshold of being *prima facie* exempt there is no need to have regard to the public interest test (s33 and Schedule 1).
- I30 I have determined therefore that there is no further examination required under s39.
- I31 I make some final remarks about the approach adopted by Council and the characterisation of the obligations that arise under the Act.
- I32 In relation to Council's position that the *over-arching public interest would be harmed by disclosure*, Council is reminded that the public interest test under s33 requires a balancing of all of the Schedule 1 factors favouring disclosure and non-disclosure. The balance must weigh in favour of it being *contrary to the public interest* for disclosure to occur. The Schedule 1 factors cannot be displaced by a different consideration of an over-arching harm to the public interest.
- I33 I am also concerned at the suggestion that giving effect to the Act amounts to *imposing an extra regulatory burden of disclosure of commercial information provided by third parties who may otherwise seek to tender for a Council's planning panel is likely to deter some from doing so*. The Act is a push model which encourages the release of government information (s3). I do not consider it appropriate to characterise this intention of parliament to encourage transparency and accountability to be a burden. It is simply the legislative framework that is in place for public authorities and those who engage in business with them, and is standard across all Australian jurisdictions. The transparency of government is not diluted by using contracted services and it is the choice of businesses whether to tender for government services if they do not wish to be subject to information disclosure laws.
- I34 Lastly, I revisit my assessment of the s37 exemption applicable to (i) the extract of the WHS manual, (ii) the executed contract and (iii) the invoices is s37 *information relating to business affairs of third party*. The considerations relevant to the third party's interests, those of ERA, were considered and canvassed above in my consideration under that provision. While I have carefully considered the further submissions provided by Council and ERA, I am not persuaded that my decision to direct the release of the information I found not to be exempt under s37 was in error. I maintain my reasoning and determination that it would not be contrary to the public interest to release this information to Mr Murray.

Conclusion

135 For the reasons given above, I determine that:

- Exemptions pursuant to ss35 and 37 are varied; and
- The searching undertaken in relation to Item 6 was sufficient.

136 I apologise to the parties for the significant delay in finalising this external review decision.

Dated: 11 July 2024



Richard Connock
OMBUDSMAN

ATTACHMENT 1
Relevant Legislation

Section 33 – Public Interest Test

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

Section 35 – Internal Deliberative Information

- (1) Information is exempt information if it consists of –
 - (a) an opinion, advice or recommendation prepared by an officer of a public authority; or
 - (b) a record of consultations or deliberations between officers of public authorities; or
 - (c) a record of consultations or deliberations between officers of public authorities and Ministers – in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.
- (2) Subsection (1) does not include purely factual information.
- (3) Subsection (1) does not include –
 - (a) a final decision, order or ruling given in the exercise of an adjudicative function; or
 - (b) a reason which explains such a decision, order or ruling.
- (4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

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

- (1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party") and –
 - (a) the information relates to trade secrets; or
 - (b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

(2) If –

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

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority, state the name and designation of the person who made the decision; and
- (c) inform the third party of –
 - (i) its right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.

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

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

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

39. Information obtained in confidence

- (1) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –
 - (a) the information would be exempt information if it were generated by a public authority or Minister; or
 - (b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.
- (2) Subsection (1) does not include information that –
 - (a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and
 - (b) relates to trade secrets or other matters of a business, commercial or financial nature; and
 - (c) was provided to a public authority or Minister pursuant to a requirement of any law.

45. Other applications for review

- (1) A person who has applied for information in accordance with section 13 may also apply to the Ombudsman for a review of a decision if –
 - (a) the decision which may otherwise be the subject of an application for an internal review under section 43 has been made by a Minister or principal officer of a public authority and as a consequence the applicant cannot make an application under section 43 ; or
 - (ab) the decision relates to an application made to a Minister in accordance with section 13 and is a decision in relation to which a written notice must be given under section 22 ; or
 - (b) a Minister or public authority has made a decision that the information requested was not in existence on the day the application was made; or

- (c) a Minister or public authority has made a decision to give access other than in the form requested by the applicant, except where to do so would breach copyright; or
- (d) a Minister or public authority has decided that the information requested is not in the possession of the Minister or public authority; or
- (e) following a decision being made by a Minister or public authority, the applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the Minister or public authority; or
- (f) notice of a decision on an application under section 13 has not been received by the applicant and the period specified in, or calculated under, section 15 has elapsed.

(1A) A person who is an external party may apply to the Ombudsman for a review of –

- (a) a decision if the decision, which may otherwise be the subject of an application for an internal review under section 43(2) or (3), has been made by a Minister or principal officer of a public authority and as a consequence the external party cannot make an application under section 43 ; or
- (b) a decision to provide, in accordance with an application made to a Minister in accordance with section 13 , information –
 - (i) relating to the personal affairs of the person; or
 - (ii) that is likely to expose the person to competitive disadvantage.

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

- (a) a Minister or public authority has decided not to consult the person under section 36(2) or section 37(2) and the person believes that he or she is a person who was required to be consulted; or
- (b) a decision has been made on a review under section 43 and a person, other than the person who applied for the review, is adversely affected by the decision.

(3) If a notice of a decision has been given under this Act, an application referred to in subsection (1) must be made within 20 working days of the day on which the applicant received notice of the decision.

(4) If a notice of a decision to which subsection (1A) relates has been given under section 36(3) or section 37(3) to an external party, the external party may only make an application under subsection (1A) in relation to the decision

within 20 working days of the day on which the external party received the notice.

Schedule 1 – Matters Relevant to Assessment of Public Interest

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

- (a) the general public need for government information to be accessible;
- (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
- (c) whether the disclosure would inform a person about the reasons for a decision;
- (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
- (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
- (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
- (g) whether the disclosure would enhance scrutiny of government administrative processes;
- (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
- (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
- (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
- (k) whether the disclosure would promote or harm the economic development of the State;
- (l) whether the disclosure would promote or harm the environment and or ecology of the State;
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

ATTACHMENT 2
Index to information collated and assessed for Items 1a and 1c

Page numbers in parentheses are the page numbers of the documents released to the applicant.

Pages	Description
A. 1	Cover page;
B. 2-5	Released – emails (Pages 8-11, email dated 20 June 2019, subject <i>FW: Planning Applicant PLN-19-345 – Cable car ... Enfield Acoustics</i>);
C. 6-11	Letter dated 18 June 2019, subject fee proposal Enfield Acoustics;
D. 12-13	Released – General conditions;
E. 14-19	Appears to duplicate C;
F. 20-21	Released – General conditions;
G. 22-23	Released – email and blank page (Pages 4-5, email dated 20 June 2019, subject <i>Planning Applicant PLN-19-345 – Cable car ... Geotechnical review</i>);
H. 24-25	Released – General conditions;
I. 26-27	Released – General conditions;
J. 28-29	Released – emails (Page 1, email dated 21 June 2019, subject <i>Planning Applicant PLN-19-345 – Cable car ... Biodiversity assessment – Enviro dynamics</i>);
K. 30-33	Released – emails (Pages 14-16, email dated 21 June 2019, subject <i>Planning Applicant PLN-19-345 – Cable car ... Visual Impact</i>);
L. 34-41	Letter dated 14 June 2019, subject visual impact assessment fee proposal Orbit Visualization;
M. 42-49	Appears to duplicate L;
N. 50-53	Letter dated 20 June 2019, subject engineering traffic and servicing requirements proposal for provision of services Pitt & Sherry;
O. 54-79	Council Memorandum dated 27 June 2019, title <i>Tender Reference No P19/11</i> (with attachments);
P. 80-153	Council example documents titled, <i>Contract No P19/11: Panel of providers and Response to RFQ</i> , pages 123-146 completed by ERA Planning Pty Ltd;

- Q. 158-165 Letter Part of signed Contract between Council and ERA Planning Pty Ltd for provision of consultancy services dated 19 August 2019 attaching:
- Letter of acceptance dated 1 July 2019 (pages 158-165);
 - Notice of Addendum Number 2 issued 4 June 2019 (page 160);
 - Notice of Addendum Number 1 issued 3 June 2019 (page 161); and
 - Conditions of contract (162-195);
- R. 196-199 Released – emails (Pages 20-22, email dated 21 June 2019, subject *Planning Applicant PLN-19-345 – Cable car ... Stormwater, Road and Traffic Engineering assessment;*;
- S. 200-203 Letter from Pitt & Sherry dated 20 June 2019, subject proposal for services;
- T. 204-205 Released – emails (Page 19, email dated 19 June 2019, subject *PLN-19-345 – Cable Car – Brief/Letter of Engagement*);
- U. 206 Page out of order from Standing contract, numbered 40 of 40;
- V. 207-220 Council Document issued 22 May 2019, title *Request for tenders*;
- W. 221-241 Tender application by ERA Planning Pty Ltd dated 22 May 2019;
- X. 242-346 Duplicate Council document titled *Standing Contract*;
- Y. 347-353 Duplicate copy of part of signed contract between Council and ERA Planning Pty Ltd dated 19 August 2019;
- Z. 354-355 Internal Council emails, dated 4 and 6 November 2020, regarding Mr Murray's RTI request;
- AA. 356-364 ERA Planning Pty Ltd's Statement of coverage and insurance information;
- BB. 365-371 ERA Planning Pty Ltd's Work Health and Safety Manual extract;
- CC. 372-491 Part of signed contract between Council and ERA Planning Pty Ltd dated 19 August 2019;
- DD. 492-543 Council Memorandum regarding tender process dated 27 June 2019 (repeated twice); and

EE. 544-743 Full signed contract between Council and ERA Planning Pty Ltd dated 19 August 2024 titled, *Contract No P19/11: Panel of providers*.



Right to Information Act Review Case Reference: R2408-009

Names of Parties: Huon Aquaculture and Department of Natural Resources and Environment

Reasons for decision: s48(3)

Provisions considered: s37

Background

- 1 Huon Aquaculture Group Pty Ltd (Huon) is one of three primary companies operating in the salmon farming industry in Tasmania, including operations in Macquarie Harbour.
- 2 On 24 April 2024, the Department of Natural Resources and Environment (the Department) received an application for assessed disclosure pursuant to s13 of the *Right to Information Act 2009* (the Act) from a not-for-profit organisation (the original Applicant) seeking information in relation to farmed salmon mortality.
- 3 Part of the request was transferred to the Environment Protection Authority but the Department proceeded with the following part of the request for:

Monthly total mortalities by weight, as required to be reported to [the Department] on a quarterly basis, broken down by company, lease site, region and cause of death, September 2023 to April 2024.
- 4 A search of records in the possession of the Department identified information responsive to the request, some of which related to Huon and its salmon farming operations in Macquarie Harbour.
- 5 On 24 May 2024, in accordance with s37(2) of the Act, the Department contacted Huon seeking its view on whether the information should be released.
- 6 On 11 June 2024, Huon replied, indicating its position was that the release of the information would be likely to expose Huon to competitive disadvantage and requesting it not be released to the original Applicant.
- 7 On 21 June 2024, Ms Claudine Enriquez, a delegate under the Act for the Department made a decision to release the information sought, but in an aggregated form combined with data from the two other major salmon farming companies operating in Macquarie Harbour.

- 8 On 5 July 2024, Huon requested an internal review on the grounds that, even in aggregated form, the release of the information would lead to a competitive disadvantage for Huon.
- 9 On 19 July 2024, Ms Heather Neate, another delegate under the Act for the Department, released the internal review decision which determined that the release of the information in aggregated form would not be contrary to the public interest.
- 10 On 9 August 2024, Huon sought external review, which was accepted pursuant to s44(1) of the Act.

Issues for Determination

- 11 I must determine whether the information which is the subject of this review is exempt under s37 or any other relevant section of the Act.
- 12 As s37 is within Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, if I determine that the information is *prima facie* exempt under s37, I am then required to determine whether it would be contrary to the public interest to release it, having regard to, at least, the matters contained in Schedule 1.

Relevant legislation

- 13 Huon claimed that the information should be exempt under s37. A copy of that section is included as Attachment 1. Copies of s33 and Schedule 1 are also included.

Submissions

Huon

- 14 Huon made a number of submissions during consultation with the Department and when requesting external review, relevant parts of which are extracted below.
- 15 On 7 June 2024, Huon made a submission to the Department during initial consultation:

Huon's position is that the information that has been identified by [the Department] ... is exempt information pursuant to s37(1)(b) of the Right to Information Act 2009, on the basis that disclosure would expose Huon to competitive disadvantage. ...

The information sought is commercially sensitive information because it discloses details about recent and current impacts on production. It is information about Huon's current and future operations, in terms of production capacity and capability (and therefore the amount of salmon that Huon will have available for sale in the coming months) and the disclosure of this would

therefore be likely to expose Huon to third party competitive disadvantage.

Huon operates within an industry comprised of three competitors ..., each of which undertake salmon farming. Given the small number of participants in this market (in terms of salmon farmers), any information about impacts on recent and current production (and therefore the amount of Huon salmon going to market), has the potential to cause competitive disadvantage.

- 16 On 5 July 2024, Huon sought internal review of the Department's decision to release information in an aggregated form, and relevantly submitted:

While the aggregation of date may appear to be helpful, unfortunately it does not address our concerns and Huon remains of the view that the disclosure of this data, even in aggregated form, would expose Huon to competitive disadvantage ... for the following reasons:

... There are currently only three salmon farming operations in this region, so any information that reveals impacts on the volume of product available to the market is commercially sensitive and can be used to inform decisions in relation to marketing and sales, including pricing. As each producer knows its own mortality information, it would be able to calculate the combined mortality figures for the other two producers and from that determine trends in the volume of product which will be released to the market in the short term. This can be used to inform customer and pricing decisions and therefore to the competitive advantage of one operator (and consequently the disadvantage of another operator or the other operators).

... [G]iven the market that Huon operates in, it has in place protocols to ensure that it conducts its operations in accordance with Australian competition law. Any breach of Australia's strict competition law exposes Huon to the risk of criminal penalties, civil penalties and other forms of liability and Huon takes its obligations in this area seriously. The information about monthly total salmonid mortalities sought by the right to information request falls within the listed categories of commercially sensitive information that is not to be disclosed to competitors, in recognition of the fact that given the nature of this information disclosure would potentially advantage competitors.

Further, it is our view that, ..., given the proposed aggregated nature of the information, the salmon industry as a whole can

properly be regarded as the third person, and that the disclosure of the Mortality Figures has the potential to significantly and adversely affect the interests of the industry.

We consider that:

- a. *the release of Mortality Figures is likely to attract considerable public and media attention, with the potential to materially impact customer purchasing behaviour. It is clear from recent experience that that [sic] retailers, wholesalers and export customers are all sensitive to heightened interest in salmon farming in Macquarie Harbour;*
- b. *the seafood industry is highly competitive, and the release of the Mortality Figures is likely to have a significant detrimental impact on the salmon industry's position in that market, with customers choosing alternative seafood products in preference to salmon; and*
- c. *there have been significant positive environmental developments in the Macquarie Harbour region which may be undermined by the release of the Mortality Figures. The EPA has recently released information showing positive changes in water quality and oxygen levels and the release of the Mortality Figures (which pre-date the information released by the EPA) could provide a misleading impression of the environmental situation and negatively influence stakeholders currently considering the future operation of salmon farming in Macquarie Harbour.*

- 17 On 9 August 2024, in its application for external review, Huon made further submissions, including:

The Department ... found that because one producer would not be able to determine what proportion each competitor contributed to the total, there was no competitive disadvantage. This argument is flawed:

1. *It is generally accepted that the salmon industry in Tasmania is concentrated and there is, therefore, a heightened risk of anti-competitive outcomes. This was recognised in the Explanatory Memorandum which accompanied the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 ...*
- 18 Huon then gave two hypothetical examples of conduct postulated to be contrary to the proposed competition legislation, before continuing its submission:
 2. *Huon maintains that the release of the information, even in aggregated form, creates a very real risk that other*

producers will be able to detect mortality trends and use that information to make production and pricing decisions, particularly given the 24-month life cycle of farmed salmon.

...

Huon then shared a further description of conduct, however did not indicate the source of this example, before concluding:

It is Huon's belief, therefore, that the release of the Information is likely to result in a competitive disadvantage to it as an individual company, as well as the salmon industry as a whole...

19 Huon then addressed the public interest test:

1. *...Huon remains strongly of the view that the release of the Information will cause harm to its competitive position as contemplated by item (w) of the Schedule ... The aggregation of data still allows producers to determine trends and adjust competitive behaviour accordingly.*
2. *Similarly, Huon considers that disclosure would also be contrary to item (s) of the Schedule ... due to the potential for it to impact Huon's operations as an individual producer and the Tasmanian salmon industry as a whole. In addition ... the disclosure also sets a concerning precedent in relation to the disclosure of commercially sensitive information to anyone requesting it as part of the RTI process.*
3. *Huon considers that the disclosure would hinder debate on a matter of public interest (item (b)) as the Information is extracted from a short period (over the intense summer months) and provides no historic context or detail that would provide people with an accurate understanding of the harbour health. ...*
4. *We do not accept that disclosure of the Information will promote the environment or ecology of the State (item (l))... A snapshot of mortality rates at a particular period in time and without context cannot be used as a "measure by which it could be determined whether salmonid farming in Macquarie Harbour does or does not pose a threat to the environment".*

Mortality rates fluctuate throughout the season, with 60-70% of annual mortality occurring during the summer period. As such, the release of data for a short period of time isn't reflective of mortality rates for the entire lifecycle.

Further, monthly mortality date from September 2023 to March 2024 includes information related to the production of trout and salmon. Trout experienced higher levels of mortality than

salmon during this period and Huon has since ceased trout production; again highlighting flaws in providing a snapshot of mortality rates for a particular period.

Department

- 20 The Department was not required to make specific submissions in response to this external review, as it had provided its reasoning in its decisions. Relevant extracts of those decisions are set out below.
- 21 On 21 June 2024, in her initial decision, Ms Enriquez reasoned:

*I have carefully considered the views provided and the information already publicly available on the Salmon Portal. Whilst I do not intend to release sensitive commercial information that would expose Huon Aquaculture to a competitive disadvantage, I also do need to keep the Object of the RTI Act front of mind, so a balanced approach is required. In light of this, I have decided that the information Huon Aquaculture was consulted on will be aggregated with data from the other salmonid companies operating in Macquarie Harbour, and will **not** be broken down by company or lease site.*

- 22 On 19 July 2024, in her internal review decision, Ms Neate considered the operation of s37(1) of the Act and the meaning of competitive disadvantage, and reasoned:

As noted, all three Tasmanian salmon companies have operations in Macquarie Harbour and therefore all contribute to the aggregated figures. The release of an aggregated monthly figure would mean that each competitor would be able to determine mortality figures for the other two companies, but would not be able to determine what proportion each competitor contributed to the total. I am therefore not persuaded that there is a competitive disadvantage to [Huon] acting as an individual company.

The second argument put forward by [Huon] is that the aggregation of the mortality figures ... in essence makes the Tasmanian salmon industry as a whole the 'third party', and that the release would expose the industry to competitive disadvantage.

*...
The assertion that, in a highly competitive market, the release may cause customers to choose alternative seafood products in preference to salmon is a disadvantage characterised by competition. ... As such, the release is exempt pursuant to section 37(1)(b), subject to the public interest test.*

- 23 Ms Neate then considered the public interest test and identified matters (a), (b) and (l) as weighing in favour of disclosure, and matters (s) and (w) as weighing against disclosure. Ms Neate concluded in relation to (w):

In my view, the decision to aggregate the information rather than release data from individual companies significantly mitigates the impact of this consideration. The 'organisation' or 'person' then becomes the Tasmanian salmon industry as a whole, which (as a large and mature industry) is well placed to manage any impacts or risks that transparency about their collective operations in a sensitive region of the State may bring.

...

On balance, I consider that it is not contrary to the public interest to disclose the information as the original decision maker intended.

Analysis

- 24 Section 37(1) provides for information to be exempt if it is related to the business affairs of a third party, when a public authority obtains that information from a person or organisation other than the person making the application for assessed disclosure, if either:
- (a) the information relates to trade secrets; or
 - (b) the disclosure of the information would be likely to expose the third party to competitive disadvantage.
- 25 Huon has restricted its submissions to s37(1)(b), and there is no suggestion that trade secrets are involved, so I will confine my analysis to the issue of competitive disadvantage.
- 26 In relation to likely competitive disadvantage, when considering the equivalent provision under the now repealed *Freedom of Information Act 1991* (Tas), the Supreme Court of Tasmania in *Forestry Industry v Ombudsman*¹ held that:

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

¹ [2010] TASSC 39 at [52].

27 The Court further held that:

55. In my view, what the provisions refer to as a competitive disadvantage is something which affects one entity to the extent that it may not be able to generate as high a level of profit relative to its competitive rivals as would be expected, if all else being equal, the particular entity did not face the reason of circumstance. A competitive disadvantage will not necessarily be something which, in strict terms, impacts on an actual ability to compete, and the level of competition.

- 28 At paragraph 41 the Court interpreted *likely* to mean that there must be a *real or not remote chance or possibility, rather than more probable than not*.
- 29 Huon's submissions regarding the release of information broken down by company and lease site were accepted by the Department, and it is the Department's proposal to release aggregated data which is the subject of this review.
- 30 There are only three companies engaged in salmon farming in Macquarie Harbour, and each self-evidently knows its own mortality figures. The proposed release of aggregated data would inform each company of the contribution of the other two to the total. On face value this would not be likely to expose any of the three to a competitive disadvantage because any 'disadvantage' would be equally shared and so not impact on competition.
- 31 However, after further consideration I am of the opinion that competitive disadvantage to Huon may still occur. If, for example, one company's mortality rate was significantly in excess of its competitors' then that may well be discernible in the aggregated data and allow competitors to make marketing and other decisions on that basis, given they would already know their own figures.
- 32 Huon's alternative position is that the release of aggregated data would have the effect of making the Tasmanian salmon industry the third party for the purpose of s37. It is contended that if mortality figures for the industry as a whole are seen to be at a level which is unacceptable, either in relation to international competitors or in public debate, some people who have purchased Tasmanian salmon in the past may change their consumption habits and seek out other forms of seafood. This would disadvantage local salmon producers.
- 33 Mortality data also has the potential to damage the public image or reputation of the salmon industry. I have previously considered the possibility of reputational damage to a third party under s37(1), and in *Environment Tasmania and Environment Protection Agency*² I accepted that:

² *Laura Kelly, on behalf of Environment Tasmania and the Environment Protection Agency* (June 2017) at [148] available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

Information ha[d] the potential to be reported wrongly, inaccurately or out of context, making it a real possibility and not a remote chance that such information may damage the third party's reputation, hence being to [the third party's] disadvantage and to its competitors' advantage.

- 34 I am not convinced the outcomes of these scenarios are likely to be significant, but I am satisfied they are a real possibility and not a remote chance, so I must accept that there is some likelihood of competitive disadvantage to Huon and the Tasmanian salmon industry in general. The low threshold for effect under s37(1)(b) means I am satisfied that the information is *prima facie* exempt.

Public interest test

- 35 I now turn my attention to the mandatory public interest test under s33 and to assessing whether, after taking to account all relevant matters and at least those in Schedule 1, it would be contrary to the public interest to disclose the information I have found to be *prima facie* exempt.
- 36 Matter (a) – the general public need for government information to be accessible – was identified by the Department as relevant and weighing in favour of disclosure. I agree with this assessment, as it is in line with the object of the Act as set out in s3 and so will always be a relevant matter to be considered.
- 37 Matter (b) – whether the disclosure would contribute or hinder debate on a matter of public interest – was identified as relevant by both Huon and the Department, but with different conclusions reached. The Department, in the internal review decision, is of the view that *the salmonid farming industry is a matter of significant public interest in Tasmania and the operation of the industry in Macquarie Harbour is of particular and sustained public interest*. Huon, in contrast, submitted that *disclosure would hinder debate on a matter of public interest ... because the information in question was extracted from a short period (over the intense summer months) and provides no historic context or detail that would provide people with an accurate understanding of the harbour health*. It was not disputed that salmon farming in Macquarie Harbour is a matter of public interest.
- 38 I disagree with Huon's submission. Releasing additional information into the public arena can only stimulate and contribute to a debate which will then have a wider range, may encourage more people to contribute, and will canvass a greater diversity of opinion than if the mortality figures were not released. The participants in Tasmanian salmon farming are small in number, but it is nonetheless a mature industry able to articulate its own position in the context of an open debate in a matter of undisputed public interest. This is consistent with the position I took in *Woolnorth Wind Farm Holding Pty Ltd and*

*Department of Natural Resources and Environment*³. I find that this matter weighs in favour of disclosure.

- 39 Matter (l) – whether the disclosure would promote or harm the environment and or ecology of the State – was identified by the Department to weigh in favour of disclosure because the mortality figures are one measure by which it could be determined whether salmonid farming in Macquarie Harbour does or does not pose a threat to the environment. Huon, in turn, submitted that the information *does not give a complete or accurate picture of the environmental health of the region. A snapshot of mortality rates at a particular period in time and without context cannot be used to determine* [the impact of salmon farming on the health of Macquarie Harbour]. I agree with the Department that the mortality figures are one measure which could be used. There may well be, of course, other measures, and Huon is free to propose its own criteria, as well as provide in public debate the context it has identified as lacking. Accordingly, I find this matter weighs in favour of disclosure.
- 40 Matter (s) – whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation – was identified by both the Department and Huon as weighing against disclosure, as was matter (w) – whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person. Huon further expressed concern that *disclosure of commercially sensitive information to anyone requesting it as part of the RTI process* would set what it described as a *concerning precedent*.
- 41 I agree these matters weigh against disclosure. However, I also agree with the Department's position that the release of the requested information in aggregated form mitigates the impact of the information upon any one salmon producer.
- 42 I do not accept that Huon's concern regarding precedent is warranted. Where the release of commercially sensitive information in any situation is found, after a thorough engagement with the public interest test, to be contrary to the public interest, that information will remain exempt. Each situation is determined on its merits.
- 43 Huon, in its submissions, raised concerns that release of the information would heighten the risk of anti-competitive behaviour contrary to amendments to the *Competition and Consumer Act 2010* (Cth). In the present situation, the information is not being released by a company within the salmon farming industry, it is proposed to be released by a government department in accordance with the Act because such release is not contrary to the public interest. I am not convinced that hypothetical unlawful conduct by other persons overrides the original Applicant's right to the information as set out in s7.

³ (April 2023) at [77] – [78] available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

44 The public interest test requires a consideration of competing factors, where not all of those factors have equal weight when applied to the issue in question. Overall, after considering all relevant matters, I consider that the Department's approach in releasing the information in aggregated form significantly reduces the weight of the factors against disclosure. On balance, I am not persuaded that the disclosure of the information would be contrary to the public interest and it follows that it is not exempt under s37. The Department's decision to release the information to the original Applicant should stand.

Preliminary Conclusion

45 For the reasons set out above, I determine the relevant information is not exempt pursuant to s37.

Submissions to the Preliminary Conclusion

46 On 27 September 2024, my preliminary decision was made available both to Huon and the Department to seek their input before finalisation pursuant to s48(1)(b) of the Act.

47 On 2 October 2024, Ms Heather Neate for the Department confirmed that *NRE Tas does not wish to make any further submissions in relation to this preliminary decision.*

48 On 17 October 2024, Huon made submissions, relevant parts of which are extracted below.

49 Huon submitted in relation to s37(1)(b) of the Act:

We note that you have accepted that the scenarios given by Huon in the application for external review are “a real possibility” and not a remote chance, but that you are not convinced that the outcomes of these scenarios are likely to be significant. We disagree with this conclusion and maintain that the outcomes are potentially quite significant. ... In particular, we make the following comments:

a. You have stated that on face value, the disclosure of aggregated data would not be likely to expose any of the three producers to a competitive disadvantage “because any ‘disadvantage’ would be equally shared and so not impact on competition.” We submit that this is not an accurate interpretation of how the aggregated data would be used. While the risk of being disadvantaged is potentially the same for all three companies; one or two companies would be able to exploit this risk for their commercial gain. ... [I]f one company knows that both its competitors had high mortality, this company could flood the market with fish at a cheaper price, knowing the others would be

restricted in volume and would be chasing a higher price to recoup costs.

b. In relation to ... the potential impact to the salmon industry as a third party in itself, we stress the potential not only for consumers to change their buying behaviour but also for retailers to change their procurement behaviour – if retailers believe (based on Mortality Figures) that supply could be restricted, they could favour other species or products out of concern for continuity of supply, or based on an assumption that salmon producers will want to sell at a premium due to limited stock.

50 Huon then made submissions in relation to the public interest test:

... The public debate that you have identified relates to the impact of salmon farming on the overall health of Macquarie Harbour and, in particular, the Maugean Skate. The Mortality Figures, however, are not directly related to harbour health and/or water quality and can in fact at times be totally unrelated. ... There is, therefore a high risk that Mortality Figures will be misconstrued as indicating issues with harbour health... Further, a range of data related to mortalities is already publicly available through the Tasmanian Salmon Farming Data (Salmon Portal). To the extent that mortality figures are necessary for the purpose of public debate, this data should be sufficient (and is less likely to result in competitive disadvantage due to the age of the data compared to the salmon farming lifecycle).

... [W]e again note that mortality rates are not an accurate and complete indication of harbour health. Other indicators such as water quality and dissolved oxygen levels (both of which are publicly available) are far greater indicators and show that the harbour health is improving. It is our submission that for this reason the disclosure would not promote the environment or ecology of the State and may result in decisions being taken on the basis of a misleading snapshot of data.

Further analysis

51 I have carefully considered Huon's submissions. As I accepted that the low threshold for the possibility of competitive disadvantage both to Huon and the Tasmanian salmon industry in general made the information *prima facie* exempt under s37(1)(b), it is not necessary to discuss this further. The point of contention is in relation to whether release of the information would be contrary to the public interest.

- 52 I note that Huon accepts that the risk of disadvantage is potentially the same for all three companies engaged in the industry, it however has concerns that one or two competitors would be able to exploit this risk in certain circumstances. Huon has provided no indication of the likelihood of the other two major salmon-farming competitors in Tasmania engaging in this conduct or if this is based on specific experience of such behaviour.
- 53 The possibility of retailers reconsidering procurement practices on the basis of real or perceived future changes in supply is a normal aspect of business. Huon's submission seems to assume that the salmon industry would have no way to engage with retailers and attempt to convince them to continue to purchase Tasmanian salmon. I do not accept this as a realistic scenario.
- 54 Huon's submissions regarding the public interest test are similar to those made previously, which I considered when coming to my preliminary decision. However, it has attempted to narrowly define the public debate as being solely concerned with the health of Macquarie Harbour and the Maugean Skate, and further attempted to limit the information that is permitted to influence that debate. I do not accept this is appropriate, and maintain my view that the release of information can only contribute to public debate. The parameters of public debate are not for one participant to determine and Huon is welcome to promulgate its contention that salmon mortality may be unrelated to water quality or harbour health in any resulting debate.
- 55 Similarly, the salmon industry's concerns regarding decisions being taken on the basis of a *misleading snapshot of data* could be alleviated by making representations to relevant decision makers to clarify any misconception. I note that whether the *disclosure would confuse the public* is a matter which is specifically set out in Schedule 2 of the Act as irrelevant in assessing the public interest test.
- 56 Overall, I remain unpersuaded that the release of the requested data in aggregated form is contrary to the public interest and therefore I have not altered the findings of my preliminary decision.

Conclusion

- 57 For the reasons set out above, I determine the relevant information is not exempt pursuant to s37 of the Act.

Dated: 21 October 2024



Richard Connock
OMBUDSMAN

ATTACHMENT 1 – Relevant legislation

37. Information relating to business affairs of third party

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

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

(2) If –

- (a) an application is made for information under this Act; and
- (b) the information was provided to a public authority or Minister by a third party; and
- (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of substantial concern to the third party –

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

- (d) notify the third party that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information applied for; and
- (f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority, state the name and designation of the person who made the decision; and
- (c) inform the third party of –
 - (i) its right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.

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

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

33. Public interest test

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

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest Sections 30(3) and 33(2)

1. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:
 - (a) the general public need for government information to be accessible;
 - (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
 - (c) whether the disclosure would inform a person about the reasons for a decision;
 - (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
 - (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
 - (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
 - (g) whether the disclosure would enhance scrutiny of government administrative processes;

- (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
- (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
- (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
- (k) whether the disclosure would promote or harm the economic development of the State;
- (l) whether the disclosure would promote or harm the environment and or ecology of the State;
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.



Right to Information Act Review

Case Reference: R2308-020

Names of Parties: Kelvin Derksen-Luelf and Derwent Valley Council

Reasons for decision: s48(3)

Provisions considered: s31 and s45(1)(e)

Background

- 1 The applicant, Mr Kelvin Derksen-Luelf is a local businessman who is the Chief Financial Officer of the New Norfolk Distillery (the Distillery). The Distillery commenced a commercial tenancy agreement with Derwent Valley Council (Council) on 21 August 2019.
- 2 On 7 June 2023, Mr Derksen-Luelf made two separate assessed disclosure applications to Council under the *Right to Information Act 2009* (the Act). The relevant fees were paid.
- 3 The information sought in the first application which, for convenience, is referred to in this decision as the “lease request” was expressed as follows (verbatim):

Information as to whom our Lease of the Allonah, OT Building and Carlton Ward was sent to.

...
I would like information as to how our Lease document was disseminated and our commercial in confidence breached.

I would also like to know if this lease was sent to people outside of the eight Councilors, GM, assistant GM. I would like an investigation into if this was emailed to outside parties including but not limited to emails, text messages, printed etc.

It is clear that this information has gone outside our commercial in confidence from the Derwent valley Council and would like to know by whom and an investigation commenced.

- 4 The information sought by the applicant in the second application, referred to in this decision as the “letter request,” is (verbatim):

Information as to whom the Letter from the Premier dated 20th Feb 2023 was sent to.

...
I would like information as to how the letter from the Premier dated 20 Feburary 2023 was disseminated and our commercial in confidence breached.

I would also like to know if this letter was sent to people outside of the eight Councilors, GM, assistant GM. I would like an investigation into if this was emailed to outside parties including but not limited to emails, text messages, printed etc.

It is clear that the letter has gone outside of commercial in confidence from the Derwent Valley Council and we would like to know by whom and an investigation commenced.

- 5 On 15 June 2023, Ms Amanda McCall, a delegated officer of the Council under the Act, wrote to Mr Derksen-Luelf advising him that the application was being processed.
- 6 On 28 June 2023, Ms McCall updated the applicant in relation to the 2 RTI requests about the information to do with your lease and the letter from the Premier. She wrote that:

I have had our external IT provider search the exchanges for any emails sent from Councillors or Staff in relation to the above. To date, they have only today come back to me with the Councillor exchange and it's only from March until now.

I will say now that we don't have the ability to determine if it was printed, or texted so the search has been restricted to email exchange correspondence only.

- 7 Ms McCall sought an extension of time pursuant to s15.
- 8 On the same day, Mr Derksen-Luelf replied as follows:

Just had some further thoughts on the search.

1. It was originally sent from Ben Shaw to Quecha Horning, Dean Griggs, Tarrant Derksen and myself. Can we check if it was forwarded by QH or DG to any of the

elected members please. This original email was sent on the 21st of February.

2. The other key words are Private and Confidential, Premiers Letter, In Strictest Confidence and Letter from Premier's Letter.

3. Also can we interrogate the data about the size of attachments.

9 On 17 July 2023, Ms McCall issued a decision to Mr Derksen-Luelf for the lease request. In summary, she advised him that:

a) the searches were *limited to what is in council's control, only email exchanges provided by Council formed part of this search;*

b) Council had no responsibility for elected members' phones; and

c) *Emails are hosted on two different email exchanges ... controlled by the third-party provider.*

10 At that time, three *trace logs from the searches undertaken by Council's third-party IT provider* were provided to Mr Derksen-Luelf.

11 On 26 July 2023, Ms McCall sent a letter to the applicant titled *Information regarding the Premiers [sic] letter dated 20 Feb 2022*. This was the original decision in response to the assessed disclosure letter request. It was in identical terms to the lease request decision, with the limited exception being the descriptors of Logs 2 and 3 (see Council Submissions below).

12 No emails were released to the applicant at that time.

13 On 26 July 2023, Mr Derksen-Luelf, queried how he would go about getting the content of these emails and further information? To which, Ms McCall replied by email, *I don't have content, and I would need to get legal advice on the privacy relating to the emails. These are the logs of the transmittals.*

14 Some further emails were exchanged between the parties and on 17 August 2023 Ms McCall advised the applicant that:

We are waiting on our third party provider to extract the emails. As I have mentioned previously this isn't a quick or easy task and as you have requested all it will take time before they can be assessed for disclosure.

The lawyers you refer to have been notified to assist in determining what privacy implications there are that may excluded [sic] any information from being released as we are subject to meeting the requirements.

- 15 On 21 August 2023, in response to a further email from Mr Derksen-Luelf, Ms McCall wrote:

Just to be clear for the other RTI relating to the emails further to the list that had been provided, I am waiting on the IT provider – not the lawyers. The lawyers will do a check on content based on privacy and disclosure after I receive them from the IT provider.

It's not a matter of part sending anything through – I don't hold the information to be able to give it to you, and that's why I had to request that the third party provide it.

- 16 It appears that around this time both applications, being for the letter request and the lease request, were consolidated and dealt with as one application. For convenience I deal with them both in this decision.
- 17 On 22 August 2023, Ms McCall sent a further letter titled *Further Information*. This supplements both original decisions and is accepted as forming part of those original decisions (see Council Submissions below).
- 18 In relation to the lease request Ms McCall advised the applicant *that the email logs provided the history of all metadata associated with email correspondence, these details are where an email is/or was rather than how many emails are associated with a topic*. She confirmed that *no emails on the logs have attachments of a lease for Allonah, OT Building, or Carlton Ward...*
- 19 In response to the letter request, four emails were identified as being responsive. Three were exempt on the basis of s31 as attracting legal professional privilege, and one email was released to the applicant with the 22 August 2023 decision. That email was a copy of an email from the applicant, dated 21 April 2023, that he had sent to a number of Council staff. The email mentions four attachments that he had provided with the email but they were not supplied with the decision; this is presumably because Mr Derksen-Luelf was already in possession of them.
- 20 On 25 August 2023 Mr Derksen-Luelf requested an internal review from Council. In the email to Council the applicant raised that *[t]his has the same reference as all our other RTI's so I have attached the RTI in question.*

- 21 On 30 August 2023, Mr Ron Sanderson, General Manager of Council and its principal officer under the Act, emailed Mr Derksen-Luelf the internal review decision. The decision contained the following:

Further to your request I have conducted an internal review of this RTI application, reference 105, RTI 2023 dated 7 June 2023.

I have made the determination that supports the original decision by Council's Executive Manager Corporate dated 22 August 2023.

- 22 On 30 August 2023, Mr Derksen-Luelf applied for external review pursuant to s44(1). No submissions were made at that time.
- 23 On 11 September 2023, the applicant wrote to Ms McCall regarding the emails requested on 26 July 2023 and to query whether at *some date in the future that we can expect the email content as its been almost 8 weeks since we requested the further information*.
- 24 On 12 September 2023, Ms McCall responded with a list of current right to information requests and advised the applicant of the following:

Again, I will reiterate, that the log you received is metadata, not email lists. You have now been responded to as assisted by our third-party provider, further information isn't forthcoming as the determination letter provides.

- 25 On the same day Mr Derksen-Luelf sent a detailed reply setting out the various exchanges between the parties. He noted that there seems to be *some confusion about which RTI I am referring to in relation to the RTI request. This would be easily remedied if there were identifiers that could distinguish between the different requests...*He goes on to explain that he had expected copies of emails to be forthcoming.
- 26 It is apparent that at this point there was a misunderstanding between the parties as to what information, if any, in relation to the email searches for these two assessed disclosure requests had been identified and whether further information was being assessed for release to the applicant.
- 27 Between 13 September 2023 and 22 September 2023 there was further correspondence between the parties about the steps taken by Council and the keyword searches requested of the third party provider.

- 28 On 2 October 2023, the applicant provided submissions to this office in support of his request for external review (see Applicant Submissions below). Then on 17 October 2023, he provided a chronology and emails exchanged.
- 29 On 20 October 2023 the applicant sought priority processing of his external review. I was satisfied on the basis of the matters he raised to grant the request to expedite the application.
- 30 On 27 November 2023 my office requested copies of the four emails identified as being responsive to the letter request. On the same day Ms Grace Smith, for the Council, provided the three emails to which exemption was applied pursuant to s31, *legal professional privilege*.
- 31 On 17 January 2024, my office followed up with Mr Sanderson's office regarding further relevant information required for the determination of the external review.
- 32 By email on 18 January 2024, Ms Smith advised:
- ... I have spoken with Ron. He is going to investigate it more and get back to me as soon as possible.*
- For the RTIs that are requesting emails. Our procedure is that we go through our IT provider, and they do a search on the requested mailboxes and the requested word to be searched.*
- Sometimes, the search comes back at 1000 emails, which we then need to request for the applicant to refine.*
- As the IT provider only provides us with a Log of emails we then have to request for the full emails, depending on the amount of emails our IT will take several days and also at an extra charge to source the emails.*
- Once we are provided with the emails, we send them to the lawyers to source the exempt, disclosed and redacted emails. They then send them to us, and we work through the redacted emails to send the disclosed and redacted emails to the applicant.*
- 33 On the same day six emails were provided to my office by Ms Smith, on behalf of Mr Sanderson. It was not apparent how they directly related to either of the assessed disclosure requests and no assessment under the Act was provided.
- 34 On 6 February 2024, my office wrote to Mr Sanderson in an attempt to advance the application by seeking details of the breadth of the searches undertaken to locate relevant information.

- 35 On 6 February 2024, in response, Ms Smith provided two documents titled, *15 August 2019 Open Minutes Part 1* and *15 August 2019 Open Minutes Part 2*.
- 36 On 26 February 2024, my office spoke to Ms Smith and provided further particulars about the requirements for search records to be maintained consistent with the published guidelines.
- 37 On 5 March 2024, Ms Smith responded by providing a table titled *Recording of search* along with the following explanation:

In undertaking this search, the parameters are limited to what is in the council's control; only email exchanges provided by the Council formed part of this search. No elected members have Council-maintained phones, and as such, details such as text messages are outside the scope of the Council's IT management and are not able to be recovered or searched.

Derwent Valley Councilors and staff are hosted on two different email exchanges and have different domain accounts, created and controlled by the third-party provider.

- 38 On 12 March 2024, consistent with my early resolution powers under s47(1)(b), (g), (h) and (j) of the Act, Mr Sanderson was invited to reconsider the approach taken by Council and provide further information about the searches undertaken.
- 39 No response was received and on 22 March 2024, a follow up email was sent to Mr Sanderson.
- 40 On 25 March 2024, Ms Smith forwarded a zip file, which was described as *the whole file with all of the information*.
- 41 There was further exchange between my office and Council with a view to progressing the application. Then on 26 March 2024, Ms McCall shared a spreadsheet document and screenshot of the meeting held on 15 August 2019 in which the lease was discussed.
- 42 On 27 March 2024, my office further requested a submission from Council addressing the searching undertaken and evidence of any agreement to refine the scope.
- 43 On 8 April 2024, Ms McCall provided a document titled *review of RTI process K Derksen (Lease)*. Outlined in the Council Submissions below.

44 Mr Derksen-Luelf confirmed, on 15 April 2024, that:

- a. he was seeking to pursue both the lease and letter requests;
- b. from his perspective, the parties had discussions in relation to refining search terms for the third party email service but there was no variation to the original scope of the requests;
- c. he understood that inquiries or an investigation that had some nexus to the requests for information had been commenced; and
- d. although details about the lease were in the public domain, e.g. from Council minutes, parts of the executed lease were held by a confined number of people and were confidential.

Issues for Determination

45 The two issues for determination are whether Council:

- a. correctly relied on s31 with respect to the four emails assessed for the letter request; and
- b. undertook sufficient searches, pursuant to s45(1)(e), for the information requested by the applicant in his two assessed disclosure applications.

Relevant legislation

46 Relevant to this review are ss31 and 45 of the Act. Those sections are copied in Attachment 1.

Submissions

47 Along with submissions received from both parties, I have had regard to the correspondence exchanged between them in the course of the assessed disclosure application and following release of the original decisions, the original decisions including the supplementary decision, and the various exchanges with my office.

Applicant

48 On 2 October 2023, in support of his application for external review, Mr Derksen-Luelf lodged email submissions as follows:

Initially, I submitted an RTI request and received a response indicating the existence of 4 emails, with 3 being protected by legal privilege. Following this, I requested a review by the GM, who affirmed the correctness of the

process. However, my subsequent request for all emails in Log 1 was denied, as I was informed that the RTI had been completed. Further clarification of the process revealed a total of 7 emails, yet access to these emails was denied. Consequently, I had to submit another RTI to obtain emails from both Log 1 and Log 2 and I've been denied 7 emails under legal privilege. Surprisingly, I discovered an email that should have been disclosed in the initial RTI, despite claims of correct handling. It raises concerns that I had to initiate a follow-up RTI to obtain the same information, especially considering my initial RTI's specific request regarding the dissemination of a particular letter beyond a select group.

Additionally, I had sought information regarding the distribution of a letter from the Premier dated 20 February 2023 and concerns about a breach of commercial confidentiality.

I am troubled by the fact that the Derwent Valley Council did not adhere to the requirements outlined in the act on a second occasion. I believe a further investigation into this matter is warranted.

The email attached herewith should have been included in the initial response, and I request access to all emails as initially requested.

- 49 Attached to the submissions was the email released by Council to the applicant. The email was from Mr Sanderson to Mr Roger Curtis on 30 March 2023, forwarding an email of 28 March 2023 with the Premier's letter attached to it.

Council

- 50 Due to the brevity of the internal review decision it was of no assistance for the purpose of the external review decision, I therefore rely on the original decisions and further submissions.
- 51 In the original lease decision of 17 July 2023, Ms McCall advised the applicant that:

In undertaking this search the parameters are limited to what is in council's control, only email exchanges provided by Council formed part of this search. No elected members have Council-maintained phones and as such details such as text messages are outside the scope of the Council's IT management and are not able to be recovered or searched.

Derwent Valley Councillors and staff are hosted on two different email exchanges and have different domain accounts, created and controlled by the third-party provider. I appreciate your patience while they undertook the searches requested to provide a response to your request.

Attached are the trace logs from the searches undertaken by Council's third-party IT provider. These searches were undertaken in different scenarios to capture the broadest cross-section of data.

Below are the details of the search parameters to capture, the results of the searches have been included as attachments. Where an email has been sent from an account to a third party, Council's provider is not able to trace where, who, or how that information was sent. The privacy requirements stipulate that once an email leaves the exchange it is no longer part of the Council IP.

Log 1 – Attachment A

This includes the search of domain @derwentvalley.tas.gov.au and @dvc.tas.gov.au for all keywords listed to include - New Norfolk Distillery; Premier; Premier Letter; Lease; NND; Willow Court; Derksen.

Log 2 – Attachment B

This includes the search of domains @derwentvalley.tas.gov.au and @dvc.tas.gov.au for keywords private and confidential lease.

Log 3 – Attachment C

This includes the search of domain @derwentvalley.tas.gov.au and @dvc.tas.gov.au for attachments and the key words list.

...

- 52 In the letter sent by Ms McCall on 26 July 2023, being the original decision in response to the assessed disclosure letter request, the decision was in identical terms to the lease request decision (above), with the limited exception being the descriptors of Log 2 and Log 3. For completeness the description of the three logs is provided as follows:

Log 1 – Attachment A

This includes the search of domain @derwentvalley.tas.gov.au and @dvc.tas.gov.au for all keywords listed to include - New Norfolk Distillery;

Premier; Premier Letter; Lease; NND; Willow Court; Derksen.

Log 2 – Attachment B

This includes the search of domains @derwentvalley.tas.gov.au and @dvc.tas.gov.au for attachments and the keywords listed to include the location of the email, documents, and recipients.

Log 3 - Attachment C

Metadata from Councils 365 tenant on the access, medication, or creation of documents or emails with the keywords listed to include - New Norfolk Distillery; Premier; Premier Letter; Lease; NND; Willow Court; Derksen.

53 Additionally, in the course of the external review and engagement with my office, Council provided the following documents and further information:

- a. *15 August 2019 Open Minutes Part 1*, which included this extract:

In general terms the proposed lease makes the following provisions:

- *The lease will be between the Derwent Valley Council and the New Norfolk Distillery Pty Ltd. for the Allonah, Occupational Therapy and Carlton (C Ward) buildings and will include the exercise yards;*
- *The term of the lease shall be for five years from the date of signing;*

- b. *15 August 2019 Open Minutes Part 2*, continued:

- *If the tenant complies with the terms of the lease, and if the Council chooses to sell the buildings or any part of the buildings, the tenant has the right of first refusal in purchase of those buildings, provided that the conditions of the lease arrangements are met;*
- *The lease does not compel the council to sell the buildings, any sale of the buildings must comply with the requirements of the Local Government Act 1993;*
- *Mr Tarrant Derksen is the guarantor for the lease;*

- *The Council has not given any undertaking to provide any assistance in the restoration or repurposing of the buildings;*
- *The tenant will be responsible for all outgoings related to the buildings, excluding rates;*
- *The tenant will comply with all laws and statutory requirements and will maintain insurance to an appropriate level, and;*
- *Clauses standard to commercial leases.*

The potential tenant is proposing to pay the sum of \$25,000 per annum in arrears to the Council, with the cost of any capital works on the buildings up to the sum of \$125,000 being deducted from the rental of the buildings prior to the final payment being made. The potential tenant will be required to show proof of the cost of any capital works on the building prior to the final rent calculation being made. The proposal does not seek any assistance from the Council in regard to the development of the buildings, nor does it seek any ‘special considerations’ beyond the consideration of the rent being paid in arrears.

- c. The logs attached to the decisions were tables of email information or metadata:
 - Log 1 (attachment A), seven pages, from 3 April 2023 to 19 June 2023 - date, sender, recipient, subject.
 - Log 2 (attachment B), 19 pages, from 2 February 2023 to 28 April 2023 - date, location, subject, sender, recipient, recipient in cc, attachments, indication if read, size.
 - Log 3 (attachment C), 60 pages, date configured as month/day/ year for April, May and June 2023 - date, operation, userid, subject.
- d. Zip file of documents.
- e. Link to One Drive.
- f. *Review of RTI process K Derksen (Lease) dated 8 April 2024, which is a search record table that was provided in response to the request for submissions (the submissions).*

- 54 On 22 August 2023, Ms McCall, sent a further letter titled *Further Information* as a supplement to the original decisions. In relation to the lease request Ms McCall relevantly wrote:

Further to the determination response provided on 26 July 2023, you have requested copies of the emails that were identified on the email logs provided. Please note that the email logs provided the history of all metadata associated with email correspondence, these details are where an email is/or was rather than how many emails are associated with a topic.

As previously advised, Council doesn't host its own email exchange, it engages a third party to undertake this function in accordance with the Tasmanian Archives and Heritage Office. Email retention does not have a blanket period.

Emails were extracted and provided by the third-party provider. I can confirm that no emails on the logs have attachments of a lease for Allonah, OT Building, or Carlton Ward, this therefore completes this request for Information.

- 55 Responding to the letter request she wrote:

In relation to the Premier's letter, Council has identified four (4) emails that attach a copy of the Premier's letter dated 20 February 2023. Three (3) of these emails are exempt from disclosure on the basis that information would be privileged from production in legal proceedings on the ground of legal professional privilege (s. 31 Right to Information Act 2009). In respect of the remaining email, I have disclosed this as no exemptions apply. This, therefore, completes this request for information.

- 56 In correspondence to the applicant, on 13 September 2023, Ms McCall further explained the logs provided:

I have documented the process, I and the third-party IT provider and [sic] undertook in the assessment of this RTI. Although I don't need to provide the below, I hope that it assists you.

The three logs that were provided were reviewed based on the Right to Information Act in your request to provide emails.

- Log one contained 49 lines of data, within this, there were 28 emails, 26 of these had the words such as New Norfolk Distillery to allow the key subject word search of the email exchange.
- Log two contained 106 lines of data, within this, there were 39 emails, with 14 containing references to words such as New Norfolk distillery or Willow Court.
- Log three is a trace log of the Microsoft accounts, including the access to files – however the dates and times do highlight that these lines are recorded multiple times as the core settings of Microsoft Office allow for autosaving every 30 seconds or a minute. While log 3 contained 970 lines of data, there were 64 files or types of actions. 24 of these again had reference to keyword searches.

The cross population of logs 1,2 and 3 information highlights that the overall total is reduced from 64 lines of data to 54. This was then further reduced when looking for Lease or Premiers Letter reducing the overall keyword search to 7.

These lines and emails were then assessed for relevance against your specific RTI request and the provisions of the Right to Information Act including but not limited to section 31 which references Legal Privilege (which can simply be asking for legal advice) and Schedule 1 which contains 25 matters as an RTI officer, I must consider when assessing if the information is in the public interest.

...

57 In the submissions Council noted, under 7 June 2023, that the following searches had been undertaken:

- hard copy file;
- agenda and minutes;
- emails – *request emails and interactions*; and
- hard copy post or print.

58 The balance of the submissions primarily deal with email searching undertaken by the third party. The final paragraph in the table provides that:

The search parameter's limitation to 90 days before the search request limited our ability to search endlessly;

however, the information in the open agenda indicates that there was information that would be publicly available in the lease.

Analysis

Statement of reasons and onus

- 59 Ms McCall provided original decisions for both applications and a supplement to them.
- 60 Mr Sanderson provided the internal review decision, set out in the Background above, which unfortunately did no more than affirm the original decisions and did not provide sufficient reasoning to justify this conclusion.
- 61 The totality of the purported decision was two paragraphs, from which it is not apparent that the principal officer exercised the necessary functions and impartially assessed the request for information as required under ss43(4) and (5):
- (4) *If an application for a review of a decision is made to the principal officer in accordance with subsection (1), (2) or (3), the principal officer must as soon as practicable –*
- (a) *review the decision and make a fresh decision; or*
- (b) *arrange for a delegated officer, other than the delegated officer who made the decision, to review the decision and make a fresh decision.*
- (5) *A decision on a review under this section in respect of an application made under section 13 is to be given in the same manner as a decision in respect of the original application.*
- 62 Furthermore, the decision did not comply with the statutory requirements for notice of a decision and reasons to be given (s22). It was wholly inadequate because it did not:
- set out the subject matter of the review undertaken, which in this instance related to two separately lodged, and paid for, assessed disclosure applications;
 - make findings in relation to the information requested and the principal officer's satisfaction with the searching undertaken;
 - state the reasons for the decision; or
 - contain advice as to review rights.

- 63 The inadequacy of the internal review decision means that, unless I am wholly satisfied by the original decision, Council will not have discharged the onus with respect to exemptions applied (s47(4)).
- 64 The principal officer is reminded, in future, to ensure adherence to the requirements of the Act for fulfilling the task of conducting an independent and impartial internal review. The decision of *Q and Northern Midlands Council*¹ provides further guidance on compliance with the Act.

Scope

- 65 Before I can consider sufficiency of searching, an initial matter that I must turn my mind to is the scope of the request.
- 66 It is apparent from the assessed disclosure applications that Mr Derksen-Luelf seeks information about any release of the lease and letter (which were in similar terms) by Council staff or elected members:

*Information as to whom our Lease ... was sent to ...
information as to how our Lease document was
disseminated ... if this lease was sent to people outside of
the eight Councilors, GM, assistant GM ... including but
not limited to emails, text messages, printed etc.*

- 67 The applicant wants the information related to the circulation or sharing of the lease agreement that his business enterprise had entered into with Council. Although he accepted that some information about the lease was in the public domain, as reflected in the Minutes of the 15 August 2019 Council meeting, his position is that the executed lease agreement and particulars contained in it had not been released publicly.
- 68 The Council has taken the contrary position that the lease is in the public domain, as details were minuted. The extent of the public release is a point of contention between the parties and informs the applicant's request.
- 69 The applicant similarly maintains that the Premier's letter was made available by his business to Council, and that neither the letter nor the content of it was released by the Distillery into the public domain.
- 70 The parties appear to be at odds as to whether there was a refinement in the scope of the request, limiting it to email searches. Council has set out that it considers that agreement was reached that searching could be limited to emails with either the lease or letter attached. The applicant, however, takes the position that any refinement was with respect to the

¹ See *Q and Northern Midlands Council* (September 2023) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

search terms for the emails and not agreement to limit his request to only emails with relevant attachments.

- 71 In Council's submissions to my office there are references to the steps undertaken, including searches of hardcopy records, but no such searches were discussed in the original or internal review decisions. Council was also unable to produce correspondence from the applicant in which there was agreement to narrow the scope to emails with attachments.
- 72 I find that there was no agreement reached between the parties that efforts to search were limited to emails with attachments.

Searching

- 73 I then turn to the searching that was undertaken to identify information responsive to the assessed disclosure requests, and whether the steps taken were sufficient.
- 74 Section 45(1)(e) enables an applicant to seek external review if they believe, on reasonable grounds, that there is an insufficiency in the searching for the information.
- 75 The question of *reasonable grounds* is an objective one, that requires consideration of the relevant facts and circumstances of the application made under the Act.
- 76 The Ombudsman's *Guideline in Relation to Searching and Locating Information*² (the Guideline) provides general guidance to delegates and principal officers on the requirements and procedures for searching. This includes the importance of clear and cogent reasoning of the decision-maker and the internal reviewer as to the searching undertaken:

The information which is subject to search includes electronic records in the possession of the Minister or public authority, such as material retained on data management systems, and in email records.

...

The scope of the search is determined by the terms of the application for assessed disclosure. Where the terms of the application are unclear or too general in nature, you should negotiate immediately with the applicant to refine or redirect their application (negotiations must be completed within no more than 10 working days from receipt of the application). At the initial stage, all of the

² The revised edition, 24 January 2013, available at: www.ombudsman.tas.gov.au/right-to-information/rti-publications

information which is thought to be covered by the application for assessed disclosure should be identified and located. An assessment should then be made as to exactly what information falls within the scope of the application, and within the right given to the applicant by s 7 of the Act.

...
Your decision on the application for assessed disclosure should include details of the searches you undertook, as this promotes openness and transparency, and it may reduce the likelihood that the applicant will seek review on one of the grounds mentioned.

- 77 Given the narrow searching and the very limited reasoning provided in the decisions and other communications, I am satisfied that there are indeed reasonable grounds for the applicant questioning the searches and the sufficiency of those searches by Council.
- 78 Little detail has been provided by Council to explain the very limited searches and the submissions table does not set out the exact steps taken, when and by whom the searches were undertaken, and the outcomes.
- 79 On 6 February 2024, my office wrote to Mr Sanderson in an attempt to advance the application:

Questions remain around whether Council's response to the first request for information was fully addressed, as Council appears to have considered that only emails attaching the relevant lease could be responsive to the request. Mr Derksen-Luelf is concerned that this is an overly narrow interpretation of his request and that further relevant information may have been omitted from Council's assessment, which gives rise to a ground for review under s45(1)(e) of the Right to Information Act 2009 (the Act), namely that Council did not conduct a sufficient search for information responsive to his request. Accordingly, to enable our office to review the searching conducted, please:

1. *Provide confirmation of whether further information exists, such as emails, meeting minutes and other file notes relevant to the request but not attaching the lease, which are responsive to Mr Derksen-Luelf's request for assessed disclosure;*
2. *If information exists but was not assessed, as it was not considered responsive to Mr Derksen-Luelf's request for assessed disclosure, please indicate this as appropriate;*

3. Provide records of all searches you have conducted in relation to Mr Derksen-Luelf's request for assessed disclosure, in accordance with the Ombudsman's Guideline in Relation to Searching and Locating Information (No. 4/2010); ...

- 80 Then on 27 March 2024, my office further requested a submission from Council addressing the searching undertaken:

The submission can be brief and does not require a particular form. Some of the matters you may wish to consider addressing are:

- *An outline of any agreement between the parties to refine or modify the scope of the assessed disclosure request;*
- *Considerations that were taken into account when deciding on the steps for the search;*
- *Whether there are other avenues available for further searching that may produce a result (see the matters outlined in my letter to Mr Sanderson, dated 12 March 2024);*
- *Indication of the relevance of the materials already supplied to this office, such as the Record of Search, email logs, One Drive folder, and other emails;*
- *Other matters that informed the searching and attempts to locate information responsive to the request;*
- *The basis for your satisfaction that the searching for information was sufficient.*

It remains a question for you which of those matters, if any, you would like to address in submissions.

- 81 From the responses received and the correspondence to Mr Derksen-Luelf, it appears that Council solely relied on an external service that provides email services for the searching. The final paragraph in the submissions table includes:

The search parameter's limitation to 90 days before the search request limited our ability to search endlessly; however, the information in the open agenda indicates that there was information that would be publicly available in the lease.

- 82 Council appears to be indicating that any searches for information responsive to the requests were constrained to a 90 day period. If this is correct, I strongly encourage Council to consider the adequacy of that record keeping practice.
- 83 On 22 September 2023, Ms McCall advised Mr Derksen-Luelf that:
- ... my wording states 7 keyword searches when I was undertaking to respond to your specific RTIs containing Lease or 'Premiers Letter' – not 7 emails. These keyword searches didn't provide 7 emails, and therefore, they cannot be provided.*
- 84 It is presumably these keyword searches referred to that resulted in the metadata logs provided to the applicant. The combinations of the word searches and date ranges across the two email systems is unclear.
- 85 Multiple metadata logs regarding potentially relevant information for both requests were provided to the applicant and to this office. The information contained in the logs is not the email record. This information therefore was not sufficiently responsive to the request and the logs alone do not indicate that the searches undertaken for relevant information were adequate.
- 86 In relation to the provision of the metadata logs to the applicant, this was not a satisfactory response by Council to his applications for information. Despite best attempts by Ms McCall to explain the metadata, the logs provide no useful information of the kind being sought.
- 87 Furthermore, it appears that Council did not search its own electronic records, including emails locally stored in its own data management system. There was no reference to searches of Council's internal records management and no particularising of the record keeping system Council uses and the limitations of it for retrieving business records of a kind relevant to the request.
- 88 In relation to text messages Council advised no searches were undertaken because:

The council doesn't have access to mobile records, there wouldn't be sufficient grounds to request Telstra get these records of staff.

I didn't request information based on Code of Conduct complaints that were also lodged. The main staff noted as involved were also no longer with Council.

- 89 It further remains unclear from Council, despite requests for clarification, what actual steps, if any, were taken to enquire of key people to confirm whether they had communicated the lease or letter to anyone else, either in hardcopy or electronically by email or by other means.
- 90 There was mention in the submissions, and it was raised orally with my staff, that there was a Code of Conduct investigation on foot, but no substantive explanation has been provided as to how that impacted on implementing the applicant's request under the Act or affected the internal searching and enquiries.
- 91 Having regard to the scope of the applicant's request, and the information that has been provided in the course of the external review, I am not satisfied that a fulsome attempt was made by Council to identify information that it may hold. I would, for example, expect searches to cover or include:
- a. Council's records management or database system used by Council for its compliance with archiving requirements;
 - b. enquiries made of those elected members or staff known to be in possession of the letter or the lease agreement as to any circulation, by any means, that they may have been a party to (or an explanation be provided as to why such enquiries have not yet or will not be made);
 - c. details of any review of a postal register or similar, including the date range checked and any particular search terms.

92 Therefore, I find that the searching was insufficient. Council is required to take further steps in order to satisfy the request for information. Any information identified as being responsive would then need to be assessed and a fresh decision issued to the applicant (consistent with s22) if any exemptions are relied upon.

Section 31 – legal professional privilege

- 93 Council identified three emails which were assessed as exempt under s31, as being subject to legal professional privilege. This provision sets out that *information is exempt information if it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege*.
- 94 The emails are:
- a. Mr Sanderson to Mr Curtis forwarding an email from Mr Shaw for New Norfolk Distillery to Mr Sanderson dated 28 March 2023

along with the Premier's letter dated 20 February 2023 attached, dated 30 March 2023.

- b. Mr Sanderson to Mr Curtis with four attachments - the Premier's letter, New Norfolk Distillery legal letter to Council dated 21 April 2023, Mr Derksen-Luelf letter to Council dated 21 April 2023 and 41 pages of accounts - dated 26 April 2023.
- c. Mr Curtis to Mr Sanderson with the lease attached, dated 28 April 2023.

95 The three emails therefore cover both the lease and the letter requests.

96 Having regard to the requirements of s31, and consistent with the approach in prior decisions,³ I am required to consider whether the *dominant purpose* of the communication was to seek or receive legal advice.

97 I am satisfied that the dominant purpose of the emails sent to Mr Curtis and the one received in reply were for the dominant purpose of legal advice being obtained by Council.

98 Therefore, I find that the three emails are exempt from disclosure under s31. They attract privilege due to being records of the confidential communications between a legal advisor and client for the dominant purpose of giving or receiving legal advice. The emails are not required to be disclosed to the applicant.

Other matters

Schedule of Documents

99 In the course of the external review application progressing Council has provided a high volume of documents, including different versions of metadata logs, a zip folder of unindexed documents, and a link to a series of emails. Unfortunately, no Schedule of Documents or index was provided which has made the task of managing the application more difficult, thereby adding to delay.

100 On review of the documents, much appear to be Council's internal documents related to the original request for information, and some of the documents are out of scope and it is not apparent why they have been provided.

³ See *Janiece Bryan and Glenorchy City Council* (30 June 2023) at paragraph 30, available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

101 Consistent with the Manual⁴ and my previous guidance on this, such as in my decision of *Alexandra Humphries and Department of Health*,⁵ it is best practice for the decision maker to prepare a Schedule of Documents of the information identified and assessed under the Act.

102 Council is encouraged to adopt this approach in future.

103 Similarly, an index of other documents or material provided to my office for the purposes of the external review is also recommended. This is most efficient and ensures all relevant information is considered.

Managing multiple applications

104 On 12 September 2023, in an email to Council, Mr Derksen-Luelf raised the confusion arising between the parties due to multiple applications not having unique identifiers:

There seems to be some confusion about which RTI I am referring to in relation to the RTI request. This would be easily remedied if there were identifiers that could distinguish between the different requests which I have suggested in multiple emails previously. I am not referring the to [sic] RTI that you have sent through. I have attached the email that is in question in relation to this RTI.

105 It appears that the same identifier was applied to the leave and letter requests and to other assessed disclosure applications made for the Distillery. This appears to have created difficulties for both parties in communicating about and managing the different requests.

106 It similarly presented difficulties for my office when communicating with the parties and added to delay.

107 Council is therefore encouraged to adopt a process that makes it easy to identify an assessed disclosure application for its own records and for the applicant.

Preliminary Conclusion

108 For the reasons set out above, I determine that:

- there was an insufficiency of searching for information responsive to the assessed disclosure application; and
- the exemption applied by Council under s31 is affirmed.

⁴ Ombudsman Tasmania, *Right to Information Act 2009, Tasmania: Ombudsman's Manual*, July 2010. Available at www.ombudsman.tas.gov.au/right-to-information

⁵ See *Alexandra Humphries and Department of Health* (June 2023), paragraphs 79 to 85, available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

Response to the Preliminary Conclusion

- 109 As the above Preliminary Decision was adverse to the public authority, it was released to Council on 19 September 2024, for further input, if any, prior to finalisation. This is consistent with the requirements of s48(1)(a) of the Act.
- 110 On 8 October 2024, Ms McCall provided a 17 page response to the Preliminary Decision.

Council response

- 111 Council's input, in response to the Preliminary Decision, provided the following:

- a. an outline of the RTI applications and relevant background;
- b. an explanation of the human and other resourcing issues impacting Council's RTI processes during the period of the assessed disclosure application;
- c. clarification of Council's document referencing convention:

[a numerical reference] which appears at the top of all letters, is the Council's document management reference on the records. This isn't the same indicator. The name and date of the RTI are the unique identifiers recorded in the Council's SharePoint records system.

This reference allows searching and document control of the folder locations. The 105 file reference has been migrated from the Council's hard copy record system, which is currently transitioning to the SharePoint records system. The council doesn't have a TRIM or other purchased document management system.

- d. an explanation that Council has two email domains – one for Councillors and one for Staff – and (verbatim and emphasis original):

*Both email exchanges are Office 365 managed by third-party provider Techquity. The below has been provided by their Director- **90 day search limit through the Office 365 licence tool –***

Advice from the Managing Director of Council third-party IT provider

We can only get exchange logs for 90 days in Microsoft 365.

We could do a search in the backups we are running for you however this would be a per mailbox search and only able to be on the subject line (not content in the body of the email).

As you mentioned, searching could also return thousands of unrelated results, and we can't filter the search with any sender/recipient details, so everything would be returned.

This would also be reliant on the email existing at the point of time for the backup, if the user deleted the email prior to the backup running then there will be no record of it.

- e. advice that the applicant has used two email addresses in communicating with the Council; and
- f. confirmation that, in relation to the Preliminary Decision, *[f]undamentally, the Council stands by its decision to provide the applicant with the information it has in accordance with the Act...*

Lease request

112 In regard to the lease request searching Ms McCall relevantly advised (verbatim):

13. *Upon receiving the RTI information from the applicant, an email for a mail trace was sent to our internal IT resource (13/6/23) requesting information on who had forwarded or distributed the Distillery lease agreement email that had been sent to the Councillors by the Acting General Manager on 23/05/23.*

14. *The initial request to our IT internal resource stated Can you please search and provide – who and when the Lease document has been distributed to? I am aware that it went to Elected Members and myself on the date attached but I need to know if it was sent by;*

- Any elected members from their Council email
- Any employee prior to receiving this copy including but not limited to Dean, Quecha or Mandy

15. *Regarding the question of why I didn't go directly to Councilors, [sic] this will be addressed later in the response. Two of the three Council Officers (Dean and Quecha) were no longer with the Council at the time of the request, so the request must go via the Council's third-party IT provider rather than directly to the officers involved. As a matter of privacy, officers don't have access to previous staff emails. The last employees had ceased employment during the discussions.*

16. *On 19/06/23, the data provided by the Council's internal IT resource was requested to be checked by the Council's third-party IT provider as the preliminary extract didn't appear to be extensive.*

17. *Response from our IT provider on 28/06/23 noting We've been combing through this one, and there could be lots of cases of emails sent out to external addresses, but they could be legitimate emails. to our third- party IT provider to undertake a mail trace.*

18. *11/07/23 Information provided by the third-party provider: I've attached one of the exports from the new audit tools available through the extra license in 365. This is just on the word 'Distillery'. The date is in US format (M/D/YY), and we'll get that fixed up in more searches/exports, but I'd send through an example. I've split the fields out a bit to make it slightly easier to see information, and the filter at the top can help with Operation types and user IDs.*

- 113 Ms McCall goes on to address the *outcomes of searching*, including an explanation of the various logs, and explains the following limitations when searching for emails:

Since the lease decision was made and executed, there has been a significant change in staff and councillors—this affects how the search parameters for archiving mailboxes undertake searches.

In response to identifying 'whom' and 'how' the documents believed to have been distributed by the applicant, we requested our internal IT resource undertake a mail trace as part of the search.

- 114 Furthermore, *mail tracing has a 90-day time limit. It cannot be backdated or changed.*

115 Emails extracted by Techquity were reviewed by lawyers for Council to identify any that were responsive to the assessed disclosure request. None were found to be within scope.

Letter request

116 In undertaking the searching for the letter request, Ms McCall advised that:

47 ...an email for a mail trace was sent to our internal IT resource (13/6/23) requesting information on the Premiers Letter. A response was provided on 16/06/23. Both searches were compiled into the same search parameters, and the keyword search traced the same information.

48 On 19/06/23, the data provided by the Council's internal IT resource was requested to be checked by the Council's third-party IT provider.

117 Mr Derksen-Luelf provided further particulars to Council, including names of Council staff, to assist with the searching process. Some of those staff were no longer employed by Council and Ms McCall explained in her response:

50 ... Their email accounts were archived under Council's standard process. However, the references found in the email exchange had the applicant sent the email to Councillors on 21/04/23

51 Upon receiving the RTI information from the applicant, an email for a mail trace was sent to our internal IT resource (13/6/23) requesting information on the attached Premiers Letter via email containing the subject Private and Confidential – sent from Kelvin Derksen to Mayor Michelle Dracoulis; Deputy Mayor Luke Browning; Councilor Jessica Cosgrove; Councillor Justin Derksen Councillor Matthew Hill Councillor Peter Binny; Councillor Phillip Bingley; Councillor Sara Lowe; Ron Sanderson on 21/04/23 and cc' Tarrant Derksen.

118 Council was similarly assisted by its lawyer to assess the four emails identified from the process, which have been considered above in the Preliminary Decision.

Other applications

119 Ms McCall provides a similar overview with respect to other, unrelated assessed disclosure applications lodged with Council by Mr Derksen-

Luelf. For the purposes of this external review, I have had no regard to those requests as that additional information is not within the scope of my external review.

Further analysis

- 120 I carefully considered the response from Council about the searching undertaken and related matters outlined.
- 121 Before addressing the sufficiency of search question, I note that Ms McCall provided an overview of the resourcing issues at the time of the requests for information being made by Mr Derksen-Luelf and set out that *Council has now undertaken training of several staff within the administration of RTIs; however, there is still a lack of documented processes or guidance on specific metrics...*
- 122 The adequacy of Council's resourcing, human or otherwise, is not central to the matters before me, however I accept that those circumstances may have contributed to the way this application initially progressed. Fortunately, it seems that there has been improvement in this regard and Council is encouraged to continue its capacity and capability building to ensure compliance with the Act.
- 123 I further note the indication that Council is reviewing its file referencing convention for RTI to make referencing easier and avoid a recurrence of the confusion experienced by the parties on this occasion.

Email searches

- 124 Based on the information provided by Ms McCall in response to the Preliminary Decision, I am now satisfied with the search for emails that was undertaken for both the lease and letter requests. While there were valid concerns (as outlined in the Preliminary Decision) about the initial search, the steps taken to address these appear to be sufficient. This is because Council has demonstrated that:
 - a. *internal IT assistance was sought in the first instance;*
 - b. *external assistance, of Techquity the third party IT provider, was then obtained; and*
 - c. *Council engaged its lawyers to review the relevance of emails collated by Techquity.*

Other searching

- 125 *Information* is broadly defined in the Act and therefore public authorities are required to have regard to the various storage locations and

information formats that may produce information responsive to an assessed disclosure request. For example, electronic communication is not limited to emails and may include text messages or chat functions like Microsoft Teams.

- 126 The applicant indicated that he was seeking information about the release of the lease and the letter, which may have been by text message. Council took limited steps in this regard, noting that mobile phones are not the property of Council.
- 127 Council is reminded that in such circumstances enquiries, rather than physically searching of a phone, may be appropriate.
- 128 After full consideration of the details available to me about the searching undertaken, I am satisfied on this occasion that there are no further searches of electronic records that are required for this application. While the applicant had legitimate concerns based on the explanations and decisions provided to him, there does not appear to be any further searching which could functionally be undertaken with Council's somewhat limited record keeping system.
- 129 Furthermore, with respect to any other searching that may have been undertaken, I am satisfied that Council has demonstrated that adequate steps were taken to search Council's ordinary records, including its hardcopy files and new SharePoint system.

Sufficiency of search

- 130 Whilst I initially found that the searching undertaken had been insufficient, with the benefit of the additional input from Ms McCall in response to the Preliminary Decision, I am now satisfied that Council undertook a sufficient search in response to the letter request and the lease request.
- 131 In summary, I am now of the view that there are no further searches that I could properly direct Council to undertake in relation to the information being sought by the applicant.

Other matters

- 132 I take this opportunity to make some observations in relation to the progress of this application, which had an unnecessarily protracted and, at times, somewhat adversarial history. This, in my view, can be attributed to several factors including the resourcing issues experienced by Council at the relevant time, the framing of the request for information, and commercial or other tensions between the parties.

- 133 I am confident, however, from recent engagement between my staff and Council's RTI team, that there has been a commitment to improving practices to ensure compliance with the Act.
- 134 Council has indicated that there was an impact upon the searching as a result of various complaints and investigations being on foot at the time of the assessment. I accept that such matters might have had some limited influence on the ordinary course of dealing with an assessed disclosure application. I find, however, that Council could have taken steps to mitigate the disruption to its searching.
- 135 It was open to Council, for example, to clearly explain to the applicant the impacts of those matters upon the searching at the relevant points in time and to negotiate with him for an extension of time. I encourage Council to, in future, identify practical approaches that are consistent with the spirit and substance of the Act.
- 136 Although the sufficiency of Council's record keeping system is not a matter over which I have jurisdiction under the Act, based on the information provided to me in the course of the external review I remain concerned about the adequacy of Council's email storage procedures. For example, it still remains unclear to me how Council ordinarily stores its records including emails and it appears that recovery of emails is time limited without back up beyond 90 days. Emails of Council staff and elected officials are important business records that should be safely stored in a manner akin to previously common hardcopy correspondence and must be retrievable for the purposes of the Act and, as may arise, inquiries under other legislation.
- 137 It remains a matter for Council to ensure it has clear policies, procedures and practices regarding records keeping and information management. However, that this is the case is not apparent from the original decision, internal review decision, correspondence with my office or input in response to the Preliminary Decision.
- 138 In relation to the original request, which in part sought information and in part sought an investigation, there was an opportunity for the parties to refine the scope to crystallise the type of information that could be searched for under the Act. It is disappointing that refinement did not occur early to truly clarify the limits of the application. Council is encouraged to identify early opportunities to assist an applicant if there is doubt about the request as it assists both parties.
- 139 I further note that Council appears to have taken a narrow approach to the request finding that:

In reference to the applicant not receiving emails in the

first instance. The applicant didn't ask for emails. He asked for who it was sent to. Therefore, he was provided information on what and who was sent.

- 140 Such a narrow reading of the request as a whole, in circumstances where metadata or logs would not satisfy the applicant's request, was unhelpful and added to the delay. Council is discouraged from reading down an application with a focus on identifying the minimum amount of information.
- 141 Lastly, I anticipate this outcome may well be disappointing for Mr Derksen-Luelf, however the question before me is limited to the sufficiency of the searching of Council's records as required under the Act.
- 142 The statutory intent is to enable individuals to have access to information held by a public authority, subject to limited exemption. The Act does not provide for me to investigate the adequacy of the Council's record keeping or whether possible misconduct occurred in the unauthorised release of information. There are other complaint and review mechanisms available to investigate such issues.
- 143 In this instance the application did encounter a myriad of issues as canvassed above in the Preliminary Decision and Further Analysis. I am, however, satisfied that those issues were ultimately overcome and that no further searching of Council's records that will produce information responsive to the request.

Conclusion

- 144 For the reasons set out above, I determine that:

- the search for information responsive to the assessed disclosure request by Council was ultimately sufficient; and
- exemptions claimed by Council pursuant to s31 are affirmed.

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

Dated: 18 October 2024



Richard Connock
OMBUDSMAN

Attachment 1

Relevant legislation

31. Legal professional privilege

Information is exempt information if it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.

45. Other applications for review

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

- (a) the decision which may otherwise be the subject of an application for an internal review under section 43 has been made by a Minister or principal officer of a public authority and as a consequence the applicant cannot make an application under section 43 ; or
- (ab) the decision relates to an application made to a Minister in accordance with section 13 and is a decision in relation to which a written notice must be given under section 22 ; or
- (b) a Minister or public authority has made a decision that the information requested was not in existence on the day the application was made; or
- (c) a Minister or public authority has made a decision to give access other than in the form requested by the applicant, except where to do so would breach copyright; or
- (d) a Minister or public authority has decided that the information requested is not in the possession of the Minister or public authority; or
- (e) following a decision being made by a Minister or public authority, the applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the Minister or public authority; or
- (f) notice of a decision on an application under section 13 has not been received by the applicant and the period specified in, or calculated under, section 15 has elapsed.

(1A) A person who is an external party may apply to the Ombudsman for a review of –

- (a) a decision if the decision, which may otherwise be the subject of an application for an internal review under section 43(2) or (3) , has been made by a Minister or principal officer of a public authority and as a consequence the external party cannot make an application under section 43 ; or
- (b) a decision to provide, in accordance with an application made to a Minister in accordance with section 13 , information –
 - (i) relating to the personal affairs of the person; or
 - (ii) that is likely to expose the person to competitive disadvantage.

- (2) If person has applied for information in accordance with section 13 , another person may apply to the Ombudsman for review if –
- (a) a Minister or public authority has decided not to consult the person under section 36(2) or section 37(2) and the person believes that he or she is a person who was required to be consulted; or
 - (b) a decision has been made on a review under section 43 and a person, other than the person who applied for the review, is adversely affected by the decision.
- (3) If a notice of a decision has been given under this Act, an application referred to in subsection (1) must be made within 20 working days of the day on which the applicant received notice of the decision.
- (4) If a notice of a decision to which subsection (1A) relates has been given under section 36(3) or section 37(3) to an external party, the external party may only make an application under subsection (1A) in relation to the decision within 20 working days of the day on which the external party received the notice.



Right to Information Act Review

Case Reference: R2202-063

Names of Parties: Lee Moyle and University of Tasmania

Reasons for decision: s48(3)

Provisions considered: s31, s35, s36

Background

- 1 On 22 March 2021, the Australian Maritime College (the AMC) of the University of Tasmania (the University) notified Mr Lee Moyle of allegations made against him in the performance of his role as a volunteer Amateur Radio Assessor with the AMC. On 24 June 2021, the AMC determined that Mr Moyle had breached the University's Behaviour Policy, Conflict of Interest Procedure and the Assessor Guidelines, and he was removed from his role. Following Mr Moyle's appeal of this decision, he was reinstated to his role on 25 August 2021.
- 2 On 26 April 2021, Mr Moyle applied to the University under the *Right to Information Act 2009* (the Act) for information held by the University relating to himself, and he paid the fee on 30 April 2021. He requested:

...a copy of the following information and documents held by the University of Tasmania including the Australian Maritime College:

 1. *All documents and correspondence that relates or refers to me;*
 2. *All documents contained on any electronic database or system that relates or refers to me;*
 3. *All emails that relate or refer to me for the period of 1 January 2019 to 26 April 2021.*
- 3 On 12 July 2021, Ms Jane Beaumont, in the capacity of delegate of the University under the Act, issued a decision to Mr Moyle. The University located 191 documents responsive to the application and released 12 documents consisting of 26 pages to Mr Moyle. Some of these pages were released in full and some were redacted in part. Ms Beaumont determined that some information was out of scope and this information was also withheld. She identified that some information responsive to the application had been communicated to Mr Moyle previously and this was not released. A schedule of documents was provided by the University, but this did not indicate the exemptions relied upon and was itself partially redacted.

- 4 Ms Beaumont determined that some information was exempt from release under the following sections of the Act:
 - Section 31 – Legal professional privilege;
 - Section 35 – Internal deliberative information; and
 - Section 36 – Personal information of a person.
- 5 On 12 July 2021, Mr Moyle wrote to the University requesting an updated document schedule which detailed the exemptions applied. Ms Beaumont provided this on 14 July 2021. She also indicated that the documents identified by the University as already being in his possession were excluded from assessment under the Act, because they were either currently or previously in his possession, or otherwise available to the public.
- 6 On 9 August 2021, Mr Moyle made an application for internal review of the decision and provided further information to the University on 9 August 2021 and 23 August 2021.
- 7 On 25 August 2021, Mr Brendan Parnell, a delegate of the University under the Act, issued an internal review decision to Mr Moyle. Mr Parnell affirmed the initial decision and provided further additional reasons in relation to the application of ss35 and 36, which are set out in the Submissions section of this decision below.
- 8 On 26 August 2021, Mr Moyle applied to this office for external review. His external review application was accepted under section 44(1), as Mr Moyle had received the internal review decision and applied for external review within 20 working days of that decision.

Issues for Determination

- 9 I must determine whether the information not released by the University is eligible for exemption under ss31, 35, 36, or any other relevant section of the Act.
- 10 As ss35 and 36 are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in section 33. This means that, should I determine the information is *prima facie* exempt from disclosure under these sections, I must then determine whether it would be contrary to the public interest to release it. In doing so, I must, at least, consider all the matters contained in Schedule 1 and ensure irrelevant considerations set out in Schedule 2 have not been taken into account.

Relevant legislation

- 11 The University has relied on s31, 35 and 36 of the Act to exempt information from release in its decision. I attach copies of these sections to this decision at Attachment 1.
- 12 Copies of s33 and Schedule 1 of the Act are also attached at Attachment 1.

Submissions

The University – original decision

- 13 The University did not make submissions to this external review, beyond the reasoning of its decisions. As the internal review affirmed the original decision, this reasoning is largely contained in Ms Beaumont's decision, which provided:

Section 31 - Legal Professional Privilege

...

This section states 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.

Material that I determine falls within legal professional privilege includes:

- *Legal review and advice with respect to complaints against yourself and amongst members of the amateur radio community; and*
- *Correspondence between University staff and University legal advisors containing legal advice.*

Communications between the University's legal team and University staff and third parties are confidential communications and of such a nature that those relevant documents would be privileged from production in legal proceedings. Privilege has not been waived in respect of any documents. The documents referred to are communications between UTAS [University] officers and legal counsel.

For these reasons I determine these documents are exempt from release. The documents are referred to in Schedule 1.

Section 35 - Internal deliberative information

I have also considered Section 35 of the RTI Act which states information is exempt information if it consists of an opinion, advice or recommendation, a record of consultations or deliberations, in the course of, or for the purposes of deliberative processes and; (sic) does not include purely factual information, a final decision or a reason which explains a decision, order or ruling.

Material that I have determined as internal deliberative information includes:

- *Internal working documents, pre-decisional considerations, and any documents that are not purely factual information;*
- *Documents that would disclose the matter and the nature of the consultation and deliberation that took place for deliberative purposes;*
- *Documents containing recommendations, opinion and advice prior to the making of a final decision; and*

- Reports on the findings of internal investigations.

Pursuant to AMC Amateur Radio Assessor Guidelines non-compliance with the Assessor Guidelines can be considered a serious offence which may justify removal of an individual's accreditation as an assessor. Likewise, conduct [sic] individuals who conduct themselves in a manner which does not comply with the University of Tasmania behaviour policy may face consequences which include discontinuation of an individual's involvement with the University. An inquiry by the College/Division which was undertaken [sic] obtain all relevant information to inform the decision making process for dealing with such a complaint is, by its very nature, internal deliberative information of the investigator and all those who contributed in providing that information.

Information with respect to the decision including the collection of information, meeting notes, responses from relevant officers, and any communications between staff in discussion of legal advice sought out in making a decision, were internal deliberations and therefore it is contrary to the public interest for them to be released.

Section 36 - Personal information of a person

I have determined that there are a number of documents within the information sought that contain personal information whereby the release of that information would cause their identity [sic] to be apparent or reasonably ascertainable. The release of that information is therefore not in the public interest. Some personal details of officers and third parties have been redacted in some documents that are to be released. The small size of the Australian Amateur Radio community, and the complainants being known to each other, means it has not been possible to redact some documents without the identity of the individuals remaining identifiable. Documents that could not be redacted to remove personal information have not been released to you.

- 14 In her application of the public interest test under section 33 relevant to the information determined to be prima facie exempt from disclosure under ss35 and 36, Ms Beaumont determined that the following matters from Schedule 1 weighed in favour of releasing the information:
 - (c) whether the disclosure would inform a person about the reasons for a decision;
 - (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions; and
 - (m) whether the disclosure would promote or harm the interests of an individual or group of individuals.

- 15 However, she determined that the following matters weighed against releasing the information:
- (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; and
 - (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.

- 16 Ms Beaumont concluded that releasing the information determined to be *prima facie* exempt from disclosure under ss35 and 36 would be contrary to the public interest and reasoned as follows:

I have given particular weight and relevance to the factors above in forming the following views:

- All operators of amateur radio require a certificate of proficiency and a callsign to operate. Because Amateur Radio examination is a volunteer led process, it is important for public safety that other assessors and candidates are able to communicate to the AMC any safety and other concerns that they perceive may be relevant to the AMC in its role as manager of Amateur Radio examinations in Australia.
- Exposing personal opinions which were expressed under the intention of providing information relevant to the safety or better governance of the Amateur Radio process may impact the ability to attract future volunteers to this process.
- The AMC is reliant on various sources on information to obtain feedback on the effectiveness of its processes. Failure to maintain confidentiality of feedback from potential applicants could harm the ability to obtain this information in the future.

Mr Moyle

- 17 Mr Moyle provided submissions in support of his application for internal review on 8 August 2021. Where applicable, parts of these are set out verbatim below, and his footnotes are contained within the text in brackets.
- 18 In relation to Ms Beaumont's reliance on the legal professional privilege exemption under section 31 of the Act, Mr Moyle submitted that in applying section 31, the University must ensure the information satisfied the requirements of the Evidence Act 2001 and that the privilege had not been waived.

- 19 He submitted that generally, Ms Beaumont had misapplied the public interest test in relation to the information claimed to be exempt from disclosure under ss35 and 36. He submitted that there was no evidence that the allegations made against him, or the personal information of the persons who made the allegations, were confidential. Further, that releasing such information would not jeopardise the health or safety of other assessors or candidates, nor hinder the provision of feedback to the AMC. He set out that:

9. ...It could be argued that by not including the public interest test as a sub-category of Internal Deliberative Information (s 35) exemption and Personal Information of a Person (s 36) exemption, the decision is in error. In other words, the delegated officer has incorrectly applied the public interest test.

10. Moreover, the public interest test (s 33) must be applied in the context of the object of the RTI Act. The object of the RTI Act is to favour the disclosure of information (3. Information in the possession of a public authority means information in the possession of a public authority that relates to the official business of the authority, but does not include information which is in the possession of the public authority for the sole purpose of collation and forwarding to a body other than another public authority) in the possession of a public authority (4. A 'public authority' is defined to include the University of Tasmania.). Importantly, the public interest 'test is not a matter of discretion, but rather requires an evaluative judgment assessed on the basis of objective criteria'. (5. Gun Control Australia Inc v Hodgman and Archer [2019] TASSC 3, [19].)

...

42. The delegated officer must support her assertions with factual evidence. There is no evidence that the safety or welfare of other assessors or candidates are in jeopardy. There is no evidence that the purported allegations are actually confidential. In fact, the evidence is to the contrary. There is no evidence that the espousing of personal opinions will impact on the safety or better governance of the Amateur Radio process or will stop feedback to the Australian Maritime College.

43. Furthermore, it is no secret that members of the Radio Amateur Society of Australia ('RASA') have made complaints [representations] about the Applicant to Mr Martin Crees-Morris (Manager – OMC and Amateur Radio, Australian Maritime College)...

- 20 In relation to the application of the public interest test for information claimed to be exempt from disclosure under s35, he submitted that Ms Beaumont had not considered all relevant factors. Notably, that she had not considered the validity of the allegations made against him and had not considered the matter in the context of the conflict between various groups within the radio community, setting out that:

27. The delegated officer states the documents ‘were internal deliberations and therefore it is contrary to the public interest for them to be released’. (10. The delegated officer’s decision, dated 12 July 2021, page 3, [6].) Clearly the delegated officer has not applied the public interest test. She has simply concluded that since the documents relate to internal deliberative information, they are automatically exempt.

28. Furthermore, the Applicant contends that the delegated officer has not properly considered the relevant factors...

29. The characterisation of a breach of the AMC Amateur Radio Assessor Guidelines as a serious offence is hyperbole. Moreover, it is factually incorrect in respect to the Applicant. (11. The document titled ‘Appellant’s Appeal Submission’, dated 15 July 2021, submitted to the AMC contains a detail explanation why the Applicant [Mr Moyle] has not breached any rules, ordinances, or legislation.) An Amateur Radio volunteer assessor only conducts Amateur Radio exams on behalf of the Australian Maritime College. The role is a community service without reward but the assessor’s work provides a significant financial benefit to the Australian Maritime College.

...

32. Clearly, the delegated officer has not considered the veracity of the purported allegations and whether the allegations were lawfully valid and whether they were made in bad faith. The complainants were all members of the Radio Amateur Society of Australia which is currently in considerable conflict with the Wireless Institute of Australia of which the Applicant holds the position of Vice President.

33. In conclusion, a proper consideration of the public interest is in favour of the release of all the information that has been redacted by the delegated officer.

21 In relation to the application of the public interest test for information claimed to be exempt from disclosure under s36, he submitted that:

45. The delegated officer has determined that the information is personal information but has failed to apply the s 33 public interest test. In other words, the delegated officer has stated that the information is personal information and therefore is exempt.

...

47. Furthermore, an amateur radio operators’ name, address and callsign is not confidential personal information. It is publicly available to any person in the world...

48. Moreover, the governing members of the Radio Amateur Society of Australia [RASA]...have been extremely critical of the Wireless

Institute of Australia [WIA], of which the Applicant is the Vice President, on the internet and in particular social media. (13. RASA states that ‘the WIA does not offer the in-depth investigative or representative services we provide’).

22 Mr Moyle also raised the following relevant issues:

- He did not have copies of all the documents the University identified as being already in his possession and requested the University provide these to him.
- He submitted that the descriptions of documents in the document schedule should not have been redacted, and that he required this information to be able to properly respond to the exemptions claimed by the University. He also queried why the University had redacted the document descriptions in relation to documents already sent to him.
- He submitted that the searches carried out by the University for information responsive to the application were insufficient. This was because he had identified three emails which he claimed would have been responsive to the application but were missing from the document schedule.

23 On 23 August 2021, Mr Moyle provided supplementary submissions which provided examples of the public conflict and the opinions expressed by members which included online articles, screenshots of comments and correspondence from the WIA to a member regarding misrepresentation in public.

24 In his application for external review, Mr Moyle commented *The University of Tasmania, amongst other things, has made serious errors of fact and law.*

The University – internal review

25 In his internal review decision, Mr Parnell provided the following additional reasons in relation to the application of sections 35 and 36:

Section 35

...

If the University is unable to deliberate and include those deliberations in written communication, it may inhibit and harm the ability of the University to function effectively.

For these reasons I affirm the Original Decision with respect to the exemption contained in section 35 of the RTI Act.

Section 36

Having reviewed the information sought, I am not of the view that it is possible to release any of the exempt documents, including a release

with redactions, without disclosing significant and identifying personal information. Any such release of the information concerned would, in my view, be of significant concern to the relevant individuals.

I note your commentary and interpretation of ‘personal information’. As disclosure of a person’s name would make their identity apparent, as specified at section 5 of the RTI Act, I disagree with your view that it is not ‘personal information’.

I also note your comments that there have been complaints made against you and you have name [sic] various persons. This claim does not support the public interest case to release personal information and instead, in my view, supports exempting it based on the reasoning contained within the Original Decision.

Finally, having a person’s details publicly available via a database with their permission does not, in my view, suggest that they have waived their rights for the reasonable protection of their personal information in separate, confidential, and potentially unrelated communications.

For these reasons I affirm the Original Decision with respect to the exemption contained at section 36 of the RTI Act.

- 26 In relation to the searches carried out by the University for information responsive to the application, Mr Parnell indicated:

I conclude that the original request by the Decision Maker for information from the relevant areas of the University was exhaustive and the information provided covered the scope of your RTI request. I note your concern as to two emails you sent to the University and a response. I am of the view that as these documents are in your possession further investigations are not required.

Analysis

- 27 In accordance with section 7 of the Act, a person has a legally enforceable right to information in the possession of a public authority, unless that information is exempt from disclosure.
- 28 The objects of the Act are set out in section 3, and are stated to improve democratic government in Tasmania:
- (a) *by increasing the accountability of the executive to the people of Tasmania; and*
 - (b) *by increasing the ability of the people of Tasmania to participate in their governance; and*
 - (c) *by acknowledging that information collected by public authorities is collected for and on behalf of the people of Tasmania and is the property of the State.*

The purpose of the Act is therefore to facilitate and promote the provision of the maximum amount of information.

Preliminary matters

- 29 The University has provided this office with a summary of the searches undertaken in response to the application. The summary is on the template from the Ombudsman's *Guideline in relation to searching and locating information*¹ and uses the process set out in this guidance from my office. I have reviewed it and am satisfied that the University has conducted sufficient searches for relevant information and I have not considered this matter further in this decision.
- 30 Following a letter from this office, on 18 April 2024, the University released the documents it had originally determined to already be in Mr Moyle's possession to him. I have not considered this matter further in this decision.
- 31 When dealing with an email chain, my references to numbered emails (i.e. the first or second email) are to those which appear first in the chain in reverse chronological order.
- 32 I am satisfied that the following information is out of scope as it is unrelated to the application and accordingly, does not need to be released to Mr Moyle:
 - pages 1-2 of Document 88;
 - Documents 112-115, 140, 152, 154 and 161.
- 33 The University has applied:
 - section 31 (legal professional privilege) to exempt information from disclosure in document numbers 8-9, 40, 54, 60, 62, 64, 71-75, 79, 81, 85, 88-89, 97, 99-100, 118-121, 138-139, 147-148, 155-156, 164, 166-168, 175, 182-183 and 191 in full;
 - section 35 (internal deliberative information) to exempt information from disclosure in document numbers 21, 25, 41, 46-47, 49, 51-53, 55, 59, 63, 65-68, 70, 90, 94-96, 98, 116-117, 122-123 and 125-126 in full;
 - section 36 (personal information of a person) to exempt information from disclosure in document numbers 2-7, 20, 22-23, 45, 56-57, 78, 82-83, 110-115, 127-137, 141-143, 153-154, 157-163, 165, 169-170, 176-178, 181, 186-187 and 189-190 in full;
 - sections 31 and 35 to exempt information from disclosure in document numbers 43, 58, 81, 101-109, 173 and 184 in full;
 - sections 31 and 36 to exempt information from disclosure in document numbers 171 and 174 in full;
 - sections 31, 35 and 36 to exempt information from disclosure in document number 180 in full; and

¹ Guideline 4/2010, available at www.ombudsman.tas.gov.au/right-to-information/rti-publications

- sections 35 and 36 to exempt information from disclosure in document numbers 80, 144-146 and 179 in full.

Section 31 – Legal professional privilege

- 34 For information to be exempt from disclosure under section 31 of the Act, I must be satisfied that it *is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege*.
- 35 Legal professional privilege is a common law principle which protects the confidentiality of communications made between a lawyer and their client, if they were made for the dominant purpose of (i) obtaining or providing legal advice; or (ii) for use in existing or anticipated litigation.² This privilege is also codified in section 118 of the *Evidence Act 1995* (Cth) as client legal privilege.
- 36 The privilege does not extend to communications made for non-legal purposes. As Gleeson CJ noted in *Esso Australia Resources Ltd v FCT*, it would be *contrary to the rationale of the privilege that communications made for non-legal purposes should be able to free-ride on the protected purpose and obtain protection*.³
- 37 I am not required under the Act to consider the public interest in relation to communications that are exempt by reason of legal professional privilege. As the Courts have noted, legal professional privilege exists to serve the public interest in the administration of justice, by promoting free disclosure between clients and their lawyers and to enable lawyers to give proper legal advice.⁴
- 38 I will deal with the information under the following categories:

Information exempt under section 31

Documents 8-9, 40, 43, 54, 60, 62, 64, 71-72, 79, 85, 89, 97, 99-101, 103-108, 118-121, 138-139, 145 (except first email), 147-148, 155-156, 164, 166-168, 172-173, 182-185 and 191

- 39 These are draft documents and emails between University staff members and legal advisors. Some emails contain attachments of draft and/or other documents. I am satisfied that these emails and attachments are communications between a lawyer and client for the dominant purpose of obtaining or providing legal advice and are exempt from disclosure under section 31.

Documents 73-75

- 40 Document 75 is an email from Mr Martin Crees-Morris forwarding Documents 73 and 74 to Ms Katie Lack. Mr Crees-Morris and Ms Lack both hold non-legal roles at the University and this is not a communication between a lawyer and client. However, I am satisfied that it forwards and summarises legal advice provided and remains eligible for exemption under section 31.

² *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49, at [73] per Gleeson CJ, Gaudron and Gummow JJ, at [107] per Callinan J;

³ *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49, at [78] per Gleeson CJ

⁴ *Grant v Downs* (1976) 11 ALR 577, at [586] per Stephen, Mason and Murphy JJ.

Information partially exempt under section 31

Document 58

- 41 This is an email from Mr Crees-Morris to other non-legal University staff members, forwarding three attachments. The second attachment to the email is a document prepared by Ms O'Keefe, and the third attachment is an email between Mr Crees-Morris and Ms O'Keefe. I am satisfied that the second and third attachments were communicated for the dominant purpose of providing legal advice and are exempt from disclosure under section 31.
- 42 The email and the first attachment appear to be deliberative in nature and I will assess these under section 35.

Documents 81 and 102

- 43 These are emails between Mr Crees-Morris and Ms O'Keefe and further emails between Mr Crees-Morris and other non-legal University staff members. The University has applied sections 31 and 35 to exempt the emails from disclosure in full. I am satisfied that the emails between Mr Crees-Morris and Ms O'Keefe, and those forwarded by Ms O'Keefe, are communications between a lawyer and client for the purpose of obtaining or providing legal advice and are exempt from disclosure under section 31.
- 44 The first email in Document 81 and the first two emails in Document 102 are deliberations or consultations between non-legal University staff members in the course of the official business of the public authority. Accordingly, they will be assessed under s35.

Document 109

- 45 These are emails between Mr Crees-Morris, the Legal Services team and other University staff members in relation to an email from a third party to Mr Crees-Morris. The University has applied sections 31 and 35 to exempt the emails from disclosure in full. The third and fourth emails in the chain were forwarded to the Legal Services team. I am satisfied that these emails are communications between a lawyer and client for the purpose of obtaining legal advice and are exempt from disclosure under section 31.
- 46 The first and second emails are merely acknowledging receipt and giving thanks and do not record any deliberations or consultations between University staff members. Accordingly, they are not exempt under sections 31 or 35 and should be released to Mr Moyle.

Document 88

- 47 Document 88 consists of 102 pages of emails. As provided above, the University has applied section 31 to exempt this document from disclosure in full. However, it is not clear why this document would be exempt from disclosure under section 31 in its entirety.

- 48 The document may be part of the response to Mr Perraton's email at page 3 of document 88, which requested that Mr Crees-Morris carry out a search following Mr Moyle's request for information under the Act. Responding to a request under the Act is not the provision or request for legal advice, however, so would not be automatically eligible for exemption under s31.
- 49 I will assess each email within document 88 individually (where the information has not been repeated elsewhere in the documents provided to this office by the University).

Information exempt under section 31

Pages 4 (first two emails), 6 (first email), 11-12, 15-17, 22-28, 30-32, 38-40 and 42-46, 49-50, 53 (last email), 54-56, 59-69 and 145 (except first email)

- 50 These are emails between non-legal staff and legal advisors at the University, with some between non-legal staff relaying legal advice or formulating advice requests. I am satisfied that they are communications between a lawyer and client for the dominant purpose of obtaining or providing legal advice and are exempt from disclosure under s31.

Information not exempt under section 31

Pages 3 and 14

- 51 These are emails from Mr Perraton to Mr Crees-Morris regarding Mr Moyle's application for assessed disclosure of information. I am not satisfied that they were communicated for the dominant purpose of obtaining or providing legal advice. Rather, they were communicated to obtain information responsive to Mr Moyle's application. They are not therefore exempt from disclosure under section 31 and should be released to Mr Moyle.

Pages 8-9, 51-52, 53 (first two emails), 70, and 74

- 52 These are emails between University staff members, forwarding and discussing emails from Mr Moyle. It is not clear why these emails would be exempt from disclosure under section 31, as they were not made between a lawyer and a client, or relay any legal advice obtained.
- 53 Pages 8-9 and 81-84 are purely administrative exchanges and would not be exempt under s35 and should be released to Mr Moyle.
- 54 The remainder will be assessed under s35.

Pages 4 (second email), 5, 6 (second email), 7, 10, 13, 18-21, 29, 33, 41, 47-48, 80-84 and 86-102

- 55 These are emails from Mr Moyle to the University or replies to him. They do not form part of emails seeking or providing legal advice and it is not clear why they would be exempt from disclosure under section 31. I am not satisfied that they were communicated for the dominant purpose of obtaining or providing legal advice. They are not therefore exempt from disclosure under section 31 and should be released to Mr Moyle.

Pages 34-37, 57-58, 71-73, 75-79, 85

- 56 These are emails and a screenshot of a Facebook post sent by third parties who are not employees of the University. They are not attached to requests for legal advice and it is not apparent why s31 would be applicable to exempt this information. All of the information is duplicated in other documents and claimed to be exempt for other reasons, so I will not address it further here.

Information to which section 31 is also applicable

- 57 The University has applied sections 35 and/or 36 to claim that other information is exempt in full. However, I consider section 31 to be the appropriate exemption in relation to the following:

Documents 55, 65-67 and 122

- 58 These are emails between Mr Crees-Morris and other University staff members, forwarding and discussing emails between Mr Crees-Morris and Ms O'Keefe and attaching draft documents. The University has applied section 35 to determine that the emails and attachments are exempt from disclosure in full.
- 59 However, I am satisfied that the emails between Mr Crees-Morris and Ms O'Keefe, and the draft documents attached, are communications between a lawyer and client for the dominant purpose of obtaining or providing legal advice and are exempt from disclosure under section 31.
- 60 The remaining parts of the emails between University staff members are administrative in nature and do not record any deliberations or consultations between University staff members. Accordingly, the remaining parts of these emails are not exempt under section 35 and should be released to Mr Moyle.

Document 59

- 61 These are emails between Mr Crees-Morris and other University staff members, forwarding emails between Mr Crees-Morris and Ms O'Keefe and attaching a draft document. The University has applied section 35 to determine that the emails and attachments are exempt from disclosure in full.
- 62 I am satisfied that the emails between Mr Crees-Morris and Ms O'Keefe, and the attachment, are communications between a lawyer and client for the dominant purpose of obtaining or providing legal advice and are exempt from disclosure under section 31.
- 63 I am also satisfied that the second line of the email between Mr Crees-Morris and University staff members relays legal advice received and is also exempt from disclosure under section 31.
- 64 The remaining part of this email will be assessed under section 35.

Documents 68, 116 and 123

- 65 These are emails between Mr Crees-Morris and other University staff members, forwarding and discussing emails between Mr Crees-Morris and Ms O'Keefe and in some cases, attaching draft documents. The University has applied section 35 to determine that the emails and attachments are exempt from disclosure in full.
- 66 I am satisfied that the emails between Mr Crees-Morris and Ms O'Keefe, and the attachments, are communications between a lawyer and client for the dominant purpose of obtaining or providing legal advice and are exempt from disclosure under section 31.
- 67 I will assess the remaining parts of these emails under section 35.

Document 90

- 68 This is an email from Ms Lynch to Mr Crees-Morris. The University has applied section 35 to determine that the email is exempt from disclosure in full. I am satisfied that the second and fourth sentences relay legal advice received and are exempt from disclosure under section 31. I will assess the remaining parts of this email under section 35.

Documents 95-96 and 98

- 69 These are emails between Mr Crees-Morris and other University staff members, forwarding and discussing emails between Mr Crees-Morris and Ms O'Keefe. University has applied section 35 to exempt these emails from disclosure in full.
- 70 I am satisfied that the emails between Mr Crees-Morris and Ms O'Keefe are communications between a lawyer and client the dominant purpose of obtaining or providing legal advice and are therefore exempt from disclosure under section 31.
- 71 I will assess the remaining parts of these emails under section 35.

Documents 144 and 146

- 72 These are emails between Mr Crees-Morris and other University staff members, forwarding and discussing emails between Mr Crees-Morris and Ms O'Keefe. The University has applied sections 35 and 36 to determine that the emails are exempt from disclosure in full.
- 73 I am satisfied that the emails between Mr Crees-Morris and Ms O'Keefe, and the attachments, are communications between a lawyer and client for the dominant purpose of obtaining or providing legal advice and are exempt from disclosure under section 31.
- 74 I will assess the remaining parts of the emails under section 35.

Section 35 – Internal deliberative information

75 For information to be exempt under section 35(1) of the Act, I must be satisfied that it consists of:

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

76 Once those conditions are met, I must then be further satisfied that the information was prepared or recorded during, or for the purpose of, deliberative processes related to the official business of the University. Under section 35(2)-(4), the exemption does not apply to:

- purely factual information;
- a final decision, order or ruling given in the exercise of an adjudicative function;
- a reason which explains such a decision, order or ruling; or
- information that is older than 10 years.

77 If I find the information to be *prima facie* exempt under section 35, I must then consider whether it is contrary to the public interest to disclose the information under section 33, considering, at least, all the matters contained in Schedule 1 and disregarding all the matters contained in Schedule 2.

78 The University has sought to claim that the entirety of many emails are exempt under s35. This is not a correct approach and has not excluded the purely factual information at the beginning and end of these emails. None of my findings below apply to the details of the senders of emails, the time and date of emails, salutations, signature blocks or email footers. This is not able to be exempt under s35 and should be released to Mr Moyle.

79 I further note that Documents 46-47 are copies of document 48, which has been released in full to Mr Moyle and are not exempt from release.

80 I will deal with the information under the following categories:

Information *prima facie* exempt under section 35

Documents 21, 41, 49, 51-52, 53, 58, 59(first email), 68, 70, 81, 94, 102, 117, 125-126 and 179

81 These are draft documents and emails between University staff members. Some of the emails contain attachments consisting of draft documents seeking input about their content from University staff members. Some of the emails express opinions or seek input from other staff members.

- 82 I am satisfied that these documents record consultations and deliberations between staff members at the University for the deliberative processes related to the official business of the University and are *prima facie* exempt under section 35(1)(b).

Information partially *prima facie* exempt under section 35

Document 25

- 83 This is a briefing prepared by Mr Crees-Morris in response to a letter of complaint from Mr Moyle. I am satisfied that the initial part of the briefing until the end of the *Background* contains purely factual information and is not exempt from disclosure under section 35. Mr Crees-Morris' name and the date at the conclusion of the document are also purely factual.
- 84 I am satisfied that the remainder of the document is a record of advice prepared by an officer of the University in the course of a deliberative process and is *prima facie* exempt from disclosure under section 35(1)(a).

Document 63

- 85 This is an email from Mr Crees-Morris to other University staff members seeking input. I am satisfied this is a record of deliberations between University staff members and is *prima facie* exempt under section 35.
- 86 The attachment contains the final version of a letter from Mr Crees-Morris to Mr Moyle. This does not reveal any information about the subject of the deliberations in the email and is not exempt, but has already been provided to Mr Moyle and need not be again released.

Document 90

- 87 This is an email from Ms Lynch to Mr Crees-Morris. I have already determined parts of this email to be exempt under section 31. I am satisfied that the third sentence is a record of deliberations between staff members at the University and is *prima facie* exempt from disclosure under section 35(1)(b).
- 88 The remaining parts of this email are administrative in nature, not exempt from disclosure under section 35 and should be released to Mr Moyle.

Documents 95-96, 98 and 116-117

- 89 These are emails between Mr Crees-Morris and other University staff members, forwarding and discussing emails between Mr Crees-Morris and Ms O'Keefe. I have already determined parts of these emails to be exempt under section 31.
- 90 I am satisfied that the remaining parts of the emails record consultations and deliberations between staff members at the University for the deliberative processes of the University and are *prima facie* exempt under section 35(1)(b).

Document 123

- 91 This is an email between Mr Crees-Morris and other University staff members, forwarding and discussing emails between Mr Crees-Morris and Ms O'Keefe. I have already determined parts of these emails to be exempt under section 31.
- 92 In the second line of the last email, I am satisfied that the seventh word to the end of the sentence is a record of deliberations between staff members at the University and is *prima facie* exempt under section 35(1)(b). The rest of the information in this email is administrative in nature, not exempt under section 35 and should be released to Mr Moyle. The second email has been assessed as part of Document 68.

Documents 144-146

- 93 I have assessed the emails between Mr Crees-Morris and Ms O'Keefe to be partially exempt under section 31. I am satisfied that the other emails between Ms Lynch, Mr Crees-Morris and Mr Cook record consultations or deliberations between University staff members and are *prima facie* exempt under section 35(1)(b).

Pages 70-77 of Document 88

- 94 These are emails between Mr Crees-Morris and a third party and further emails between Mr Crees-Morris and Ms Lack. I consider the emails between Mr Crees-Morris and Ms Lack to be records of deliberations between staff members at the University and are *prima facie* exempt from disclosure under section 35(1)(b). I will assess the emails between Mr Crees-Morris and a third party under section 36.

Public interest test

- 95 I now turn to my assessment of whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt under s35. I consider the following matters from Schedule 1 to be relevant and weigh in favour of disclosure:

- (a) *the general public need for government information to be accessible;*
- (c) *whether the disclosure would inform a person about the reasons for a decision;*
- (d) *whether the disclosure would provide the contextual information to aid in the understanding of government decisions;*
- (f) *whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation; and*
- (g) *whether the disclosure would enhance scrutiny of government administrative processes.*

- 96 I consider there to be some benefit in disclosing the information in terms of informing Mr Moyle and adding context to the decision taken by the University, as well as enhancing scrutiny of government decision making or administrative processes.
- 97 However, I consider this to be of relatively low weight overall. The information consists of draft documents and deliberations between University staff members which do not communicate a finalised position. Transparency and accountability of government processes are key reasons for the Act existing and for information to be disclosed. However, the Act also recognises that some information should be exempt from disclosure, and the purpose of section 35 is to ensure the integrity of early deliberative processes in decision making.
- 98 I give weight to the following matters:
- (n) whether disclosure would prejudice the ability to obtain similar information in the future; and
 - (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.
- 99 I consider there to be a risk that public officers involved in complaints handling and disciplinary matters may be reluctant to express early opinions thoroughly and candidly if they were routinely disclosed to the public, or staff members whose performance is subject to review, as part of the Right to Information process.
- 100 I therefore find that it would be contrary to the public interest to release the information I have determined to be *prima facie* exempt above, and it is therefore exempt under section 35. The exceptions to this finding are in relation to the first two emails in Document 102 and the first email in Document 81, which are not exempt and should be released to Mr Moyle.

Section 36 – Personal information of a person

- 101 For information to be exempt under section 36 of the Act, I must be satisfied that its release would reveal the identity of a person other than Mr Moyle, or that the information would lead to that person's identity being readily ascertainable.
- 102 Section 36(1) 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 13.*
- 103 Personal information is defined in section 5 to be:
- ...any information or opinion in any recorded format about an individual -

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

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

- 104 If I find the information to be *prima facie* exempt under section 36, I must then consider whether it is contrary to the public interest to disclose the information under s33, considering at least all the matters contained in Schedule 1 and disregarding all the matters contained in Schedule 2.
- 105 The University has claimed exemption under s36 to withhold numerous pages of information in full. I am satisfied that the following information contains personal information of a third party which would reveal their identities, or lead to their identities being readily ascertainable, and are *prima facie* exempt from disclosure under section 36, subject to the public interest test. These are Documents: 2-7, 20, 22-23, 45, 56-57, relevant parts of 70-77, 78, 80, 82-83, 110-111, 127-137, 141-143, 153, 157-161, 162-163, 165, 169, 170-171, 174, 176-178, 180-181, 186-187 and 189-190.
- 106 While the University has not specifically indicated the exemption relied on to withhold the redacted information in the documents released to Mr Moyle, this information consists of names, position titles and contact details. I am satisfied that this information is personal information and is *prima facie* exempt from disclosure under section 36, subject to the public interest test.
- 107 I make further comments in relation to the following documents:
- Documents 110-111, 127-137, 137, 141, 160, 162-163, 171, 176-178, 181, 186-187 and 189*
- 108 These are emails between University staff members and third parties. The University has applied sections 31 and/or 36 to exempt these emails from disclosure in full. I am satisfied that these emails contain personal information of a third party which would reveal their identities or lead to their identities being readily ascertainable and are *prima facie* exempt from disclosure under section 36.
- 109 The final email in the chain in document 171 is administrative in nature, is not exempt from disclosure and should be released to Mr Moyle.

Document 180

- 110 This is an email with attachments from Ms O'Keefe to a University staff member. The University has applied sections 31, 35 and 36 to determine the email and attachments are exempt from disclosure in full. I am satisfied the attachments to the email contain personal information of a third party which would reveal their identities, or lead to their identities being readily ascertainable, and are *prima facie* exempt from disclosure under section 36.
- 111 The body of the email is administrative in nature, was not communicated for the purpose of obtaining or providing legal advice and does not record any deliberations or consultations between University staff members. Accordingly,

it is not exempt from disclosure under sections 31, 35 or 36 and should be released to Mr Moyle.

Pages 70-77 of Document 88

- 112 I am satisfied that the emails between Mr Crees-Morris and a third party contain personal information of that third party which would reveal their identity or lead to their identity being readily ascertainable and are *prima facie* exempt from disclosure under section 36.

Public interest test

- 113 I will assess the University's application of section 36 in relation to the following categories of people:

- public authority staff; and
- members of the amateur radio community.

- 114 In relation to both categories, I consider matters (a), (c), (d), (f) and (g), as set out above in relation to s35, to be relevant and weigh in favour of disclosure. As before, I consider there to be some benefit in disclosing the information for the purpose of informing Mr Moyle and adding context to the decision taken by the University, as well as enhancing scrutiny of government decision making or administrative processes. I provide further comments in relation to each category below.

Public authority staff

- 115 The University has applied redactions to the names, telephone numbers, email addresses and position titles of public authority staff in the documents released to Mr Moyle. I consider this information to be personal information as these people's identities would be apparent or reasonably ascertainable from the information.

- 116 As I have consistently found in previous decisions⁵, in the absence of any specific and unusual circumstances, the personal information of current and former public authority staff generated while performing their regular duties is not usually exempt from disclosure under section 36. This topic has been considered by the Australian Information Commissioner⁶ and is standard Australian practice. Such information includes names, position titles, signatures, work telephone numbers and email addresses.

- 117 Accordingly, I find that names, position titles, work telephone numbers and email addresses of current (and, if applicable, former) public authority staff

⁵ See *Emma Hamilton and Department of Natural Resources and Environment Tasmania*, issued 24 November 2023, at [53]-[57], available at www.ombudsman.tas.gov.au; *Linda Poulton and Department of Natural Resources and Environment*, issued 24 November 2023, at [96]-[97], available at www.ombudsman.tas.gov.au; and

Tarkine National Coalition and Department of Natural Resources and Environment Tasmania, issued 13 October 2023, at [84]-[86]; available at www.ombudsman.tas.gov.au.

⁶ Australian Information Commissioner, *Disclosure of public servant details in response to a freedom of information request*, available at www.oaic.gov.au, accessed 13 February 2023.

members are not exempt from disclosure under section 36 and should be released to Mr Moyle.

- 118 The exception is direct or personal telephone numbers of public authority staff, if this information is not routinely provided to the public. I accept that there is a potential for harm in the release of this type of information, and consider it valid for public authorities to limit the release of direct contact numbers to enable contact from the public to be directed through specific channels.

Members of the amateur radio community

- 119 Various members of the amateur radio community have raised issues to the AMC and the University has sought to exempt the personal information of these people from disclosure. Other members are mentioned in documents but have not provided the documents to the University, or authored them.

- 120 I consider following matters from Schedule 1 to weigh against disclosure:
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
 - (n) whether the disclosure would prejudice the ability to obtain similar information in the future; and
 - (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.

- 121 I note from the AMC's website that the AMC no longer conducts amateur radio examinations and this function has now been transferred to the ACMA. However, I still consider it to be of fundamental importance that the integrity of assessment processes at the AMC is protected. To ensure good standards of training and proficiency are maintained, it is necessary for third parties to be able to raise safety and other concerns to the AMC, in confidence. The complainants would have had an expectation of confidentiality in relation to how the University managed their complaints and personal information. If there was a possibility that their personal details could be disclosed to third parties through the right to information process, people may be reluctant to raise issues in future. This could lead to poor practices developing in relation to training and pose a risk to public safety.

- 122 The AMC formerly relied on a network of voluntary assessors to conduct amateur radio examinations, and the ACMA's website confirms that these examinations are still led by volunteers. If volunteers were aware that their personal details may be disclosed to third parties through the right to information process, they may cease to donate their time, which would be a great loss to the community. I consider there to be a risk that disclosure of members' personal information could prejudice the ability to recruit volunteers in future.

- I23 In addition, I do not consider that members' names can simply be redacted from the documents without revealing their identities. As I previously determined in *Gerry Willis and Department of Health*,⁷ the risk that individuals may become identifiable becomes greater with smaller data sets. Given the small size of the amateur radio community, I consider there to be a significant risk that the identities of members would be revealed if the substance of a complaint and surrounding circumstances were disclosed.
- I24 Where members are merely mentioned in documents, they have neither authored or provided these documents to the University, nor consented to their personal information being shared. As such, I am of the view that it would be contrary to the public interest to disclose their personal information.
- I25 Therefore, I find that it would be contrary to the public interest for the personal information of members of the amateur radio community to be disclosed. This information is exempt under section 36 and is not required to be released to Mr Moyle.

Other matters

- I26 In relation to the redacted descriptions of documents in the document schedule, I agree with Mr Moyle's comments in his internal review submissions. It would be very difficult to properly respond to the exemptions claimed by the University where descriptions have been redacted. This appears to have occurred as the University has used the subject line of emails in its document schedule and, consequently, some contain personal information of third parties which it has then redacted.
- I27 However, there is also absolutely no reason why any redactions should be applied to the descriptions of documents which the University has determined are already in Mr Moyle's possession. The University should cease this practice and ensure that document schedules are not redacted, which is easily accomplished by using more general descriptions if the title of a document contains exempt information.
- I28 The University also did not indicate in the document schedule the exemptions relied upon to withhold the redacted information in the documents released to Mr Moyle. I also encourage the University to detail this information in its document schedules so there is clarify regarding the exemptions relied upon.

Preliminary Conclusion

- I29 For the reasons set out above, I determine the exemptions claimed pursuant to sections 31, 35 and 36 are varied.

⁷ (12 December 2023), at [31]-[32], available at www.ombudsman.tas.gov.au

Conclusion

- I30 As the above preliminary decision was adverse to the University, it was provided to it on 31 May 2024 to seek its input prior to finalisation, pursuant to s48(1)(a) of the Act.
- I31 On 21 June 2024, the University advised that it did not seek to make submissions in response to the preliminary decision. Consequently, my findings remain unchanged.
- I32 For the reasons set out above, I determine the exemptions claimed pursuant to sections 31, 35 and 36 are varied.
- I33 I apologise to the parties for the significant delay in finalising this decision.

Dated: 25 June 2024



Richard Connock
OMBUDSMAN

Attachment I – Relevant Legislation

31- Legal professional privilege

Information is exempt information if it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.

35 - Internal deliberative information

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

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

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

(2) Subsection (1) does not include purely factual information.

(3) Subsection (1) does not include –

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

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

Section 36 – Personal information of a person

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

(2) If –

- (a) an application is made for information under this Act; and
- (b) the information was provided to a public authority or Minister by a third party; and
- (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party –

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

- (d) notify that person that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information that has been applied for; and

- (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.
- (3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f), decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.
- (4) A notice under subsection (3) is to –
- (a) state the nature of the information to be provided; and
 - (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
 - (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.
- (5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) –
- (a) until 10 working days have elapsed after the date of notification of that person; or
 - (b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or
 - (c) until 20 working days after notification of an adverse decision under section 43; or
 - (d) if during those 20 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or
 - (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 33 – Public interest test

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

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

Schedule 1 – Matters Relevant to Assessment of Public Interest

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

- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

**Right to Information Act Review****Case Reference:** R2202-110**Names of Parties:** Linda Poulton and Department of Justice**Reasons for decision:** s48(3)**Provisions considered:** ss35, 36, 39

Background

- 1 The Tasmanian Government has announced plans to build a prison in northern Tasmania. On 1 October 2019, the Glen Avon Farms site at 135 Birralee Road, Westbury was announced by the Tasmanian Government as the preferred site for the prison. This site was eventually abandoned and the site of the Ashley Youth Detention Centre in Deloraine is now proposed for the project.
- 2 There was significant backlash from the Westbury community after it was announced that the township was the preferred site for the northern prison by the State Government. Consequently, the Government contracted with consultancy firm SGS Economics (SGS) to produce a report detailing the likely social and economic impacts a new prison would have on the Westbury community. In producing this survey SGS, with the assistance of Government, conducted a mail out survey of Westbury residents asking them to provide their views on Westbury being the preferred site for the northern prison.
- 3 On 23 June 2020, Westbury resident Ms Linda Poulton, submitted an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the Department of Justice (the Department). Specifically, Ms Poulton requested the following:
 1. *All communications between the State Government and its consultants in relation to the Glen Avon site including communications with and between:*
 - a.) *SGS Economics and Planning;*
 - b.) *JMG Engineers and Planners;*
 - c.) *Myriad Consulting; and*
 - d.) *Neil Shepherd and Associates – Town and Regional Planning*
 2. *All communications (whether internal or to external parties) relating to the new site.*
 3. *All information relating to the due diligence or other preliminary investigations undertaken by the Government or its consultants in relations to the new site.*

4. *All information relating to the site selection processes adopted by the State Government in respect of the new site.*
 5. *All information (including communications) relating to and leading to the transfer the new site to the State Government in 1999.*
 6. *All information relating to the funds used to transfer the new site to the State Government, including any national scheme from which these funds were sourced.*
 7. *All information held by the Government in relation to the natural or conservation values of the new site*
 8. *All information relating to the steps taken by the Government to administer or manage the new site since the transfer of the new site to the government in 1999, including without limitation:*

 - a.) *Steps taken to maintain the natural values on the new site;*
 - b.) *The erection of the signs referring to the Nature Conservation Act on the new site*
- 4 On 12 October 2020, Mr Tom Saltmarsh, a delegated officer under the Act, issued a decision on Ms Poulton's application for assessed disclosure. Information responsive to items 1(a), (b), (d) and 2 of Ms Poulton's application was deemed to be partially exempt from disclosure pursuant to s39(1)(a) of the Act. Items 5, 6, 7, and 8 of Ms Poulton's application were transferred to the then Department of Primary Industries, Parks, Water and Environment (DPIPWE) in accordance with s14 of the Act, as the Department considered that this information was more closely connected with DPIPWE's functions than the Department's. No information was identified as being responsive to items 3 and 4 of Ms Poulton's application.
- 5 On 15 October 2020, Ms Poulton requested an internal review of the original decision made by Mr Saltmarsh. On 30 November 2020, this internal review decision was issued to Ms Poulton by Ms Michelle Lowe, another delegate under the Act. Ms Lowe's internal review decision affirmed the original decision made by Mr Saltmarsh.
- 6 On 30 November 2020, Ms Poulton applied to Ombudsman Tasmania for an external review of Ms Lowe's decision. This application was accepted on the basis that the application was made within 20 working days of the applicant receiving Ms Lowe's internal review decision, and that the appropriate fee had been paid.

Issues for Determination

- 7 I must determine whether the information not released by the Department is eligible for exemption under ss35, 36 or 39 of the Act. As ss35, 36 and 39 are

contained in Division 2 of Part 3 of the Act, my assessment is made subject to the public interest test in section 33.

- 8 This means that, should I determine that any of the requested information is *prima facie* exempt from disclosure under ss35, 36 or 39, or any other exemption provision contained within Division 2 of Part 3 of the Act, I must then determine whether it would be contrary to the public interest for it to be disclosed. In making this assessment I must have regard to, at least, the matters contained in Schedule 1 of the Act.

Relevant Legislation

- 9 I have attached a copy of ss35, 36 and 39 of the Act to this decision at Attachment 1. Copies of s33 and schedule 1 of the Act are also included at Attachment 1.

Submissions

Applicant

- 10 The applicant did not make any submissions in relation to this external review.

The Department

- 11 The Department did not make submissions to this external review, beyond the reasoning it set out in the statement of reasons of both the original and internal review decisions. As Ms Lowe's internal review decision affirmed Mr Saltmarsh's original decision without restating the full reasoning, I will outline the reasoning provided by Mr Saltmarsh below.
- 12 Mr Saltmarsh's decision of 12 October 2020 set out that Items 1(a), (b), (d) and 2 of Ms Poulton's application were deemed to be partially exempt from disclosure pursuant s39(1)(a) of the Act, as:

I consider that the communications were made in confidence and were not intended to be made public.

Further, I consider that the communications are internal deliberative in nature [and] would be exempt, under section 35(1)(b) of the Act if generated by the Department

- 13 Ms Saltmarsh was also of the opinion that it would be contrary to the public interest for information he identified as *prima facie* exempt under s39 to be made available to Ms Poulton:

Section 39 of the Act is subject to the public interest test in section 33 of the Act – i.e. information will only be exempt if it is contrary to the public interest to disclose that 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 1 but are not limited to those matters.

I consider that the following Schedule 1 factors weigh in favour of disclosure:

- a) the general public need for government information to be accessible;*
- b) whether the disclosure would contribute to or hinder debate on a matter of public interest;*
- c) whether the disclosure would inform a person about the reasons for a decision;*
- d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions; and*
- f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation.*

I consider that there are no Schedule 1 factors weighing against disclosure.

Notwithstanding this, it is contrary to the public interest to disclose the information. The overriding public interest consideration is the need to ensure that there is a frank exchange of views between Departmental officers and consultants when making decisions. The disclosure of consultations or deliberations would likely prevent such exchanges from occurring, with a consequent detrimental impact on good decision making. Further, it would also lead to a reluctance to document the reasons for decision, with a consequent loss in transparency in the decision-making process.

Preliminary issue one – duplicate emails

- 14 Before proceeding with the Analysis section of my decision, I find it necessary to note that the information identified as responsive to Ms Poulton's application, and which was provided to my office for assessment, contains duplicate copies of many emails.
- 15 For clarity and efficiency, where there are duplicate emails my decision will explicitly assess one copy of each email but not its duplicates, however my findings will apply to all duplicate copies.

Preliminary issue two – correspondence with the Northern Tasmanian Development Corporation should be assessed under s35 of the Act as it is a public authority

- 16 In its original decision, which was affirmed on internal review, the Department assessed the State Government's correspondence with the Northern Tasmanian Development Corporation (NTDC) for disclosure under s39 of the Act.

- 17 However, it is my view that the NTDC is in fact a public authority for the purposes of the Act. This is because the NTDC is funded and run by seven Councils (City of Launceston, Northern Midlands, Meander Valley, Flinders, Break O'Day, George Town and West Tamar), and s5 of the Act provides that a council-owned company is to be considered a public authority under the Act.
- 18 Accordingly, I find that redacted information contained in correspondence between either the Department of Justice or the Department of Premier and Cabinet, and the NTDC is more appropriately assessed for disclosure under s35 of the Act. This is because this section provides for the assessment of information communicated between officers of public authorities and the determination of whether it should be disclosed.

Analysis

Section 35 - Internal Deliberative Information

- 19 The Department did not seek to exempt any information pursuant to s35 of the Act, but I consider that it is a more appropriate provision than s39 of the Act in relation to the potential exemption of information contained within emails sent between officers of public authorities.
- 20 For information to be exempt from disclosure under s35 of the Act, I must be satisfied that it consists of:
 - an opinion, advice, or recommendation prepared by an officer of a public authority;¹ or
 - a record of consultations or deliberation between officers of public authorities;² or
 - a record of consultations or deliberations between officers of public authorities and Ministers.³
- 21 Once one of those subsections is met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative processes related to the official business of the Department.
- 22 The outlined exemption above does not apply to the following:
 - purely factual information;⁴ or
 - a final decision, order or ruling given in the exercise of an adjudicative function;⁵ or
 - a reason which explains such a decision, order or ruling;⁶ or

¹ Section 35(1)(a).

² Section 35(1)(b).

³ Section 35(1)(c).

⁴ Section 35(2).

⁵ Section 35(3)(a).

- information that is older than 10 years.⁷
- 23 As to the meaning of ‘purely factual information’ in s35(2), I refer to *Re Waterford and Treasurer of the Commonwealth of Australia (No 1)* where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the word ‘purely’ in this context has the sense of ‘simply’ or ‘merely’ and that the material must be ‘factual’ in quite unambiguous terms.⁸
- 24 The meaning of the phrase ‘in the course of, or for the purpose of, the deliberative processes’ has also been considered by the AAT. In *Re Waterford and Department of Treasury (No 2)* it adopted the view that these are an agency’s ‘thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action’.⁹
- 25 I now turn to assess whether information contained in the following emails is exempt from disclosure under s35 of the Act.
- 26 I have retained the numbering system from the Schedule provided by Mr Saltmarsh with his 12 October 2020 decision, for ease of reference.

Item 1(a), Document 146

- 27 This is an email sent on 16 December 2019 from Mr Mark Baker of Northern Tasmanian Development Corporation (NTDC) to Mr Sean Hollick, a Ministerial advisor. The email contains discussions of a NTDC press release and queries about the number of jobs expected to be created as part of the project.
- 28 I am satisfied that this is a record of consultations between officers of public authorities and Ministers regarding the siting of the Northern prison and relates to the official business of the Government. Accordingly, it is *prima facie* exempt under s35(1)(c).

Item 1(a), Document 148

- 29 This is an email sent on 15 October 2019 from Ms Maree Tetlow, the Chief Executive Officer of the NTDC, to Mr Craig Plaisted of Meander Valley Council and a staff member of the NTDC. It indicates projections of jobs to be created and money to be spent on the project.
- 30 I am satisfied that the information redacted is *prima facie* exempt under s35(1)(a) as opinion, advice or recommendation prepared by an officer of a public authority.

⁶ Section 35(3)(b).

⁷ Section 35(4).

⁸ *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at 14.

⁹ *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.

Item 1(d), Document 3

- 31 This is an email sent internally on 1 October 2019 from Mr Brian Risby to Mr Anthony Rees, both of the Department. The email discusses land use concerns regarding the proposed prison site.
- 32 I am satisfied the redacted information consists of deliberations between officers of a public authority that were prepared in the course of the deliberative processes related to the official business of the Department and is therefore *prima facie* exempt from disclosure under s35(1)(b) of the Act .

Item 2, Document 3

- 33 This is an email sent internally on 16 June 2020 from Mr Dale Webster, then of the Department, to officers at the Department and the Department of Premier and Cabinet. It details neighbouring properties and property owners to the proposed prison site on Birralee Road, Westbury.
- 34 The information claimed to be exempt by the Department mostly consists of purely factual information, which cannot be exempt under s35 of the Act. However, it clearly includes personal information and some information is more appropriately assessed for disclosure under s36 of the Act. I will assess this information for disclosure (which consists of all of the names of property owners and their properties listed, excluding the words Crown Land and Brushy Rivulet) under s36 later in my decision.
- 35 The final line of Mr Webster's email consists of information which is not purely factual or likely to be exempt under s36. It contains a request that two officers discuss a plan to contact the relevant neighbours. This does not appear to form part of any internal deliberative process and it is not apparent why it would be exempt under the Act. It should be released to Ms Poulton.

Item 2, Documents 10, 11, 12, 19, 20, 21, 27, 30

- 36 These emails have been sent internally between staff at the Department of Premier and Cabinet, the then Department of Primary Industries, Parks, Water and Environment and the then Minister for Justice, Ms Elise Archer MP.
- 37 The information redacted in these emails includes draft press releases and draft responses to questions posed by media outlets about the prison.

I am satisfied that this information is *prima facie* exempt under s35(1)(c) of the Act, except for where media queries are quoted in the black text in Documents 20 and 30 as this is not internal deliberative information. The redacted information consists of deliberations between officers of a public authority and Ministers that were prepared in the course of the deliberative processes related to the official business of the Department.

Item 2, Document 25/31

- 38 The Department has sought to exempt from disclosure a quote of a media query from the Advocate posed to the then Department of Primary Industries,

Parks, Water and Environment in internal emails. These questions relate to threatened species and the proposed Westbury prison site.

- 39 These questions were sent by an external party a public authority and the questions themselves cannot be internal deliberative information. This information is not exempt and should be released to Ms Poulton.

Item 2, Document 33

- 40 This is an email sent from Ms Jennifer Lee of the Department, to Mr Hollick, a Ministerial advisor. In part of this email, Ms Lee is liaising with Mr Hollick about how to make contact with land owners neighbouring the site that was then proposed for the northern prison.
- 41 I am satisfied that this email is *prima facie* exempt from disclosure under s35(1)(c) of the Act.
- 42 The numbered list and the paragraph following contain personal information of property owners and will also be considered as to whether this information is exempt under s36 of the Act in a further part of my Analysis.

Item 2, Document 36

- 43 The Department has sought to exempt from disclosure a series of questions posed to the Department of Premier and Cabinet by Ms Emily Baker, a journalist with the ABC, which were quoted in an internal email. These questions relate to the rezoning of the Westbury prison site.
- 44 These questions were sent by an external party to a public authority and the questions themselves cannot be internal deliberative information. This information is not exempt and should be released to Ms Poulton.

Public Interest Test

- 45 Information I have found to be *prima facie* exempt from disclosure can be characterised broadly as communications relating to the northern prison project, I will assess this information for release within the single s33 public interest assessment.
- 46 There has been widespread media coverage and public debate around whether a second prison in the north of the State should be built, and if so, where it should be built. There was significant opposition from Westbury residents when it was announced by the State Government that their town would be the site of the northern prison.
- 47 As a result of the high level of public interest in this issue, I agree with the Department and find the following Schedule 1 matters to be relevant and weigh in favour of disclosure:
- a) *the general public need for government information to be accessible;*

- b) whether the disclosure would contribute to or hinder debate on a matter of public interest;*
- c) whether the disclosure would inform a person about the reasons for a decision;*
- d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions; and*
- f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation.*
- 48 The Department, in its original decision, did not identify any matters listed in Schedule 1 of the Act as being relevant and weighing against disclosure. Rather the Department asserted that the release of redacted information within these emails would prevent frank and robust communication of public authority officers in the future. It further considered that this would have a detrimental effect on future government decision making.
- 49 I reject the argument put forward by the Department. Officers of public authorities should expect that communications they make in the ordinary course of their duties might be made subject to disclosure under the Act.¹⁰ This is in accordance the object of the Act as set out in s3, which promotes open and transparent government operations.
- 50 I accept, however, that s35 exists to permit early thinking processes to be kept confidential where the release of such information would undermine the ability of the public service to determine the best path forward and finalise its position on various issues. There is some information here which is legitimately claimed to be exempt on this basis, namely Documents 11, 12 and 19 in Item 2.
- 51 I am satisfied that it is not contrary to the public interest for information for the remainder of the information I have identified as *prima facie* exempt under s35 of the Act to be released. Accordingly, this information is not exempt and should be made available to the applicant, subject to my consideration of s36.

Section 36 – Personal Information

- 52 For information to be exempt under s36 of the Act, I must be satisfied that it contains information that is the personal information of a person other than the applicant.¹¹ Personal information is defined as any information about an individual whose identity is apparent or reasonably ascertainable from that information,¹² and who is alive or has not been dead for more than 25 years.¹³
- 53 The Department did not seek to exempt any information pursuant to s36, but I consider that it is a more appropriate provision in relation to certain

¹⁰ *Manuel Sessink and Department of Justice* (24 May 2023) at [41] date accessed: 20 November 2023.

¹¹ Section 36(1).

¹² Section 5.

¹³ Section 5.

information identifying community members and staff of businesses considered below.

- 54 I identified information in Item 2, Document 3 (which consists of all of the names of property owners and their properties listed, excluding the words Crown Land and Brushy Rivulet) and Item 2, Document 33 (which consists of the numbered list and the paragraph following contain personal information of property owners) to be considered under s36.
- 55 There are also names and direct telephone numbers and email addresses of community members and staff of businesses located near the prison site in the emails between the Department and SGS.
- 56 This information is clearly *prima facie* exempt, as it reveals the names, addresses and details about these people. The release of information revealing the personal information of such community members and the staff of businesses throughout the responsive information is not likely to contribute to public debate on the northern prison, and there is a risk of harm to the individuals concerned. Accordingly, I find that it would be contrary to the public interest to make this information publically available.
- 57 I am satisfied that this information is exempt under s36 and should not be provided to Ms Poulton.

Section 39 – Information Obtained in Confidence

- 58 The Department sought to exempt relevant information under s39, as information obtained in confidence. For information to be exempt from disclosure under s39 of the Act, I must be satisfied that it is information that has been communicated in confidence to the Department and that:
 - The information would be exempt information if it were generated by a public authority or Minister;¹⁴ or
 - The disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.¹⁵
- 59 I now turn to consider the validity of each instance of the Department's application of s39.

Emails sent from the Department of Justice and the Department of Premier and Cabinet to external parties

- 60 The Department has identified information contained within many emails as being exempt from disclosure, either partially or in full, under s39 of the Act.
- 61 Section 39 of the Act operates to exempt from disclosure information *communicated in confidence by or on behalf of a person or government to a public*

¹⁴ Section 39(1)(a).

¹⁵ Section 39(1)(b).

authority and not information that is generated by it.¹⁶ The exception to this is when the information sent externally reveals or restates information which has been provided in confidence by a third party. I am not satisfied, however, that this is the case here in almost all instances. The Department is instructing SGS and is not restating confidential information provided to it. The only exception relates to information regarding the engagement of SGS, which reveals details of its billing structure and is identified specifically below.

- 62 Beyond this limited exception, I find that any email sent by an officer of a public authority public to an external person or organisation does not meet the requirements for exemption as set out in s39, and is therefore not exempt from disclosure.

Emails the Department of Justice and the Department of Premier and Cabinet received from external parties

Item 1(a), Documents 1, 2, 3 and 5

- 63 These emails are part of an email chain between Ms Ellen Witte of SGS and Mr Anthony Rees of the Department. Mr Rees is requesting that SGS conduct interviews with businesses in the Westbury industrial precinct. Mr Rees and Ms Witte also negotiate how the interviews will be conducted and the fee that SGS will charge for this service.
- 64 I am not satisfied any of the redacted information contained in these emails is deliberative in nature so as to qualify for exemption under s35, were it generated by an officer of a public authority. Accordingly, none of the information redacted by the Department in these emails can be considered exempt from disclosure under s39(1)(a). Therefore, the redacted information should be made available to Ms Poulton.

Item 1(a), Document 7

- 65 The Department has redacted two lines of information in an email from Ms Witte to Mr Brad Wheeler of the Department. Ms Witte is requesting that Mr Wheeler forward through a contact for a business to be included in the socio-economic study.
- 66 The information redacted is not deliberative in nature, and so is not exempt from disclosure under s39(1)(a).

Item 1(a), Document 16

- 67 This is an email sent from Ms Witte to Mr Rees dated 20 January 2020. Ms Witte is informing Mr Rees that she is seeking a cost estimate from Myriad Consulting on what the cost of further consultation will be. Again, this correspondence is not deliberative in nature, and so is not exempt under s39(1)(a).

¹⁶ Camille Bianchi and the Department of Health (4 November 2021) at [149] date accessed 17 November 2023.

Item 1(a), Document 32

- 68 This is an email sent from Ms Witte to Mr Rees dated 19 November 2019, and has been sent to offer the Department SGS's services. The department has redacted approximately three pages of information. The redacted material consists of details about the offer put to the Department by SGS. These details include how the survey will be conducted, how the results of the survey will be incorporated into a report, when the survey will be conducted, the fees charged for the survey and other information.
- 69 Having reviewed this material, I am satisfied that this information is *prima facie* exempt from disclosure under s39(1)(b). This email was communicated to the Department in confidence, and it contains detailed terms of the offer and description of SGS' processes. Its release may be reasonably likely to impair the ability of the Department to obtain future tenders for consultant work, if this were released in full under the Act.

Item 1(a), Documents 36 and 38

- 70 These are two emails sent from Ms Witte to Mr Prince Suryaprakash of the Department. The department has redacted information contained in the body of these emails. The redacted information consists of SGS's offer regarding the invoice schedule for the socio-economic impact survey.
- 71 I am again satisfied that this information is *prima facie* exempt from disclosure under s39(1)(b) for the same reasons as Item 1(a), Document 32.

Item 1(a), Document 65

- 72 This is an email sent from Ms Andrea Ingham of SGS to Mr Brad Wheeler of the Department. The department has redacted information contained in the body of this email. The redacted information consists of Ms Ingham's request that she be provided with the mobile numbers of the businesses neighbouring the proposed site for the northern prison in Westbury.
- 73 I consider the redacted information to be a request, rather than a record of deliberations, accordingly, I am not satisfied that this information is *prima facie* exempt from disclosure under s39(1)(a), and it should be made available to the applicant subject to my earlier finding regarding s36.

Item 1(a), Document 71

- 74 This is an email from Ms Ingham to Mr Wheeler. The Department has redacted four paragraphs from the body of this email.
- 75 I am not satisfied that the first three paragraphs of this email are *prima facie* exempt from disclosure under s39(1)(a). This information consists of Ms Ingham's advice that residents have not received survey material, and that Myriad Consulting suspect that this is a result of issues with the address listing supplied to Myriad. I do not consider this material to be deliberative in nature, and so I find that it is not exempt from disclosure.

76 With regard to the last paragraph redacted, I can see that Ms Ingham is suggesting to Mr Wheeler a particular course of action as a result of the issues with the mail out of the survey. I am satisfied that this information is deliberative and would be *prima facie* exempt information pursuant to s35(1)(b) if it was communicated between officers of a public authority. Accordingly, I find this information to be *prima facie* exempt under s39(1)(a).

Item 1(a), Document 83

77 This is an email from Ms Witte to Mr Wheeler dated 22 April 2020. The department has redacted two paragraphs contained within this email. Having reviewed this material, I am satisfied that it is deliberative, and so would be *prima facie* exempt from disclosure had it been communicated between officers of a public authority pursuant to s35(1)(b). Accordingly, this information is *prima facie* exempt from disclosure pursuant to s39(1)(a).

Item 1(a), Document 89

78 This is an email sent from Ms Witte to Ms Ingham and Mr Wheeler dated 22 April 2020.

79 In this email Ms Witte forwards on correspondence from Myriad Consulting detailing the community members who requested more time to submit the mail out survey and other advice.

80 I am satisfied that all of the redacted material in this email is *prima facie* exempt from disclosure under s39(1)(a).

Item 1(a), Document 90

81 This is an email sent from Ms Ingham to Mr Wheeler and Ms Witte dated 22 April 2022. The department has redacted one line of information in this email.

82 None of the information is deliberative and it is not exempt under s39. However, the names of community members, as already discussed, are exempt from disclosure under s36.

Item 1(a), Document 96

83 This is an email sent from Ms Witte to Mr Wheeler dated 22 April 2020. The department has redacted the two paragraphs contained in the body of this email.

84 Having reviewed this material, I am satisfied that it is deliberative in nature. This information would be *prima facie* exempt from disclosure if it communicated between officers of a public authority. Accordingly, this information is *prima facie* exempt from disclosure pursuant to s39(1)(a).

Item 1(a), Document 107

85 This is an email sent from Ms Witte to Mr Wheeler and Ms Michelle Foster of the Department. The Department has redacted the three paragraphs contained in the body of this email. The redacted information consists of

details about the fees owed to SGS by the Department. As with the previous discussion of fee structures in Item 1(a), Document 32, I find that this is *prima facie* exempt under s39(1)(b) of the Act.

Item 1(a), Documents 119, 120, 122, 123, 124, 125, 127, and 128

- 86 These are a series of emails sent between representatives at SGS and the Department. The Department has redacted information detailing SGS's position in relation to negotiations and discussion between SGS and the Department about what fees are owed by the Department to SGS. I consider this information to be *prima facie* exempt from disclosure pursuant to s39(1)(b).

Item 1(a), Document 134

- 87 This is an email sent from Ms Witte to Mr Wheeler. The Department has redacted the three body paragraphs in this email. I consider the first and second redacted paragraphs to be deliberative in nature. Accordingly, I find this information to be *prima facie* exempt from disclosure in its entirety pursuant to s39(1)(a).
- 88 The last paragraph is not exempt under s39, however, I find the final 11 words of this paragraph exempt from disclosure under s36 as it consists of the personal information of a community member.

Item 1(a), Document 140

- 89 This is an email sent from Ms Witte to Mr Wheeler and Ms Lee. The Department has redacted four dot points contained in the body of this email. I am not satisfied that the first two dot points or the last dot point are *prima facie* exempt pursuant to s39(1)(a), as I consider this information to be purely factual information which could not be exempt under s35. This information should be made available to the applicant.
- 90 With regard to the third dot point, though I do not consider it to be purely factual information, I am not satisfied that it is deliberative in nature, therefore it would not be *prima facie* exempt from disclosure under s35 of the Act. Accordingly, it cannot be considered *prima facie* exempt under s39(1)(a). This information should be made available to the applicant.

Item 1(a), Document 153

- 91 This is an email sent from Ms Witte to Mr Wheeler, Mr Suryaprakash and Ms Lee. The Department has redacted the body of the email. This information consists of a summary of preliminary draft survey results.
- 92 The Government contracted with SGS to conduct this survey to inform itself as to whether the proposed construction of the northern prison in Westbury should go ahead. Accordingly, I am satisfied that this survey, and discussion of its results should be considered deliberative in nature and would be *prima facie* exempt from disclosure were it communicated between officers of a public

authority. Therefore, I am satisfied that this information is prima facie exempt under s39(1)(a).

Item 1(a), Document 158

- 93 This is an email sent from Ms Witte to Mr Wheeler. The Department has redacted the two body paragraphs in this email. This information consists of Ms Witte's response to a query of Mr Wheeler's. I am satisfied that it is deliberative in nature and is therefore prima facie exempt from disclosure under s 39(1)(a).

Item 1(a), Document 174

- 94 This is an email from Ms Danielle Blanco of SGS to Ms Foster. The Department has redacted information contained within three dot points in the body of this email in full. Having reviewed this material, I can see that it is purely factual, and therefore would not be prima facie exempt from disclosure under s35. Accordingly, it cannot be considered prima facie exempt under s39(1)(a) of the Act. While it discusses invoices, it does not provide any financial information and I am also not satisfied that it is the type of information which could be exempt under s39(1)(b). It should be released to Ms Poulton.

Item 1(a), Document 179

- 95 This is an email sent from Ms Ingham to Mr Suryaprakash. The single sentence contained in the body of this paragraph has been redacted by the department. I am satisfied that the first 15 words and last two words of this sentence are not exempt from disclosure, as this information is not deliberative in nature. However, I am satisfied that the name of a community member in this sentence is exempt from disclosure under s36 .

Item 1(a), Document 223

- 96 This is an email sent from Ms Ingham to Mr Bennett. The department has redacted the one dot point contained in the body of this email. Having reviewed this material, I can see that is a response to a question posed from Ms Ingham. However, I can also see that it is purely factual information and accordingly is not prima facie exempt under s39(1)(a), as it could not be exempt under s35.

Item 1(a), Document 228

- 97 This is an email sent from Ms Ingham to Mr Suryaprakash. The Department has redacted one sentence consisting of the body of this email in full. This sentence is not deliberative in nature and therefore is not exempt. It should be made available to the applicant.

Item 1(a), Document 234

- 98 This is an email sent from Ms Ingham to Mr Suryaprakash. The Department has redacted two dot points contained in the body of this email. Again, this

information is not deliberative and so is not prima facie exempt from disclosure under s39(1)(a).

Item 1(a), Document 240

- 99 This is an email sent from Ms Ingham to Mr Suryaprakash. The Department has exempt from disclosure the body of this email in its entirety. Having reviewed this email I am satisfied that it is deliberative in nature and is therefore prima facie exempt from disclosure under s39(1)(a).

Item 1(a), Document 255

- 100 This is an email sent from Ms Ingham to Mr Suryaprakash. The Department has redacted the majority of the body of this email which consists of answers SGS provided to members of the community in response to their questions. Having reviewed this material, it appears to be purely factual information and could not be exempt under 35. It is accordingly not exempt from disclosure under s39(1)(a). This information should be made available to Ms Poulton.

Item 1(a), Document 261

- 101 This is an email sent from Ms Ingham to Mr Suryaprakash. The Department has redacted information contained in the second half of this email.
- 102 This information does not appear to be deliberative but rather informs Mr Suryaprakash of tight deadlines and details about the survey. Accordingly, this information is not prima facie exempt from disclosure under s39(1)(a) and should be made available to Ms Poulton.

Item 1(a), Document 289

- 103 This is an email sent from Ms Ingham to Mr Suryaprakash and Ms White. The Department has redacted two lines of information contained in the body of this email.
- 104 I do not consider this information to be deliberative in nature, so it is not exempt from disclosure under s39(1)(a). However, the name in redacted information is exempt from disclosure under s36 as it contains the personal information of a community member.

Item 1(d), Document 1

- 105 This is an email sent from Mr Neil Shephard of Neil Shephard and Associates to Mr Suryaprakash. The Department has redacted, pursuant to s39(1)(a), the body of this email in its entirety. Having reviewed this material, I am satisfied that it is deliberative in nature and, accordingly, is information that would be considered prima facie exempt under s35(1)(b) were it generated by, and communicated between, officers of a public authority. Accordingly, I find this information prima facie exempt from disclosure under s39(1)(a).

Item 1(d), Document 22

- 106 This is an email sent from Mr Shepherd to Mr Wheeler. The department has redacted, pursuant to s39(1)(a) of the Act, the body of this email. The redacted information contains Mr Shepherd's suggested response to two questions posed to the Department by community members regarding the northern prison development in Westbury. As the suggested answers are lengthy, the redacted information also includes Mr Shepherd's shorter summary of one of the answers suggested.
- 107 Having reviewed this email, I am satisfied that this information is prima facie exempt under s39(1)(a) as I consider it to consist of deliberative information that could be exempt under s35(1)(b) were it communicated between officers of public authorities.

Item 1(d), Documents 38, 40, 52, 54, 56 and 87

- 108 These emails were sent from Mr Shepherd to Mr Rees and discuss planning and zoning concerns regarding the prison project.
- 109 I am satisfied that all of these emails are deliberative in nature, and accordingly, am satisfied that they would be prima facie exempt under s35(1)(b) were they communicated between officers of public authorities. Therefore, I find that they are prima facie exempt from disclosure under s39(1)(a).

Public Interest Test

- 110 The information contained in emails that I have identified as being prima facie exempt pursuant to s39(1)(a) of the Act is all very similar in nature. The information consists of communications regarding planning matters facing the northern prison development and information related to the survey conducted by the Department. The information I have identified as being prima facie exempt pursuant to s39(1)(b) is of a different character, as it relates to the tendering process and payment arrangements for SGS to undertake its consultancy work. I will consider both types of information in the following public interest test assessment.
- 111 In its original decision, which was affirmed on internal review, the Department considered Schedule 1 matters (a), (b), (c), (d), and (f) to be relevant and to weigh in favour of disclosure. These are:
 - a) *the general public need for government information to be accessible;*
 - b) *whether the disclosure would contribute to or hinder debate on a matter of public interest;*
 - c) *whether the disclosure would inform a person about the reasons for a decision;*
 - d) *whether the disclosure would provide the contextual information to aid in the understanding of government decisions; and*

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

- 112 I agree that these are relevant matters and have considered multiple previous external reviews regarding this northern prison project, which clearly is a matter of significant community interest and scrutiny.
- 113 The Department did not identify any Schedule 1 matters as weighing against disclosure, however suggested that there was an overriding public interest consideration in ensuring frank exchange between the officers of a public authority and external consultants, and that the release of exempt information would have a chilling effect on those exchanges. The Department's argument is that the release of these exchanges would have a detrimental effect on government decision making. Therefore, the Department reasoned that it would be contrary to the public interest for these exchanges to be made publicly available.
- 114 Again, I largely reject this argument. Officers of public authorities should expect that communications made in the ordinary course of their duties might be made subject to disclosure under the Act and should still undertake their duties frankly and fearlessly despite this. I recognise, however, that very early thinking processes are intended to be covered by s35, but do not consider that much of this information is of the type envisaged for exemption under that section. This is heightened by the fact that almost all of the communication from the Department to SGS is not exempt, so it is hard to conceive of a justification for exempting very similar information sent in response by SGS.
- 115 I am satisfied that it is not contrary to the public interest for information I have identified as *prima facie* exempt under s39(1)(a) of the Act to be released. Accordingly, this information should be made available to the applicant.
- 116 In relation to the information I assessed as *prima facie* exempt under s39(1)(b), different considerations apply. I consider matters (s) - whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation - and (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 – are relevant and weigh against disclosure. If details about how SGS conducts its cost-benefit analysis and environmental impact assessments were made publicly available competitors would be able to use that information to shape how they conduct their assessments and analysis. Likewise, if information revealing the granular details of what SGS charge for its services were made publicly available, there is a substantial risk that its competitors would use that information to undercut SGS.
- 117 This is a difficult balance to strike, however, I am satisfied that it is contrary to the public interest to release the tables and dollar figures contained in Item 1(a), Documents 107, 119, 120, 122, 123, 124, 125, 127 and 128, and Item 1(d),

Document 6. I am also satisfied that the detailed application for the contract in Item 1(a), Document 32 is exempt under s39(1)(b), as this is commercially sensitive information about the way SGS bids for work and its pricing structure. Details about what it was actually contracted to do and final payment figures can be distinguished from this original application. I also consider the percentage figures only in Item 1(a), Documents 36 and 38 are also exempt under s39(1)(b).

I18 The remainder of the information is not exempt and should be released to Ms Poulton.

Preliminary Conclusion

I19 Accordingly, for the reasons set out above, I determine that:

- Exemptions pursuant to s35 apply; and
- Exemptions pursuant to s36 apply; and
- Exemptions claimed pursuant to s39 are varied.

Conclusion

I20 As the above preliminary decision was adverse to the Department, it was made available to the Department on 28 March 2024 to seek its input prior to finalisation in accordance with s48(1)(a) of the Act.

I21 The Department advised on 24 April 2024 that it did not wish to make a submission responding to my preliminary decision, however it did seek clarification from my office regarding my finding in relation to a specific email responsive to Ms Poulton's application. The Department advised that it would not object to a finding that it be released, and I have clarified in my above reasoning my finding that I do not consider it exempt.

I22 Accordingly, for the reasons set out above, I determine that:

- Exemptions pursuant to s35 apply; and
- Exemptions pursuant to s36 apply; and
- Exemptions claimed pursuant to s39 are varied.

I23 I apologise to the parties for the inordinate delay in finalising this decision.

Dated: 29 April 2024



Richard Connock
OMBUDSMAN

Attachment I

Relevant Legislation

Section 35 – Internal Deliberative Information

- (1) Information is exempt information if it consists of –
 - (a) an opinion, advice or recommendation prepared by an officer of a public authority; or
 - (b) a record of consultations or deliberations between officers of public authorities; or
 - (c) a record of consultations or deliberations between officers of public authorities and Ministers – in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.
- (2) Subsection (1) does not include purely factual information.
- (3) Subsection (1) does not include –
 - (a) a final decision, order or ruling given in the exercise of an adjudicative function; or
 - (b) a reason which explains such a decision, order or ruling.
- (4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 36 – Personal Information of a Person

- (1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13.
- (2) If –
 - (a) an application is made for information under this Act; and
 - (b) the information was provided to a public authority or Minister by a third party; and
 - (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party – the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –
 - (d) notify that person that the public authority or Minister has received an application for the information; and
 - (e) state the nature of the information that has been applied for; and
 - (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.
- (3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f), decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.
- (4) A notice under subsection (3) is to –
 - (a) state the nature of the information to be provided; and
 - (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
 - (c) inform the person to whom the notice is addressed of –

- (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.
- (5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) –
- (a) until 10 working days have elapsed after the date of notification of that person; or
 - (b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or
 - (c) until 20 working days after notification of an adverse decision under section 43 ; or
 - (d) if during those 20 workdays the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or
 - (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or
 - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 39 – Information Obtained in Confidence

- (1) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –
- (a) the information would be exempt information if it were generated by a public authority or Minister; or
 - (b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.
- (2) Subsection (1) does not include information that –
- (a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and
 - (b) relates to trade secrets or other matters of a business, commercial or financial nature; and
 - (c) was provided to a public authority or Minister pursuant to a requirement of any law.

Section 33 – Public Interest Test

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

Schedule 1 – Matters Relevant to Assessment of the 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;
 - (l) whether the disclosure would promote or harm the environment and or ecology of the State;
 - (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
 - (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
 - (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
 - (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
 - (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) Whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) Whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.



Right to Information Act Review

Case Reference: R2202-108

Names of Parties: Linda Poulton and Department of Justice

Reasons for decision: s48(3)

Provisions considered: s35, s36 s39

Background

- 1 The Tasmanian Government has announced plans to build a prison in northern Tasmania. The siting of this prison has proven to be a controversial issue within the Tasmanian community. On 1 October 2019, the Glen Avon Farms site at 135 Birralee Road, Westbury was announced by the Tasmanian Government as the preferred site for the prison. This site was eventually abandoned, and the site of the Ashley Youth Detention Centre in Deloraine is now proposed for the project.
- 2 After announcing Westbury as the preferred site for the prison, the Department of Justice contracted with SGS Economics and Planning for the production of a socio-economic impact assessment report (the Report) that would assess the impact that the development of this prison would have on the local community. In producing this report, the local population was surveyed in order to understand community attitudes toward the prison (the Survey).
- 3 On 15 June 2020, Ms Linda Poulton, a Westbury resident and opponent of the proposal, applied to the Department of Justice (the Department) for assessed disclosure under the *Right to Information Act 2009* (the Act) in relation to this project. Specifically, Ms Poulton requested the following:
 1. *All communications between the State Government and its consultants SGS Economics and Planning (SGS) and/or Myriad Consulting in relation to:*
 - a) *The phone and postal surveys in respect of the proposed prison at Birralee Road, Westbury; and*
 - b) *The socio-economic impact assessment report (howsoever named) prepared by SGS.*
 2. *All communications related to the decision by the State Government to widen the survey to include people across the Meander Valley Municipality.*

3. All communications evidencing the efforts made by the State Government or its consultants to obtain information from the Tasmanian Electoral Commission in order to conduct the surveys.
4. All versions of the report prepared by SGS Economics and Planning and sent/delivered to the State Government or the Minister, including delivery details identifying the date of delivery.
5. All correspondence between the Minister for Corrections and:
 - a.) Other Ministers; and
 - b.) The Department of Justice

In relation to the Northern Regional Prison Project, including without limitation in relation to the SGS socio-economic impact assessment report (howsoever named) and the phone and postal surveys and/or socio-economic impact assessment report (howsoever named).
6. Information identifying the nature of the retainer and the cost of all of the State Government's consultants' fees connected with the site selection process for the Northern Regional Prison and the preferred site for the prison at Birralee Road, including without limitation:
 - a.) the cost of work performed by JMG Engineers and Planners and outgoings/disbursements;
 - b.) the cost of work performed by SGS Economics and Planning and outgoings/disbursements;
 - c.) the cost of work performed by Myriad Consulting and outgoings/disbursements;
 - d.) the cost of work performed by Neil Shepherd and Associates – Town and Regional Planning and outgoings/disbursements.
7. All communications between the Government [and] the Northern Regional Development Corporation in relation to the Northern Regional Prison Project including the preferred site at Birralee Road.
8. All communications between the Government and the Tasmanian Chamber of Industry and Commerce in relation to the Northern Regional Prison Project including the preferred site at Birralee Road.
9. All communications between the Government and the Meander Valley Council in relation to the Northern Regional Prison Project including the preferred site at Birralee Road.

10. Any communications relating to the application or potential application of the Major Projects Bill to the Northern Prison Project.

- 4 On 12 October 2020, Mr Tom Saltmarsh, a delegated officer for the Department under the Act, issued a decision on Ms Poulton's application. Mr Saltmarsh refused items 1 and 2, item 4 (insofar as it related to the final version of the Report), and item 9 of Ms Poulton's application pursuant to s12(3)(c)(i) of the Act. This was on the basis that information responsive to these parts of her request had *already been provided to the applicant either as an active disclosure or as part of an application for assessed disclosure made on 23 June 2020*. Information responsive to item 4 of Ms Poulton's request was deemed to be exempt from disclosure in full under s39(1)(a) as information received in confidence, insofar as it related to the draft versions of the Report referred to in Ms Poulton's application. Information responsive to item 5 of Ms Poulton's request was deemed partially exempt from disclosure under s35(1)(a) and (b) as internal deliberative information. Information responsive to item 3, 6(a) and 10 was released in full, while no information was identified as responsive to items 2, 6(b), 6(c) or 6(d) of Ms Poulton's request.
- 5 On 15 October 2020, Ms Poulton requested an internal review of this decision. On 30 November 2020 an internal review decision was issued to Ms Poulton by Ms Michelle Lowe, a delegate of the Department under the Act, affirming the original decision made by Mr Saltmarsh.
- 6 On 30 November 2020, Ms Poulton applied to Ombudsman Tasmania for an external review of Ms Lowe's decision. This application was accepted on the basis that the application was made within 20 working days of the applicant receiving Ms Lowe's decision, and that the appropriate fee had been paid.
- 7 In undertaking the initial review of this matter, concerns arose that the Department had incorrectly applied s12(3)(c)(i) of the Act to refuse to assess information responsive to Ms Poulton's application on the basis that this information was otherwise available to her. This was because the information the Department had asserted was otherwise available was not available in full but with redactions.
- 8 Following lengthy discussions with my office, the Department issued a fresh decision to Ms Poulton in relation to this aspect of her application on 26 March 2024.
- 9 Ms Poulton was afforded a separate review right in relation to that fresh decision. Accordingly, my decision on this external review is confined to an assessment of information identified as exempt from disclosure as part of the Department's internal review dated 30 November 2020. My decision will not include an assessment of information that was initially refused in error pursuant to s12(3)(c)(i) of the Act.

Issues for Determination

- 10 I must determine whether the information not released by the Department is eligible for exemption under ss35 or 39 of the Act. As ss35 and 39 are contained in Division 2 of Part 3 of the Act, my assessments are made subject to the public interest test in section 33.
- 11 This means that, should I determine that any of the requested information is *prima facie* exempt from disclosure under ss35 or 39, I must then determine whether it would be contrary to the public interest for it to be disclosed. In making this assessment I must have regard to, at least, the matters contained in Schedule 1 of the Act.

Relevant legislation

- 12 I have attached a copy of ss35, 36 and 39 of the Act to this decision at Attachment 1.
- 13 Copies of section 33 and Schedule 1 of the Act are also included at Attachment 1.

Submissions

Applicant

- 14 The applicant did not make any specific submissions in relation to this external review.

The Department

- 15 The Department did not make submissions regarding this external review, beyond the reasoning provided in the statement of reasons of the Department's original decision of 12 October 2020. As Ms Lowe's internal review decision merely affirmed Mr Saltmarsh's original decision and did not restate the reasoning in full, I will outline the reasoning provided by Mr Saltmarsh below.
- 16 With regard to item 4 of Ms Poulton's request, Mr Saltmarsh reasoned that:

I am refusing the application in so far as it relates to the final version of the report referred to in item 4 under section 12(3)(c)(i) of the Act as the information is publicly available . . .

In relation to drafts of that report, I have decided to exempt information under section 39(1) of the Act.

- 17 Mr Saltmarsh made the following comments regarding the application of s39(1)(a) to the draft reports:

In relation to drafts of that report, I have decided to exempt information under section 39(1) of the Act.

Section 39(1)(a) of the Act provides relevantly:

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
- b) ...

I consider that the drafts were provided by SGS Economics to the Department in confidence and were not intended to be made public.

Section 35(1) of the Act:

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)... –

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

I consider that draft documents, by their very nature, are deliberative.

In Re Waterford and Department of Treasury (No. 2) (1984) 5 ALD 588 at 606: 1 AAR 1 at 19-20, the Commonwealth AAT relied on the Shorter Oxford English Dictionary meaning of “deliberation” as “the action of deliberating: careful consideration with a view to decision” and said:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Deliberations on policy matters undoubtedly come within this broad description. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play.

It by no means follows, therefore, that every document on a departmental file will fall into this category. Section

36(5) provides that the section does not apply to a document by reason only of purely factual material contained in the document (see, in this regard, the Full Court decision in Harris (1984) 51 ALR 581). See also s.36(6) relating to reports and the like. Furthermore, however imprecise the dividing line may first appear to be in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency. A document which, for example, discloses no more than a step in the procedures by which an agency handles a request under the FOI Act is not a document to which s.36(1)(a) applies.

Section 35(2) of the Act provides that section 35(1) of the Act does not include purely factual information. In Re Waterford and the Treasurer of the Commonwealth of Australia (No 1), it was also held that the word ‘purely’ has the mean [sic] of “simply” or “merely”. Consequently, 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.

Although factual information is present in the draft documents, it cannot be disclosed as it is inextricably bound with the deliberative processes.

- 18 Mr Saltmarsh also reasoned that it would be contrary to the public interest for the draft version of the requested report to be made available to Ms Poulton:

Section 35 of the Act is subject to the public interest test in section 33 of the Act – i.e. information will only be exempt if it is contrary to the public interest to disclose that 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 1 but are not limited to those matters.

I consider that the following Schedule 1 factors weigh in favour of disclosure:

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

- c) whether the disclosure would inform a person about the reasons for a decision;
- d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions; and
- f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation.

I consider that there are no Schedule 1 factors weighing against disclosure.

Notwithstanding this, it is contrary to the public interest to disclose the information. The overriding public interest consideration is the need to ensure that there is a frank exchange of views between Departmental officers and consultants when making decisions. The disclosure of consultations or deliberations would likely prevent such exchanges from occurring, with a consequent detrimental impact on good decision making. Further, it would also lead to a reluctance to document the reasons for decision, with a consequent loss in transparency in the decision-making process.

- 19 Regarding the application of s35 to various emails responsive to Ms Poulton's request, Mr Saltmarsh set out the following:

I have decided to exempt information under section 35(1) of the Act.

I consider that that the relevant emails are deliberative in nature as they consist of

- opinions, advice or recommendation prepared by Department officers; or
- a record of consultations or deliberations between Department officers

and are exempt for the same reasons as set out in relation to item 4.

Analysis

Section 35 – Internal Deliberative Information

- 20 The Department identified nine emails, a feedback summary document, a draft media release, and a draft public communications release as either exempt in full or in part pursuant to s35 of the Act.
- 21 For information to be exempt from disclosure under s35(1)(b) or (c) of the Act, I must be satisfied the requested information consists of a record of consultations or deliberations between officers of public authorities and/or

Ministers. I must also be satisfied that the consultations or deliberations were made *in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister, or of the Government.*

- 22 This exemption does not apply to the following:
 - purely factual information;¹
 - a final decision, or order or ruling given in the exercise of an adjudicative function;² or
 - information that is older than 10 years.³
- 23 As to the meaning of ‘purely factual information’ in s35(2), I refer to *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*⁴ where the Commonwealth Administrative Appeals Tribunal observed that the word ‘purely’ in this context has the sense of ‘simply’ or ‘merely’ and that the material must be ‘factual’ in quite unambiguous terms.
- 24 Associate Professor Moira Paterson, in her text, *Freedom of Information and Privacy in Australia 2.0*, refers to the decision in *Re Waterford* and concludes that, regarding factual information:

In other words . . . it must be capable of standing alone. The material must not be so closely linked or intertwined to the deliberative process as to form part of it.⁵

- 25 The meaning of the phrase ‘in the course of, or for the purpose of, the deliberative processes’ has also been considered by the Administrative Appeals Tribunal. In *Re Waterford and Department of Treasury (No 2)*⁶ it adopted the view that these are an agency’s thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.⁷

Document 5.13

- 26 This is an email from Mr Tom Cooper to Mr Sean Hollick and Mr Patrick Clancy dated 24 April 2020 at 11:54am. The parties to the email are officers of a public authority or Ministers’ offices. The redacted information in this email consists of a series of questions posed by Ms Sharon Webb in relation to the Survey, and a draft response to those questions drafted by Mr Cooper. Mr Cooper sent this email to Mr Hollick and Mr Clancy to seek their input as to how best to respond to Ms Webb’s questions.
- 27 It is clear this is an internal email, and I am satisfied that it is a record of consultations or deliberations between officers of public authorities and

¹ Section 35(2).

² Section 35(3).

³ Section 35(4).

⁴ (1984) AATA 518.

⁵ LexisNexis Butterworths Australia, 2nd edition 2015 at 7.30.

⁶ (1984) 5 ALD 588.

⁷ See Note 8 at [14].

Ministerial officers. I am also satisfied that this consultation occurred in the course of, or for the purpose of, the deliberative processes related to official business, as responding to public enquiries regarding a major infrastructure project is part of the official business of government. Accordingly, I am satisfied that the redacted information in this email is *prima facie* exempt from disclosure under s35(1)(c) of the Act.

Document 5.16

- 28 This is an email from Ms Jennifer Lee of the Department to Mr Hollick dated 20 April 2020 at 3:12pm. The Department has applied s35 of the Act to exempt from disclosure information contained in the body of Ms Lee's email to Mr Hollick. In her email to Mr Hollick, Ms Lee provides advice on how many surveys have been issued to Meander Valley residents, and how many have been returned, and whether this data has been previously published in the media. Ms Lee sent this information to Mr Hollick to help inform the Government's response to questions posed by the media.
- 29 As this information is a record of consultations between officers of public authorities and Ministerial officers in the course of official business, I am satisfied that it is *prima facie* exempt from disclosure under s35(1)(c) of the Act.

Document 5.19

- 30 This is an email from Mr Hollick to Ms Lee and Mr Allan de Weys of the Department dated 20 April 2020 at 12:42pm. The redacted information in this email consists of Mr Hollick's draft response to media questions posed to the Government about how the Survey made available to Meander Valley residents regarding the proposed northern prison was conducted, which he had sent to Ms Lee and Mr de Weys to seek their input.
- 31 I am satisfied that the body of this email is a record of consultations between public officers which occurred in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, as I consider responding to questions posed by the media to be part of the official business of government. As such, the redacted information in this email is *prima facie* exempt from disclosure under s35(1)(c) of the Act.

Document 5.25

- 32 This is an undated draft public communications release. The Department has sought to exempt this document in full. Having reviewed this document, I can see that it has been made subject to substantial editing by former Minister for Corrections, Ms Elise Archer, and then been approved for publishing subject to those edits. Accordingly, I am satisfied that it is a record of consultations between public officers and Ministers which occurred in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority. It is therefore *prima facie* exempt from disclosure pursuant to s35(1)(c) of the Act.

Document 5.27

- 33 This is an email from Mr Hollick to Ms Lee and Mr de Weyes dated 15 April 2020 sent at 3:35pm. The Department has sought to exempt the Department's first attempts at developing a response to a series of questions posed to the Government by *The Examiner* newspaper's Mr Nick Clark in relation to relation to how the Survey was conducted. Specifically, Mr Clark sought comment on remarks by Ms Poulton that were published in *The Examiner*.
- 34 As I have mentioned, responding to questions posed by the media or constituents will generally be considered to be part of the official business of government. Accordingly, I am satisfied that this email is to be considered *prima facie* exempt from disclosure under s35(1)(c) of the Act.

Document 5.32

- 35 This is an email from Ms Lee to Mr Brad Wheeler of the Department dated 9 April 2020 and sent at 12:08pm. It shares proposed content for the Department's website regarding the prison project, which is in draft form. I am satisfied that this is *prima facie* exempt from disclosure under s35(1)(b) of the Act.

Document 5.34

- 36 This is an email from Mr Hollick to Ms Lee and Mr Wheeler dated 9 April 2020 sent at 9:42am. The Department has sought to exempt a question posed by Mr Hollick as to whether information to be posted on the frequently asked questions section of the northern regional prison page of the Department's website is still current.
- 37 This information is record of consultations between officers of public authorities or Ministers which occurred in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority. As such, the redacted information in this email is *prima facie* exempt from disclosure under s35(1)(c) of the Act.

Document 5.40

- 38 This is an email from Mr Hollick to Ms Lee dated 9 April 2020 sent at 8:19am. The Department has sought to exempt the Government's approved response to a series of concerns raised by a member of the public relating to the Survey. The approved response was attached to an email sent internally from Mr Hollick to notify Ms Lee that the member of public had been responded to.
- 39 Though I recognise that the redacted information was sent internally, it is important to note that this is the Government's approved response, and that this response has since been provided to the member of the public. As such, this information is now purely factual and I am not satisfied that it could be exempt from disclosure under s35(1) of the Act. Accordingly, this information should be made available to Ms Poulton.

- 40 I note that the information now to be released includes the name of the member of the public I have referred to. I will assess this information under s36 of the Act later in my decision, as it is the personal information of this person.

Document 5.44

- 41 This is an email from Ms Lee to Mr Hollick dated 31 March 2020 sent at 11:28am. The redacted information in this email consists of Ms Lee's answer to Mr Hollick's request for an update on the number of surveys that had been returned.
- 42 The information redacted is purely factual and it is not apparent why it would be exempt under s35. It is to be released to Ms Poulton.

Document 5.50

- 43 This is an email from Mr Hollick to Mr Dale Webster and Mr Wheeler, both then of the Department, dated 20 March 2020 sent at 12:40pm. The redacted part of the email contains draft wording for a media release notifying Meander Valley residents that they have more time to return their survey forms.
- 44 This email was sent internally between officers of public authorities and Ministerial staff. Because this email was sent to seek input on the drafting of a media release, I am satisfied that this consultation occurred in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority. Accordingly, I am satisfied that the redacted information in this email is *prima facie* exempt from disclosure under s35(1)(c) of the Act.

Document 5.54

- 45 This is a draft media release relating to the northern prison project communicating the extension of time to submit survey responses. The Department has sought to exempt it in full. As this is a draft version of the media release, I find that this information is *prima facie* exempt from disclosure pursuant to s35(1)(c) of the Act.

Information more appropriately assessed for disclosure pursuant to s35 of the Act

Document 4.2.1

- 46 This document is an early draft of the Report, with suggested edits by Mr Prince Suryaprakash of the Department. The Department has claimed that this would be exempt pursuant to s39(1)(a), as information received in confidence. In relation to the edits to the document, I do not agree that these would be exempt under s39, but consider that they would be *prima facie* exempt under s35(1)(a) as the opinion of an officer of a public authority in the course of a deliberative process related to the official business of a public authority.

Public Interest Test

- 47 As noted, s35 is subject to the public interest test in s33, so I now turn to assess whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt. In making this assessment, I am required consider all relevant matters. At a minimum, I am to have regard to the matters in Schedule 1 of the Act.
- 48 In its original decision, which was affirmed on internal review, the Department indicated that it considered Schedule 1 matters (a), (b), (c), (d), and (f) to be relevant and weighed those matters in favour of disclosure.
- 49 The Department did not identify any Schedule 1 matters as weighing in favour of exemption. However, it reasoned:
- . . . it is contrary to the public interest to disclose the information. The overriding public interest consideration is that there is a need to ensure a frank exchange of views between officers when making decisions. The disclosure of consultations or deliberations between officers would likely prevent such exchanges from occurring, with a consequent detrimental impact on good decision making. Further, it would also lead to a reluctance to document the reasons for a decision, with a consequent loss in transparency in the decision-making process.*
- 50 I agree that matter (a) – the general public need for government information to be accessible – is relevant and weighs in favour of disclosure.
- 51 I also agree with the Department that matters (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest, (c) – whether disclosure would inform a person about the reasons for a decision – and (d) – whether disclosure would provide the contextual information to aid in the understanding of government decisions – are relevant and weigh in favour of disclosure. The proposed northern prison in Westbury had previously been subject to intense opposition by many Westbury residents. The release of any information illustrating how the Survey that informed the Report was conducted, and how the Report was produced and finalised would contribute to public debate on this matter of broad community interest.
- 52 I agree with the Department that matter (f) – whether disclosure would enhance scrutiny of government decision-making processes – is relevant and weighs in favour of disclosure. The disclosure of this information would allow the public to make an informed evaluation of the appropriateness of the government's decision-making processes regarding where to site the northern prison.
- 53 As quoted above, the Department relied on the inherent principles of s35 which permits exemption of information which contains the internal thinking processes of a public authority. The Department reasoned that if this type of

information was released, it would prevent robust discussion between public authority employees on matters of public interest in the future.

- 54 I do not find this general type of reasoning persuasive. As I noted in my previous decision of *Todd Dudley and Department of Natural Resources and Environment Tasmania*:⁸

It is intended that public information should be accessible to the public and the Act sets out that internal deliberative information should be released to an applicant unless this is contrary to the public interest. Public officers should be conscious that their communications could be disclosed under the Act and should continue to perform their duties appropriately and confidently regardless of this.

- 55 I consider that the more weighty matter is the draft nature of much of the information in question. As I outlined in my recent decision of *Rebecca White and Premier of Tasmania*,⁹ unless exceptional circumstances apply, it is generally unhelpful to have many slightly different versions of publicised documents in circulation. The final communications have been released and it is not usually in the public interest to release early working drafts.
- 56 Accordingly, I am satisfied that the information redacted in Documents 5.19, 5.25, 5.27, 5.32, 5.34, 5.50 and 5.54 is exempt under s35 and is not required to be released to the applicant. Mr Suryaprakash's comments in Document 4.2.I are also exempt from release.
- 57 The remaining information is not exempt under the Act and should be released to Ms Poulton.

Section 36 – Personal information

- 58 For information to be exempt under s36 of the Act, I must be satisfied that it contains information that is the personal information of a person other than the applicant.¹⁰ Personal information is defined as any information about an individual whose identity is apparent or reasonably ascertainable from that information,¹¹ and who is alive or has not been dead for more than 25 years.¹²
- 59 The Department did not seek to exempt any information pursuant to s36, but I consider that it is a more appropriate provision in relation to the name of a member of the public who asked questions of the Department contained in document 5.40.

⁸ *Todd Dudley and Department of Natural Resources and Environment Tasmania* (12 May 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

⁹ *Rebecca White and the Premier of Tasmania* (10 April 2024) at [31] date accessed: 6 May 2024, available at: https://www.ombudsman.tas.gov.au/__data/assets/pdf_file/0008/757925/R2309-028-Final-decision-White-and-Premier.pdf.

¹⁰ Section 36(1).

¹¹ Section 5.

¹² Section 5.

- 60 The name of this person is clearly *prima facie* exempt as it is the personal information of a person other than the applicant. I find that the release of this information would also be contrary to the public interest, as its release would not add value to the information provided to the applicant, but would impact on the interests of the person concerned as it would negatively impact on their privacy. Accordingly, I find that this information is exempt from disclosure pursuant to s36 of the Act.

Section 39 – Information obtained in confidence

- 61 The Department has sought to exempt information communicated between it and SGS from disclosure pursuant to s39(1) of the Act. For information to be exempt from disclosure under this section, I must be satisfied that its disclosure would *divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister and –*
- (a) *the information would be exempt information if it were generated by a public authority or Minister; or*
 - (b) *the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.*

Document 4.2.1

- 62 This document is an early draft of the Report, with suggested edits by Mr Suryaprakash of the Department. I have already found the edits to be exempt under s35(1)(a) but agree that the remainder would be *prima facie* exempt under s39(1)(a). This is because I am satisfied that it was communicated in confidence to the Department and would have been eligible for exemption under s35(1)(a) had it been prepared by a public officer of the Department.

Document 4.2.2

This document is an email sent from Mr Anthony Rees to Ms Michelle Foster, both of the Department, dated 6 February 2020 sent at 3:25pm. This is a covering email which simply says *as discussed*. It was not communicated in confidence to the Department and is not otherwise exempt under the Act. It is entirely unclear why the Department sought to exempt this information and it should be released to the applicant in full.

Documents 4.2.4 and 4.2.7

- 63 These are emails sent from Mr Suryaprakash of the Department to Ms Ellen Witte of SGS on 29 January and 27 February 2020. As they were not communicated internally but sent to an external consultant, it is not clear how they could be exempt under s39 or s35. I am not satisfied that the Department has discharged its onus pursuant to s47(4) to show why these emails should be exempt and I find that they should be released in full to Ms Poulton.

Documents 4.2.5 and 4.2.10

- 64 These documents are emails from Ms Witte of SGS Economics to officers of the Department dated 28 February 2020 and 14 May 2020. Attached to both emails are pre-release draft versions of the Report and the bodies contain a summary of recent changes to the drafts. I am satisfied that these emails were sent in confidence. I am also satisfied that if the information in the body of both emails was generated by officers of a public authority or Minister, it would be considered *prima facie* exempt pursuant to s35(1)(b) or (c) of the Act. Accordingly, I find that the three dot points and the last paragraph of information contained in Document 4.2.5 and the second two sentences of Document 4.2.10 are *prima facie* exempt from disclosure pursuant to s39(1)(a) of the Act. The rest of these emails are purely factual and should be made available to Ms Poulton.

Document 4.2.8

- 65 This document is a summary produced by SGS of pre-release feedback on the Report. I am satisfied that it was communicated in confidence as part of the agreement to undertake this consulting work for the Department. I am also satisfied that if this document was generated by the Department it would be eligible for exemption under s35(1)(b) as a record of a consultation that occurred in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority. Accordingly, I find this information is *prima facie* exempt from disclosure in full pursuant to s39(1)(b) of the Act.

Documents 4.2.9 and 4.2.12

- 66 These documents are identical copies of the pre-release draft version of the Report from May 2020 that the Department sought to exempt from disclosure pursuant to s39(1)(a) of the Act. I am satisfied that these drafts are likely to have been provided to the Department in confidence by SGS. I am also satisfied that this information is opinion in relation to a deliberative process related to the official business of a public authority and that, if it had been generated by a public authority, it would be eligible for exemption pursuant to s35(1)(a) of the Act. Accordingly, I find that these pre-release draft versions of the Report from May 2020 are *prima facie* exempt from disclosure pursuant to s39(1)(a) of the Act.

Public Interest Test

- 67 I have already undertaken a public interest test assessment regarding s35 and similar considerations apply regarding the assessment of this information identified as *prima facie* exempt pursuant s39(1)(a). The Department has again identified Schedule 1 matters (a), (b), (c), (d), and (f) to be relevant and to weigh in favour of disclosing information it has identified as exempt pursuant to s39(1)(a) of the Act.

- 68 The Department has also again suggested that this information should not be released because doing so would prevent *a frank exchange of views between officers when making decisions*. As I discussed earlier in my decision, I do not find this reasoning particularly persuasive. However, I do accept that there is limited advantage in releasing many drafts, and details of the editing process, when the final version of a document has been publicly released.
- 69 Accordingly, I find that Documents 4.2.1, 4.2.5, 4.2.8, 4.2.9 and 4.2.12 are exempt from release pursuant to s39(1)(a) of the Act. Document 4.2.10 is not exempt and should be released to Ms Poulton.

Preliminary Conclusion

- 70 Accordingly, for the reasons set out above, I determine that:
- exemptions claimed pursuant to ss35 and 39 should be varied; and
 - information is exempt pursuant to s36.

Conclusion

- 71 As the above preliminary decision was adverse to the Department, it was made available to it on 22 May 2024 to seek its input prior to finalisation in accordance with s48(1)(a) of the Act
- 72 The Department advised on 5 June 2024 that it did not wish make submissions in response to my preliminary decision. As such, my findings remain unchanged.
- 73 Accordingly, for the reasons set out above, I determine that:
- exemptions claimed pursuant to ss35 and 39 should be varied; and
 - information is exempt pursuant to s36.
- 74 I apologise to the parties for the significant delay in finalising this decision.

Dated: 5 June 2024



Richard Connock
OMBUDSMAN

Attachment I

Relevant Legislation

Section 35 – Internal Deliberative Information

- (1) Information is exempt information if it consists of –
 - (a) an opinion, advice or recommendation prepared by an officer of a public authority; or
 - (b) a record of consultations or deliberations between officers of public authorities; or
 - (c) a record of consultations or deliberations between officers of public authorities and Ministers – in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.
- (2) Subsection (1) does not include purely factual information.
- (3) Subsection (1) does not include –
 - (a) a final decision, order or ruling given in the exercise of an adjudicative function; or
 - (b) a reason which explains such a decision, order or ruling.
- (4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 36 – Personal information of a person

- (1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13.
- (2) If –
 - (a) an application is made for information under this Act; and
 - (b) the information was provided to a public authority or Minister by a third party;
 - and
 - (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party – the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –
 - (d) notify that person that the public authority or Minister has received an application for the information; and
 - (e) state the nature of the information that has been applied for; and
 - (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.
- (3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f), decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.
- (4) A notice under subsection (3) is to –
 - (a) state the nature of the information to be provided; and

- (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
- (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.

- (5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) –
 - (a) until 10 working days have elapsed after the date of notification of that person; or
 - (b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or
 - (c) until 20 working days after notification of an adverse decision under section 43; or
 - (d) if during those 20 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided.

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

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

Section 39 – Information Obtained in Confidence

- (1) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –
 - (a) the information would be exempt information if it were generated by a public authority or Minister; or
 - (b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.
- (2) Subsection (1) does not include information that –
 - (a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and
 - (b) relates to trade secrets or other matters of a business, commercial or financial nature; and
 - (c) was provided to a public authority or Minister pursuant to a requirement of any law.

Section 33 – Public Interest Test

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

Schedule 1 – Matters Relevant to Assessment of the Public Interest

- I. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:
- (a) the general public need for government information to be accessible;
 - (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
 - (c) whether the disclosure would inform a person about the reasons for a decision;
 - (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions; (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
 - (f) whether the disclosure would enhance scrutiny of government decision making processes and thereby improve accountability and participation;
 - (g) whether the disclosure would enhance scrutiny of government administrative processes;
 - (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government; (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
 - (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
 - (k) whether the disclosure would promote or harm the economic development of the State;
 - (l) whether the disclosure would promote or harm the environment and or ecology of the State;
 - (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
 - (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
 - (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
 - (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
 - (q) whether the disclosure would have a substantial adverse effect on the

- industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
 - (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
 - (t) whether the applicant is resident in Australia;
 - (u) whether the information is wrong or inaccurate;
 - (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
 - (w) Whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position to that person
 - (x) Whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
 - (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

**Right to Information Act Review****Case Reference:** O2011-054
R2202-105**Names of Parties:** Malcolm Gardam and Devonport City Council**Reasons for decision:** s48(3)**Provisions considered:** s31, s32, s36, s37

Background

- 1 In 2016, Devonport City Council (the Council), a public authority under the *Right to Information Act 2009* (the Act), entered into legal arrangements including lease agreements and commercial dealings with Providore Place Devonport Pty Ltd (PPD) to manage and develop Providore Place.
- 2 Providore Place is a large construction development in central Devonport and is part of Stage One of 'The Living City Project'. In September 2019, the Tasmanian Auditor-General, in an audit covering the period December 2012 to January 2019 inclusive, reported on Providore Place as follows:

Stage One also include[s]... a multi-level car park and a food pavilion, known as Providore Place, to showcase the region's premium produce through restaurants, a distillery, accredited training facilities and market spaces. The Providore Place facility is approximately 1,500m² comprising five permanent tenancies, an open market space and a mezzanine floor to accommodate a cooking school and food education opportunities.¹

- 3 PPD is a company in which Project & Infrastructure Holdings Pty Ltd (P+i), in October 2018, had a 50% direct ownership interest, to operate Providore Place². In December 2021, Providore Place was re-named Market Square Pavilion, however I will continue to use the name Providore Place in this decision for consistency with the terminology used in the relevant material.
- 4 On 11 September 2020, Mr Gardam made an application to Council for assessed disclosure under the Act. Mr Gardam is a community member who holds concerns about the legal and financial arrangements between Council and Providore Place (Devonport) Pty Ltd in relation to the Living City food pavilion.

¹ Report of the Auditor-General No.1 of 2019-20, Procurement in Local Government at page 8, accessible at www.audit.tas.gov.au/publication/procurement-2/.

² See note 1 at page 15.

5 The information sought by Mr Gardam broadly concerns the following:

The signed, unredacted/complete copy of the initial head lease agreement including all amendments or replacement agreements, if any, as well as other relevant evidence supporting senior staff and Council representations, in regard to the Living City food pavilion initial head lease agreement entered into in 2016 between Devonport City Council and Providore Place (Devonport) Pty Ltd.

6 Mr Gardam's request for assessed disclosure was in five parts which are based on the answers provided by the General Manager to questions on notice from community members and recorded in Council Meeting Agendas. Specifically Mr Gardam's five requests for information are in the following terms:

- (a) Provide a full unredacted copy of the "...other commercial agreements that Council has with other entities which had previously been the subject of legal advice." that "The Food Pavilion lease itself is based on ..." plus evidence of the legal input into drafting this document that Council has also advised of. (NOTE: Redaction strictly limited to removal of the identity of the other party to the agreement if it was a live document used as the basis of the initial Providore Place head lease agreement.)
- (b) Provide a full unredacted copy of the "standard lease terms (which had previously been developed with legal advice), as a guide." and the "agreed term sheet approved by the Council" plus evidence of the legal advice into drafting this document that council has advised the head lease was based on. (NOTE: Redaction strictly limited to removal of the identity of the other party to the agreement if it was a live document used as the basis of the initial Providore Place head lease agreement.)
- (c) Provide the signed, full unredacted copy of the initial head lease agreement between Devonport City Council and Providore Place (Devonport) Pty Ltd, as confirmed by the Auditor General as being finalised on 1 November 2016, plus copy of all amendments or replacement agreements, if any, to that agreement.
- (d) Provide evidence of relevant experience and any training and qualifications (as one would expect to be available to support claims on a CV or a response to a position selection criteria) as applicable to demonstrate relevant "experience", as at July 2016, relating to the former Deputy General Manager's (Matthew Atkins) competence to author the report, to give advice, information or recommendations regarding the initial Food Pavilion head lease with Providore Place (Devonport) Pty Ltd and of the required complexity under consideration.
- (e) Provide evidence by releasing a list of the applicable lease agreements entered into by Council between 2011 and 2016 (immediately prior to the acceptance by council of the Providore

Place head lease) that were similar and used as the basis for the food pavilion head lease; being

- a) Any head lease as landlord?
- b) Any head lease similar to the Providore Place head lease?
- c) Any lease similar to the Providore Please head lease variously described as a cooperative shared arrangement, operating partnership and non-traditional cooperative shared arrangement?

7 On 8 October 2020, Ms Jacqui Surtees, a delegate of Council under the Act, issued a decision in respect of Mr Gardam's request. No documents were released and the following responses were provided to Mr Gardam in respect of his five specific requests:

- (a) A full unredacted copy of other commercial agreements that Council has with other entities will not be provided. All commercial lease agreements have been considered by Council in closed session, and therefore are exempt under section 32(1)(a) of the Act. Evidence of the legal input into drafting the lease agreements constitutes professional communications between Council and its legal representative and is therefore exempt under section 31 of the Act.
- (b) The standard lease terms containing legal advice which constitutes professional communications between Council and its legal representative and are therefore exempt under section 31 of the Act.

The agreed term sheet approved by the Council was done so at a confidential council meeting on 25 July 2016 and is therefore exempt under section 32(1)(a) of the Act.

- (c) The initial head lease agreement finalised in November 2016 and the replacement lease finalised in August 2019, is information that was contained in the official record of a closed meeting of Council, therefore in accordance with section 32(1)(a) of the Act, the information is exempt.
- (d) The Deputy General Manager had sufficient experience at a management level in local government, to author the report. Specifics of an individual's personal details are exempt under section 36 of the Act. The public interest test has been applied to this decision in accordance with section 33 of the Act.
- (e) Commercial leases for properties located at 17 Fenton Way; 6-10 Steele Street; and the Surf club were all subject to terms and conditions based on the lease template provided to Council, and utilised by Council's solicitors; or were existing agreements

transferred to Council as part of settlement process for properties acquired during the period 2011-2016.

- 8 On 8 October 2020, Mr Gardam sought internal review of the decision in accordance with s43 of the Act. Mr Matthew Atkins, Council's General Manager and principal officer under the Act, issued a decision upon internal review on 22 October 2020. He upheld the original decision but did not expand on the reasons issued in the first instance.
- 9 On 10 November 2020, Mr Gardam sought external review. His application was accepted under s44 of the Act on the basis he was in receipt of an internal review decision and his application for external review was submitted within 20 working days after receipt of that decision.
- 10 The applicable fee was waived under s16(2)(c), as Mr Gardam indicated in his application that he intended to use the information for a general public interest or benefit and this was accepted by Council.
- 11 On 19 January 2021, Ms Surtees provided my office with a Schedule of Documents and the full unredacted information responsive to Mr Gardam's request.
- 12 Ms Surtees advised that Council was withdrawing its claim for exemption under s32 in respect of certain information (documents 1.1, 1.2 and 1.4 in the Schedule of Documents) because the information had not been considered at a Closed Meeting of Council, as was first thought. Ms Surtees then advised that Council now relied on s37 of the Act to exempt that information, as it related to the business affairs of a third party.
- 13 On 5 May 2023, following contact from my office, Mr Gardam provided further submissions in respect of the decisions made by Council in respect of his application for information.

Issues for Determination

- 14 I must determine whether the information is eligible for exemption under ss31, 32, 36, 37 or any other relevant section of the Act.
- 15 As ss36 and 37 are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under this section, I must then determine whether it is contrary to the public interest to disclose it. In doing so, I must consider, at least, all the matters in Schedule 1 of the Act.

Relevant legislation

- 16 I attach copies of ss31, 32, 36 and 37 to this decision at Attachment 1.
- 17 Copies of s33 and Schedule 1 of the Act are also attached.

Submissions

- 18 Mr Gardam provided submissions with his application for assessed disclosure on 10 November 2020. He said:

In relation to the Living City project Council has arguably abused the “safe haven” of Closed Session and unreasonably hidden behind the “exemption” from RTI afforded by Section 32 of the Right to Information Act. The ongoing result of this approach by Council is to frustrate those seeking answers through an absence of transparency which in turn avoids accountability and any opportunity for the community to assess Council’s management of Living City.

- 19 Mr Gardam also made further submissions in relation to the specific parts of his request for information, in particular (verbatim):

RTI Request No.’s 1, 2 & 3 – *The community has for about 6 years been subjected to Council’s Providore Place representations that have progressively been exposed now, despite the absence of appropriate disclosures of Council’s own volition, and been seen to be at best “optimistic”, by Council’s own admission but not at the time, and therefore misleading if not false, regarding the arrangements between Council and the Head Lessee (Providore Place Devonport Pty Ltd). It is only reasonable that Council should provide evidence to support those representations and in the absence of meaningful disclosures to date release full copies of the head lease agreement(s) and the documentation requested.*

- 20 With regard to the fourth part of the request for information, Mr Gardam expressed his concern as to whether the Deputy General Manager had the appropriate experience and knowledge at the relevant time to undertake the commercial and legal tasks involved with the project. Mr Gardam argues that the question of the Deputy General Manger’s (DGM) experience *has been before* the Director of Local Government (DLG) and the Ombudsman’s office. Mr Gardam says that [emphasis originial]:

... findings were the DLG found it was open to General manager to conclude the DGM had the requisite experience and the Ombudsman’s office upheld that with “..... I have done so on the basis that Mr Tay’s decision was one that was open to him.”

Neither oversight agency have been prepared, when asked to do so in writing, confirm that an objective review of the DGM’s requisite experience supported the determination has done so; leaving me to assume that the initial argument that the act did not contain a definition as to “experience” just like no definition exists for “qualifications” either. I have unsuccessfully expanded on that flawed reasoning as the basis of the determinations previously. ***Clearly, if the oversight agencies had confirmed an objective assessment of “relevant experience” had been undertaken the***

matter would have rested but no such advice has been forthcoming.

- 21 Mr Gardam made submissions as to what he thought relevant experience would be in the circumstances:

Relevant experience in this instance would equate to training or experience such as short course contract law seminars or the like or extensive involvement with commercial agreement drafting and definitely not just be reliant on 5 years as the Deputy General manager at Devonport Council as stated in the DLG's determination dated 2 December 2019. This lease was one of only two substantial contracts associated with Living City that legal advice was not sought; the other being a two year exclusivity agreement with Fairbrother Pty Ltd as the preferred hotel developer.

- 22 With regard to the public interest test, Mr Gardam indicated that he did not agree that it could be contrary to the public interest for the requested documents to be released.
- 23 With regard to the fifth part of the request for information, Mr Gardam submitted that Council's response in its decision of 8 October 2020 did not address the specific requests that he made in item 5 of his application for assessed disclosure.
- 24 Council did not make submissions beyond the reasoning in its decisions, which was set out in the *Background* above and is discussed in the following analysis.

Analysis

Section 31 – Legal Professional Privilege

- 25 In the first item of his request for assessed disclosure, Mr Gardam has requested that Council not only disclose the certain commercial agreements but also disclose evidence of the legal input into the drafting of the Food Pavilion lease. Responsive to this item, Council listed a document in its Schedule of documents as *Item 1.5 Standard lease terms prepared by Levis Stace & Cooper.*
- 26 Council submitted that evidence of the legal input into drafting the lease agreements constitutes professional communications between Council and its legal representative and is, therefore, exempt under s31. Exemptions claimed under s31 are not subject to the public interest test provided in s33 of the Act.
- 27 Section 31 provides that:

Information is exempt information if it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.

- 28 It is therefore necessary to determine whether the privilege would apply to the information Council has claimed to be exempt under the section. Legal

professional privilege is a rule of substantive law and attaches to confidential communications between a lawyer and their client made for the dominant purpose of providing or obtaining legal advice, providing legal services, or for use in connection with existing or anticipated litigation.³

- 29 Legal professional privilege does not attach to documents *per se*, but to communications and the contents of documents where the dominant purpose was the seeking or giving of legal advice.⁴ That is, the privilege applies where the dominant purpose of a communication or document is the seeking or giving of legal advice or provision of legal services.
- 30 In this instance, the information claimed to be exempt under the principle of legal professional privilege is a legal document comprising a template commercial lease agreement drafted by the law firm of Levis Stace and Cooper, with extensive notes of legal advice throughout the 44 pages of the document. The Council is in this instance the client.
- 31 I have reviewed the document comprising the relevant information and I am satisfied that the document would be privileged from production in legal proceedings. I determine that this document is exempt in full pursuant to s31.

Section 32 – Closed Meeting of Council

- 32 Council has relied upon s32(1)(a) to exempt certain information responsive to the request for assessed disclosure. Council claims the information is exempt because it was considered at closed meetings of Council. Exemptions under s32 are not subject to the public interest test.
- 33 According to the schedule of documents which Council provided to my office, the following information is claimed to be exempt under s32(1)(a):

1.3	Sub-lease – Premises I
1.3a	Lease of [part of Premises I] – Confidential Report to Council
2.1	Food Pavilion Term Sheet
2.1a	LIVING CITY Food Pavilion Operations
3.1	Living City Stage I Food Pavilion Lease Document
3.2	Executed Lease – Operating Lease – LIVING CITY Food Pavilion Providore Place Oldaker St. Devonport
3.3	Lease Agreement

³ See *Daniels Corporation International Pty Ltd v ACCC* 213 CLR 543 [9] for High Court re-affirming the ‘dominant purpose test’ as established in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

⁴ *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67 [35]

34 Section 32(1) provides that:

- (1) *Information is exempt information if it is contained in –*
 - (a) *the official record of a closed meeting of a council; or*
 - (b) *information proposed by an officer of a council or a councillor for the purpose of being submitted to a closed meeting of a council for consideration if the officer or councillor has contributed to the origin, subject or contents of that record; or*
 - (c) *information that is a copy of, or a copy of part of, information referred to in paragraph (a) or (b); or*
 - (d) *information, the disclosure of which would involve the disclosure of a deliberation or decision of a council made at a closed meeting of the council, other than information by which a decision of the council was officially published.*

35 The application of the section is limited by subsections 32(2), (3) and (4). The information must be less than 10 years old from the date it was created, and information that is purely factual is not protected. The information must have been created for the purpose of submission to a closed meeting for consideration. Some further information may be exempt if its disclosure would disclose a deliberation or decision of a closed meeting which has not been officially published.

Item 1

36 Responsive to the first part of Mr Gardam's request, Council located a number of documents which Council claimed to be exempt under s32, specifically:

- Document 1.3 – Sub lease – Premises 1; and
- Document 1.3a – Lease of [Part of Premises 1] – Confidential Report to Council.

37 In Council's first decision in relation to Mr Gardam's request for assessed disclosure, the delegate under the Act made the following response to the first part of Mr Gardam's request:

A full, unredacted copy of other commercial agreements that Council has with other entities will not be provided. All commercial lease agreements have been considered by Council in closed session, and therefore are exempt under section 32(1)(a) of the Act.

38 Document 1.3a consists of a Report to a Council Meeting on 27 May 2013 and concerns the lease of part of Premises 1. Its preamble reads:

This report contains matters relating to information provided to the council on the condition it is kept confidential. As such Clause 15(2)(f) of

the Local Government (Meeting Procedures) Regulations 2005 applies and the matter should be considered by Council in a closed meeting.

- 39 The Report to Council attaches the lease which comprises document 1.3 and concludes with a recommendation for Council. The report contains information, discussion and recommendations regarding the lease of the aforementioned premises. I am satisfied that the report was prepared by an officer of Council for the purpose of being submitted to a closed meeting of Council for consideration. I therefore determine that the information comprising document 1.3a is exempt under s32 of the Act.
- 40 The other item that Council claims to be exempt under s32 in respect of the first part of Mr Gardam's request is document 1.3. This is the lease which was the subject of the above confidential report to Council and was listed as an attachment to the report to Council for the purpose of consideration at the closed session.
- 41 I accept that document 1.3 comprises information that was tabled at a closed session of the Council meeting on 27 May 2013. However, as provided by s32(3), information will not be exempt merely because it was submitted to a closed meeting of Council for consideration. The information was clearly produced for reasons to do with Council business but not for the purpose of being tabled at a closed meeting. Nor does the information consist of the official record of a closed meeting. It is a record of a commercial agreement concerning the leasing of premises owned by Council, not a record of a closed session of the Council.
- 42 It is possible to conclude that the lease was entered into as a result of a decision of Council at a closed session of a Council meeting. It was executed shortly after the meeting took place. However, nothing in the signed lease discloses deliberations of Council, and the decision by Council to enter into the lease agreement would normally be officially published and confirmed by Council once the matter was finalised. Therefore, I have determined that Document 1.3 is not exempt under s32. Council has not discharged its onus under s47(4) to show that any other exemption would be applicable, so this document should be disclosed to Mr Gardam.

Item 2

- 43 Responsive to the second part of Mr Gardam's request, Council located two documents which it claimed to be exempt under s32, specifically:
 - Document 2.1 – Food Pavilion Term Sheet; and
 - Document 2.1a – LIVING CITY Food Pavilion Operations - Confidential Report to Council Meeting – 25 July 2016.
- 44 In Council's first decision in relation to Mr Gardam's request for assessed disclosure, the delegate under the Act claimed that Document 2.1 is exempt under s32 because it was approved by Council at a confidential council meeting on 25 July 2016.

- 45 Document 2.1a consists of a Report to Council Meeting on 25 July 2016 and concerns the lease of LIVING CITY Food Pavilion Operations. It is marked confidential. The Report to Council attaches a number of documents, including the Term Sheet marked Document 2.1, and concludes with recommendations for Council.
- 46 The Report contains information, discussion and recommendations regarding the lease of the aforementioned premises. I am satisfied that the report was prepared by an officer of Council for the purpose of being submitted to a closed meeting of Council for consideration. I therefore determine that the information comprising document 2.1a is exempt under s32 of the Act.
- 47 The other item that Council claims to be exempt under s32 in respect of the second part of Mr Gardam's request is document 2.1. This is the Term Sheet which was listed as an attachment to the report to Council for the purpose of consideration at the closed session. It is marked Strictly Private and Confidential and is in draft form. The document is headed Agreement for lease/Lease term Sheet and appears to comprise the major terms and objectives for the drafting of the lease agreement proper. The document is dated May 2016.
- 48 I do not doubt that the document described as the Food Pavilion Term Sheet was tabled at the closed session of the Council meeting as advised by Council's delegate. I accept that it comprises information proposed by an officer of Council. While the document was already in existence in May 2016, I am prepared to accept that it was created for the purpose of being submitted to a closed meeting of council for consideration. The document is in draft form and it would be normal procedure to present such information to Council for confidential consideration and discussion prior to the main agreement being drafted.
- 49 I therefore determine that the information comprising Document 2.1 is exempt under s32 of the Act.

Item 3 – Head lease agreement between Council and PPD Pty Ltd

- 50 Responsive to the third part of Mr Gardam's request, Council located four documents which Council claimed to be exempt under s32, Documents 3.1, 3.2, 3.3 and 3.3a.
- 51 Documents 3.1 and 3.3a are reports in respect of closed council meetings, analogous to Document 1.3a and 2.1a above. They contain information, discussion and recommendations regarding the lease agreement terms. I am satisfied that these documents are exempt under s32(1)(a), as they were brought into existence for submission to the closed meeting and are contained in a record of that meeting.

Document 3.2

- 52 Mr Gardam requested that Council disclose the initial head lease agreement between Devonport City Council and Providore Place (Devonport) Pty Ltd, as

confirmed by the Auditor General as being finalised on 1 November 2016. Mr Gardam also requested copies of all amendments or replacement agreements.

- 53 Council made the following response to this request:

The initial head lease agreement finalised in November 2016 and the replacement lease finalised in August 2019, is information that was contained in the official record of a closed meeting of Council, therefore in accordance with section 32(1)(a) of the Act, the information is exempt.

- 54 The information located with regard to this part of the request (document 3.2) is the same as information I considered in my earlier decision of *Robert Vellacott and Devonport City Council* (April 2022),⁵ and that information has already been found not to be exempt.
- 55 With regard to the head lease agreement between Council and Providore Place (Devonport) Pty Ltd (PPD), I determined that, although the document was considered at a closed session of Council on 24 October 2016, it was not created for the purpose of submission to the closed meeting of Council. It is a record of a commercial agreement concerning the leasing of a building owned by Council to PPD, not a record of a closed session of the Council.
- 56 Furthermore, nothing in the signed lease disclosed deliberations of Council, and the decision by Council to enter into the lease agreement has been officially published and confirmed by Council. Therefore, I determined that the lease was not exempt under s32.
- 57 I further noted that the key terms of the lease had been published in the Report of the Auditor-General No 1, into the commercial and governance processes concerning procurement in Local Government (2019).⁶ Accordingly, there did not appear to be any part of the lease that would be likely to expose the Council or PPD to any competitive disadvantage, or which would justify exemption under other provisions of the Act.
- 58 Accordingly, I determined that the lease should be released in full. In as much as the information has been released, I do not need to consider the document further in this case. The information comprising document 3.2 is not exempt under s32 and should be released to Mr Gardam.

Amendments or replacement leases

- 59 Council located a document, numbered 3.3, which it considered responsive to Mr Gardam's request for copies of *all amendments or replacement leases, if any, to the original agreement* and claimed it was exempt under s32(1)(a).
- 60 Document 3.3 is headed 'Lease Agreement for Providore Place "Pavilion", 17 Oldaker Street, Devonport' and is dated 30 August 2019. This is the lease

⁵ *Robert Vellacott and Devonport City Council* (R2202-011) 6 April 2022, available at <https://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions>

⁶ Report of the Auditor-General No.1 of 2019-20, Procurement in Local Government at page 8, accessible at www.audit.tas.gov.au/publication/prcurement-2/.

which was the subject of the confidential report to Council in Document 3.3a and a draft of which was listed as an attachment to that report for the purpose of consideration at the closed session.

- 61 I accept that Document 3.3 comprises information that was tabled at a closed session of the Council meeting on 9 September 2019. However, as with the head lease agreement (Document 3.2), although the document was considered at a closed session of Council, it was not created for the purpose of submission to the closed meeting of Council. It is a record of a commercial agreement concerning the leasing of a premises, not a record of a closed session of the Council.
- 62 Furthermore, nothing in the signed lease disclosed deliberations of Council, and the decision by Council to enter into the lease agreement has been officially published and confirmed by Council. Therefore, I determine that the lease was not exempt under s32.
- 63 Council has not discharged its onus to show that any other exemption is relevant to justify not disclosing this document. My previous decision in *Elaine Anderson and the Director of Inland Fisheries*⁷ also found no justification under the Act to exempt from release a similar lease agreement regarding the operation of a restaurant and interpretation centre at the Salmon Ponds.
- 64 For all these reasons, I consider that Document 3.3 is not exempt and should be released in full to Mr Gardam.

Section 36 – personal information of a person

- 65 The third category of exemption raised by Council is that of personal information of a person under s36 of the Act. For information to be exempt under this section, I must be satisfied that its release would reveal the identity of a person other than the person seeking the information, or that the information would lead to that person's identity being reasonably ascertainable.
- 66 Section 5 of the Act defines personal information as:

...any information or opinion in any recorded format about an individual –
(a) whose identity is apparent or is reasonably ascertainable from the information or opinion; and
(b) who is alive, or has not been dead for more than 25 years.
- 67 The personal information for which Council claims exemption under s36 occurs in Document number 4.1 in the Schedule of documents, titled Candidate Summary – Matthew Atkins. The Schedule of documents describes the document as containing a summary of the now General Manager's qualifications and experience as at the end of 2018, the information contained in the document is applicable to the period when he authored the Council Report as the Deputy General manager in July 2016.

⁷ 28 April 2021, available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

- 68 I note that the internal review in this matter was completed by Mr Atkins and he was determining whether his own personal information (which did not relate to his regular duties at Council) should be released. As in the matter of *Karl Willrath and Dorset Council*⁸, in which the then general manager made an internal review decision despite the information relating to a complaint he had made regarding a breach of a Code of Conduct for Councillors, I consider this highly irregular and reflective of an unmanaged conflict of interest. This is not a matter I am able to consider as part of this external review but I urge Council to take steps to prevent this situation from recurring.
- 69 Upon examination of the information in this Curriculum Vitae document, I am satisfied that the release of this information would disclose personal information of a person other than the person making the application and I am, therefore, satisfied that the information is *prima facie* exempt under s36.

Public interest test

- 70 Section 36 is subject to the public interest test contained in the s33. This means that, as I have determined the information to be *prima facie* exempt, I am required to determine whether it would be contrary to the public interest to release it, and this requires taking into account matters set out in Schedule I of the Act.
- 71 Council has provided the following table summarising its assessment of the matters in Schedule I of the Act. Council did not include this in its original decision or internal review decision provided to Mr Gardam, although it did note in its decision dated 8 October 2020, that the public interest test had been applied to its decision in accordance with s33 of the Act. This forms part of the reasons for decision and I consider it should have been provided to the applicant to explain the Council's reasoning. Section 22(2)(d) of the Act requires that a valid statement of reasons given to an applicant must state *the public interest considerations on which that decision was based*. Council must ensure that it complies with the Act fully in future and addresses these matters in its written decision, not just to my office in the event of an external review.
- 72 A copy of Council's table is set out below:

SCHEDULE I – Matters Relevant to Assessment of Public Interest

RTI Request: M Gardam – Item 4. GM experience & qualifications				
The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:				
Clause	Yes	No	N/A	✓
(a) the general public need for government information to be accessible	✓			Fav

⁸ 30 August 2023, available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest		✓		Unfav
(c) whether the disclosure would inform a person about the reasons for a decision		✓		Unfav
(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions		✓		Unfav
(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public		✓		Unfav
(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation		✓		Unfav
(g) whether the disclosure would enhance scrutiny of government administrative processes		✓		Unfav
(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government		✓		Fav
(i) whether the disclosure would promote or harm public health or safety or both public health and safety		✓		Fav
(j) whether the disclosure would promote or harm the administration of justice, including affording procedure fairness and the enforcement of the law		✓		Fav
(k) whether the disclosure would promote or harm the economic development of the State			✓	
(l) whether the disclosure would promote or harm the environment and or ecology of the State			✓	
(m) whether the disclosure would promote or harm the interests of an individual or group of individuals	✓			Unfav
(n) whether the disclosure would prejudice the ability to obtain similar information in the future		✓		Fav
(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	✓			Unfav
(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		✓		Fav
(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		✓		Fav
(t) whether the applicant is resident in Australia	✓			Fav
(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			✓	

- 73 Council did not provide any commentary with its assessment of the different matters in Schedule 1, however, I agree that matter (a) is applicable and weighs in favour of release.
- 74 Council has assessed that matters (b), (c), (d), (e), (f), (g) are relevant but do not weigh in favour of disclosure. While I do not consider that disclosure of the general manager's qualifications and experience will contribute significantly to debate on a matter of public interest, I do not consider that it would hinder any debate. I consider this factor as weighing slightly in favour of disclosure, as Mr Gardam holds concerns about the qualifications and experience of decision makers at Council. Where information about decisions relating to the expenditure of public funds in relation to a major project undertaken by Council may contribute to the debate as to whether this was an effective use of ratepayer funds, I do view the release of this information as being of public interest.
- 75 Australian courts and tribunals have drawn a distinction between the public interest in disclosure, and matters that are of interest to members of the general public. The fact that there is a section of the public interested in a certain activity will not necessarily lead to the conclusion that disclosure of documents relating to it will be in the public interest.⁹ Mr Gardam is not specifically seeking Mr Atkins' Curriculum Vitae out of curiosity, his request is

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

related to a matter of public interest. Accordingly, I consider that that disclosure would enhance scrutiny of government decision-making or administrative processes (f) and (g) to some degree.

- 76 However, I do not consider that factors (c), (d), (e) are of similar relevance here. Disclosure of the personal information would not particularly inform a person about reasons for a decision (c), nor provide contextual information (d). Disclosure would also not inform the public about government rules and practices in dealing with the public (e). I do not agree with Council that they weigh against disclosure but consider they are not relevant here.
- 77 Council has also found matters (h), (i) and (j) to be relevant and weighed in favour of release of the information. Given the one word reasoning provided for this assessment, it is difficult to ascertain Council's rationale. It appears that Council considers the disclosure of the information would not promote equity and fair treatment of persons or corporations in their dealings with government (h), nor promote public health or safety (i), nor the administration of justice, including enforcement of the law (j). Ultimately, in my view, these three matters are not particularly relevant in the circumstances.
- 78 With regard to matter (m), Council considers disclosure of the information would harm the interests of an individual and, therefore, this matter weighs against disclosure. I agree with Council's assessment in this regard, that the release of Mr Atkins' Curriculum Vitae does have the potential to cause harm to his interests. There is a reasonable expectation of some degree of confidentiality around applications for employment and much of the content of the information is quite personal around Mr Atkins' history. There is potential for the release of this personal information to negatively impact the interests of the person whose information it is.
- 79 Council considers matters (n) and (o) to be relevant. In relation to matter (n), Council indicated that release of the information would not prejudice the ability of Council to obtain similar information in the future. Council also indicated that disclosure would prejudice the objects of, or effectiveness of a method or procedure of tests, examinations, assessments or audits conducted by or for Council (o).
- 80 In my view, this is a matter of concern. The relevant information is the type of personal information provided to an employer upon registering an expression of interest for a position of employment. It is part of a long standing and deeply entrenched process in the culture of job seeking and appointment negotiation, in which confidentiality of personal information is a critical element. While the disclosure of this information may not necessarily impact Council's ability to obtain similar information in the future, in my view it is important to respect the context of the information. I agree with Council's assessment of matter (o) and consider this weighs considerably against disclosure of the information.

- 81 With regard to matter (p) I agree with Council's assessment that disclosure of the information would not have a substantial adverse effect on the management or performance assessment by Council on Council staff, substantial being the operative word in this matter. I consider this matter of neutral impact in this situation.
- 82 I broadly agree with the remainder of the Council's basic assessment of the factors which are relevant or not applicable to this matter.
- 83 Overall, I consider that the balance of public interest factors do not favour the release of the general manager's personal information in his Curriculum Vitae. I determine that it would be contrary to the public interest to disclose this information, subject to one exception.
- 84 The exception is the summary of Mr Atkins' employment history at Council, which lists the four roles he had held at Council at that time and their duration. I do not consider it contrary to the public interest for this type of basic information about the past roles a senior executive has held within that same public authority to be released.
- 85 The remainder of the information in Document 4.I is exempt under s36 and not required to be disclosed to Mr Gardam.

Section 37 – Information relating to business affairs of a third party

- 86 Ms Surtees of Council advised my office on 19 January 2021 that Council now considered that Documents 1.1, 1.2 and 1.4 in the Schedule of Documents did not meet the criteria to claim exemption under s32 of the Act, and suggested s37 as an alternative.
- 87 In view of this, I will make an assessment of the specified information under s37 of the Act. Section 37 is subject to the public interest test under s33. I note again that this is not sufficient to meet the requirements of a valid statement of reasons under s22 and I urge Council to ensure sufficient detail is provided to the applicant of the reasons it seeks to rely on to exempt information.
- 88 Section 37(1) provides for the exemption of information that is related to the business affairs of a third party, when that information is acquired by a public authority from a person or organisation other than the person making the application for disclosure, if either:
- (a) the information relates to trade secrets; or
 - (b) its disclosure would be likely to expose the third party to competitive disadvantage.
- 89 Council has not specified which part of s37 it is relying upon, however as there is no indication in any document or submission of trade secrets being in issue, I will proceed on the basis that the concern is exposure of other parties to the agreements to competitive disadvantage.

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

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

- 91 Further, at paragraph 41 the Court interpreted *likely* to mean that there must be a real or not remote chance or possibility, rather than more probable than not.
- 92 The relevant information in this instance comprises two lease agreements and an assignment of a lease to which Council is a party, specifically:

Document I.1	Lease from Devonport City Council to Party A, dated 9 September 2016.
Document I.2	Lease from Devonport City Council to Party B, dated 1 December 2015.
Document I.4	Assignment between Parties C, D and E and Devonport City Council, dated 5 June 2015.

- 93 Section 37(2) sets out the procedure Council must follow where information is provided to Council by a third party and disclosure of that information is reasonably expected to be of substantial concern to the third party. Before deciding whether the disclosure of the information would be likely to expose the third party to substantial harm to their competitive position, Council must notify the third party and request their input regarding whether or not the information should be provided to the applicant.
- 94 Unfortunately, the procedural steps set out in s37(2) have not been followed by Council, so I have no information before me from the other parties to the legal agreements described above. I therefore cannot ascertain their opinions on whether the disclosure of the information would be of substantial concern to them. In addition, Council has made no submissions as to how the disclosure of the information would expose the third parties to competitive disadvantage.
- 95 In view of the above, I must conclude that Council has not discharged its onus under s47(4) of the Act to show there are grounds to establish that the information should not be disclosed. I determine the exemption under s37 in respect of the information in Documents I.1, I.2 and I.4 is not made out.

96 I am also of the opinion that, given the passage of time since these documents were brought into existence and subsequent developments since that time, any negative impact due to disclosure of the information would be unlikely to be significant.

Item 5

97 The fifth part of Mr Gardam's application asked for Council to:

Provide evidence by releasing a list of the applicable lease agreements entered into by Council between 2011 and 2016 (immediately prior to the acceptance by council of the Providore Place head lease) that were similar and used as the basis for the food pavilion head lease; being

- a) Any head lease as landlord?
- b) Any head lease similar to the Providore Place head lease?
- c) Any lease similar to the Providore Please head lease variously described as a cooperative shared arrangement, operating partnership and non-traditional cooperative shared arrangement?

98 In Council's decision dated 8 October 2020, Ms Surtees responded:

Commercial leases for properties located at 17 Fenton Way; 6-10 Steele Street; and the Surf Club were all subject to terms and conditions based on the lease template provided to Council, and utilised by Council's solicitors; or were existing agreements transferred to Council as part of settlement process for properties acquired during the period 2011-2016.

99 Mr Gardam is not satisfied that Council's response addresses the specific requests made in this part of his original application. He suggests, in his letter dated 5 May 2023, that the property leases named by Ms Surtees are not agreements specifically designed for a multiple subletting arrangement or a site management role as a head lessee and are actually standard leases direct with council as landlord.

100 This part of Mr Gardam's request is imprecise and Council has provided a response. I do not consider that there is any direction or further matter to consider on external review. If Mr Gardam requires additional information, I encourage him to liaise further with Council regarding the information he seeks and consider another, more specific, request for information.

Preliminary Conclusion

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

- Exemptions claimed pursuant to s31 are upheld;
- Exemptions claimed pursuant to ss32 and 36 are varied; and
- Exemptions claimed pursuant to s37 are not made out.

Submissions to the Preliminary Conclusion

- 102 As the above preliminary decision was adverse to Council, it was made available to it on 16 November 2023 under s48(1)(a) of the Act to seek its input before finalising the decision.
- 103 On 11 December 2023, submissions were received from Mr Matthew Atkins, General Manager of Council and its principal officer under the Act.
- 104 Mr Atkins agreed to release Documents 3.2, 3.3 and 4.1 in accordance with the preliminary decision. However, he raised concerns about Documents 1.1, 1.2, 1.3 and 1.4. He set out that these were still current and operational lease agreements and their release may negatively impact the parties to those leases. He set out that consultation under s37 would be needed with the external parties who have entered into these leases with Council, as they may suffer competitive disadvantage by the release of this information to the primary applicant.

Further analysis

- 105 I note that Mr Gardam's initial request for information, in relation to these leases being used as examples for the Providore Place lease, indicated that redaction should be *strictly limited to removal of the identity of the other party to the agreement if it was a live document used as the basis of the initial Providore Place head lease agreement*. I consider this shows that Mr Gardam was content for the identity of the other party or parties to the lease to be removed in information to be released to him. Once this information is removed, I do not consider that any competitive disadvantage could result for the various third parties or that this information is capable of being exempt under s37.
- 106 Accordingly, I have amended this decision to remove any reference to the identity of the other parties to the relevant leases at Documents 1.1, 1.2, 1.3 and 1.4. I also consider the following information, which would identify the parties to the leases, to be able to be redacted by agreement:

Document 1.1

- All references to the name of the tenant and address of the leased property;
- The ABN of the tenant;
- The dollar figures of the rental rate;
- Clause 1(2)a);
- An email address of the tenant in clause 3(10)c);
- The three schedules to the lease;
- The signature of the tenant; and
- The Property Condition Report annexed to the lease

Document 1.2

- All references to the name of the tenant and address of the leased property;
- The ABN of the tenant;
- The dollar figure of the rental rate;
- The first schedule to the lease;
- The common seal, business address and signature of the tenant; and
- The building maintenance schedule.

Document 1.3

- All references to the location of the leased premises listed after *Item 1.3 Sub Lease*;
- All references to the second Sub-Lessee named on the first page;
- The words between *Lease for* and *draft 2013 version* in the file path at the end of the first page;
- The words between *the Head-Lessor* and *Attachment 1* in Clause A of the Recitals;
- The eighth and ninth words on the fourth line of Clause D of the Recitals;
- The words in brackets on lines two and three of Clause 3.2;
- The tenth to thirteenth words in the fourth line of Clause 3.28(i);
- All of Clauses 5.10.1 *Shared Use Areas* and 5.11 *Carpark Extension*;
- The words in the third column of the Schedule which correspond to Items 4, 5, 6, 10 and 13;
- The name and signatures relating to the second sub-lessee on the last two pages of the lease;
- Annexures 1-4; and
- The three page Disclosure Statement Details, Sub-Lessor Details document.

Document 1.4

- The names and signatures of the three external parties to the assignment of lease;
- ABNs and addresses of the external parties to the assignment of lease;
- The address of the leased premises;
- The annual rental dollar figure;
- The names, addresses, occupations and signatures of witnesses;

- The location of the premises in the sub-lease;
- The name and signature of the sub-lessee;
- The words in the third column of the Schedule which correspond to Items 4, 5, 10 and 13;
- The two page Disclosure Statement Details, Sub-Lessor Details document; and
- The schematic document at the final page.

107 Subject to the above redactions, Documents 1.1, 1.2, 1.3 and 1.4 are to be released to Mr Gardam.

Conclusion

108 For the reasons given above, I determine that:

- Exemptions claimed pursuant to s31 are upheld;
- Exemptions claimed pursuant to ss32 and 36 are varied;
- Exemptions claimed pursuant to s37 are not made out; and
- Information identifying parties to leases is to be redacted by agreement between the parties.

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

Dated: 16 January 2024



Richard Connock
OMBUDSMAN

ATTACHMENT I – Relevant legislative provisions

31. Legal professional privilege

Information is exempt information if it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.

32. Information related to closed meetings of council

- (1) Information is exempt information if it is contained in –
- (a) the official record of a closed meeting of a council; or
 - (b) information proposed by an officer of a council or a councillor for the purpose of being submitted to a closed meeting of a council for consideration if the officer or councillor has contributed to the origin, subject or contents of that record; or
 - (c) information that is a copy of, or a copy of part of, information referred to in paragraph (a) or (b); or
 - (d) information, the disclosure of which would involve the disclosure of a deliberation or decision of a council made at a closed meeting of the council, other than information by which a decision of the council was officially published.
- (2) Subsection (1) ceases to apply after the end of the period of 10 years commencing on the date of the creation of the information referred to in that subsection.
- (3) Subsection (1) does not include information solely because it –
- (a) was submitted to the closed meeting of a council for consideration; or
 - (b) is proposed by an officer or councillor to be submitted to the closed meeting of a council for consideration –
 - if the information was not brought into existence for submission to the closed meeting for consideration, unless its disclosure would disclose a deliberation or decision of the closed meeting which has not been officially published.
- (4) Subsection (1) does not include purely factual information unless its disclosure would disclose a deliberation or decision of the closed meeting of a council which has not been officially published.
- (5) In this section –

closed meeting of a council means a meeting of a council which is formally closed to the public for a purpose specified in regulations made under the *Local Government Act 1993* and includes a closed meeting of a council committee

36. Personal information of person

- (1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13.
- (2) If –
- (a) an application is made for information under this Act; and
 - (b) information was provided to a public authority or Minister by a third party; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

37. Information relating to business affairs of third party

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

(a) the information relates to trade secrets; or

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

(2) If –

- (a) an application is made for information under this Act; and
- (b) the information was provided to a public authority or Minister by a third party; and
- (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of substantial concern to the third party –

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

- (d) notify the third party that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information applied for; and
- (f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority, state the name and designation of the person who made the decision; and
- (c) inform the third party of –
 - (i) its right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.

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

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

33. Public interest test

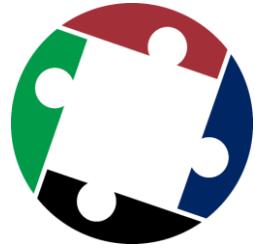
- (1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.
- (2) The matters which must be considered in deciding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

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

- (1) The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:
- (a) the general public need for government information to be accessible;
 - (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
 - (c) whether the disclosure would inform a person about the reasons for a decision;
 - (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
 - (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
 - (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
 - (g) whether the disclosure would enhance scrutiny of government administrative processes;
 - (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
 - (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
 - (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
 - (k) whether the disclosure would promote or harm the economic development of the State;
 - (l) whether the disclosure would promote or harm the environment and or ecology of the State;
 - (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
 - (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
 - (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

DECISION
OMBUDSMAN TASMANIA



Right to Information Act Review Case Reference: R2208-006

Names of Parties: Malcolm Gardam and Devonport City Council

Reasons for decision: s48(3)

Provisions considered: s32, s37

Background

- 1 Between 2016 and 2019, the Devonport City Council (Council), a public authority under the *Right to Information Act 2009* (the Act), entered into commercial agreements with Providore Place Devonport Pty Limited (PPD) to manage Providore Place food pavilion; and Fairbrother Pty Limited (Fairbrother), for commercial development works including financing, construction and potentially management of a waterfront hotel as part of the Living City development (the project), a large urban renewal project in central Devonport.
- 2 In September 2019, the Tasmanian Auditor-General, in an audit covering the period December 2012 to January 2019 inclusive, reported on the project as follows:

Stage One also include[s]... a multi-level car park and a food pavilion, known as Providore Place, to showcase the region's premium produce through restaurants, a distillery, accredited training facilities and market spaces. The Providore Place facility is approximately 1,500m² comprising five permanent tenancies, an open market space and a mezzanine floor to accommodate a cooking school and food education opportunities.

Stage Two of the Living City project, known as the Waterfront Precinct comprises a hotel, residential apartments, a riverside park and a potential marina. In November 2018, DCC lodged a development application for the redevelopment of the waterfront parkland as part of Stage Two of the project.¹

- 3 In December 2021, Providore Place was re-named Market Square Pavilion; however, I will continue to use the name Providore Place in this decision for consistency with the terminology used in the relevant material.

¹ Tasmanian Audit Office, *Report of the Auditor-General No. 1 of 2019-20, Procurement in Local Government*, September 2019, at page 8, available at www.audit.tas.gov.au, accessed 10 April 2024.

- 4 On 22 May 2022, Mr Malcolm Gardam made an application for assessed disclosure under the Act to Council. Mr Gardam is a ratepayer in the Devonport local government area and holds concerns about the actions of Council and the manner in which public funds have been used in relation to the project. He sought (verbatim):
1. *A full unredacted signed copy of the second (replacement) head lease agreement between Devonport City Council and Providore Place Devonport Pty Ltd for the food pavilion known as Providore Place entered into around August September 2019.*
 2. *A full unredacted signed copy of the Early Works Contract between Devonport City Council and Fairbrother Pty Ltd entered into in 2016 to enable early works associated with Living City - Stage 1 to commence.*
 3. *A full unredacted signed copy of the Living City Stage 1 amended AS 4300 Contract between Devonport City Council and Fairbrother Pty Ltd for Living City - Stage 1 construction, entered into around mid-2016.*
 4. *A full unredacted signed copy of the Memorandum of Understanding (or Memorandum of Agreement) between Devonport City Council and Fairbrother Pty Ltd for the sale of the land for the parkland hotel in Best Street entered into during October 2017.*
 5. *A full unredacted signed copy of the land sale contract between Devonport City Council and Fairbrother Pty Ltd for the sale of the land for the parkland hotel in Best Street, entered into during March 2019.*
 6. *A full unredacted signed copy of the two-year exclusivity agreement between Devonport City Council and Fairbrother Pty Ltd, as applicable to the proposed construction of the waterfront parkland hotel, in favour of Fairbrother Pty Ltd, if not included in any of the documents requested.*
- 5 On 24 June 2022, Ms Claire Jordan of Council, a delegate under the Act, issued a decision to Mr Gardam. She determined that:
- information responsive to items numbered one, three and four of the application was exempt under s32 of the Act, as it comprised information contained in the official record of a closed meeting of Council;
 - information responsive to item numbered two and five of the application was exempt under s37, as it comprised information relating to the business affairs of a third party, and the third party did not consent to its release because it would expose it to competitive disadvantage; and

- information responsive to item number six of the application was contained in the information responsive to item number four (which was determined to be exempt under s32).
- 6 Mr Gardam applied for internal review of Council's decision on 28 June 2022. On 19 July 2022, Mr Matthew Atkins, General Manager of Council, and its principal officer under the Act, affirmed the initial decision in relation to item numbers one, three, four, five and six of the application. However, in relation to item number two, he released a redacted version of the contract between Council and Fairbrother sought. He indicated that the redactions were applied because Fairbrother did not consent to its release in full and expressed substantial concern that disclosing the remaining information would expose it to competitive disadvantage under s37 of the Act.
- 7 On 3 August 2022, Mr Gardam applied to this office for external review of the decision. His application was accepted under s44 of the Act, on the basis he was in receipt of an internal review decision and his application for external review was made within 20 working days after receipt of that decision.

Issues for Determination

- 8 I must determine whether the information not released by Council is eligible for exemption under sections 32, 37, or any other relevant section of the Act.
- 9 As s37 is contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine the information is *prima facie* exempt from disclosure under this section, I must then determine whether it would be contrary to the public interest to release it. In doing so, I must, at least, consider all the matters contained in Schedule 1 and disregard all the matters contained in Schedule 2.

Relevant legislation

- 10 Council has relied on ss32 and 37 of the Act to exempt information from release in its decision. I attach copies of these sections to this decision at Attachment 1.
- 11 Copies of s33 and Schedule 1 of the Act are also attached at Attachment 1.

Submissions

Council

- 12 Council did not provide submissions beyond the brief reasoning of its decisions. In the initial decision, Ms Jordan's comments in relation to each item number of the application were as follows:

Item number one:

The information requested has been assessed as not to be released, subject to section 32 of the Act, as it relates to "information related to closed meetings of council".

Item number two:

This information requested for release is subject to section 37 of the Act, as it relates to "information relating to business affairs of third party". Council has contacted the third party, in accordance with section 37(2) of the Act, and confirm [sic] that the third party does not consent to its release, owing to serious concerns that disclosure of the information, would expose the third party to competitive disadvantage.

Item number three:

As the information requested relates to information subject to "closed meetings of council", in accordance with section 32 of the Act, the information is deemed exempt information, and for release [sic].

Item number four:

As the information requested relates to information subject to "closed meetings of council", in accordance with section 32 of the Act, the information is exempt from release.

Item number five:

This information requested for release is subject to section 37 of the Act, as it relates to "information relating to business affairs of third party". Council contacted the third party, in accordance with section 37(2) of the Act, and confirm [sic] that the third party does not consent to its release, owing to serious concerns that disclosure of the information, [sic] would expose the third party to competitive disadvantage.

Item number six:

As this information is contained within documentation requested in number 4 of this request, this information is also exempt information under section 32 of the Act.

- 13 In the internal review decision, Mr Atkins provided:

*I find that the application was assessed in accordance with the Act, and I advise that I uphold **response numbers 1, 3, 4, 5 & 6** of the original decision, and in regard to **response number 2**, release a redacted copy of the Early Works Contract between Devonport City Council and Fairbrother Pty Ltd. The redacted sections relate to the breakdown of individual items of the contract only. The total contract amount is unredacted as it is already publicly available information.*

The document is released in redacted form, as the third party to which the Contract Agreement relates expressed substantial

concern, namely exposure to competitive disadvantage, should the document be released in full, and therefore objected to its release.

Mr Gardam

- 14 Mr Gardam provided extensive submissions. In his submissions submitted with his application for assessed disclosure of information on 22 May 2022, he set out (verbatim):

Since 2016 numerous ratepayer questions relating to these contracts have been asked of Devonport City Council with guarded responses at best received. Council has however, disclosed selective details to the community albeit normally disclosures favourable to council. Council also has a history of directing those making requests for information to make an Application for Assessed Disclosure (an RTI request)

Considering that the operative use of the documents requested are now at an end, there is no reason that all documentation cannot be released and provide ratepayers the opportunity to scrutinize if aspects of these arrangements were in their best interests and as represented to the community by Council.

Accordingly, I hereby request copies of those documents be released.

... Council is NOT a private company and substantial ratepayer cash reserves and borrowings along with taxpayers' money have been expended on Living City with limited and selective disclosures by Devonport City Council as to specific aspects of these arrangements and the provision of evidence supporting Council's public representations. Ratepayers have a basic right to know and be able to scrutinize council's decision making and arrangements for themselves.

- 15 Mr Gardam provided detailed submissions in his external review application dated 3 August 2022, however some of his submissions focused on the reasons why he sought the information, which are not relevant to the matters I am determining. In relation to Council's application of ss32 and 37 of the Act, Mr Gardam described the decisions by Ms Jordan and Mr Atkins as *typically uncooperative and contrary to key principles of good governance; as has been the case since 2016 in relation to questions asked about the appropriateness of these arrangements*. He continued by saying (verbatim):

In relation to the Living City project Council has arguably abused the "safe haven" of Closed Session and selectively hidden behind the "exemptions" from RTI afforded by s32 of the Right to Information Act and, since being directed by the Ombudsman to release the initial Providore Place head lease agreement, now using s37. The ongoing result of this approach by Council, including

driving those seeking answers to request external reviews by the Ombudsman for rejected RTI's that can take 2-3 years, is to frustrate them through an absence of transparency which in turn avoids accountability and any opportunity for the community to assess Council's contract arrangements on the Living City project in a reasonable timeframe or at all.

- 16 Mr Gardam set out why he considered that the information should be released (verbatim):

Firstly, since 2016 concerned ratepayers have persistently questioned DCC as to specific elements of various arrangements surrounding Living City only to be responded to with "confidential"; "commercial-in-confidence"; the other party does not agree to release of the information sought and most commonly that the information related to closed meetings of council.

*Secondly, and as a pertinent example why the documents requested should be released, similar DCC responses were applied to ongoing requests relating to arrangements with Providore Place Devonport Pty Ltd, while the following DCC representations were slowly exposed in some cases years later. **The release of the initial head lease agreement was the final stage of exposing the following council representations for what they were – false.***

Mr Gardam then provided further commentary to support his argument why the information should be released, and included statements alleged to have been made by Council and quotes from the Report of the Auditor General.²

- 17 Mr Gardam provided comments on Councils decisions in relation to each item of his application (verbatim, and text underlined is Mr Gardam's emphasis):

Item number one:

DCC has offered s32 as the reason to refuse release. I question that the requested replacement head lease agreement of itself contains anything that would identify deliberations or decisions of a Closed Session and in fact is merely the tool that formalises the agreed arrangements between DCC and PPD and therefore s32 is being read too broadly so as to capture the actual lease agreement. Therefore, I request that the Ombudsman review the lease agreement against s32 with a focus on s32(1d,3 & 4) and substantiate the validity of the DCC claim for rejecting the release of this document.

² Tasmanian Audit Office, *Report of the Auditor-General No. 1 of 2019-20, Procurement in Local Government*, September 2019, available at www.audit.tas.gov.au, accessed 10 April 2024.

Item number two:

Clearly, in this instance, the Principal Officer did not believe that s37 applied on removal of the detailed cost breakdown and had no problem with releasing this contract. Likewise the same approach should present no problems with releasing the Fairbrother related documents requested. I note that reliance on s32 was not offered as a reason to refuse release of this document despite it being a contract with a third party and likely considered in Closed Session by council when giving approval for the General Manager to formalise the contract.

Item number three:

As stated above re the RTI No. 2 reasoning there should be no reason for refusing release of this document if the detailed breakdown of individual prices is redacted. When it comes to this document it is hardly of itself a document drafted to aid the decision making by councillors and release would not divulge anything that would identify deliberations or decisions of councillors in Closed Session; which has not been requested. The document requested is simply the tool that formalises a decision made by council. As to details within the contract my understanding is that a sharing arrangement existed in relation to cost savings found after project commencement of the Gross Maximum Price (GMP) contract; hardly a unique initiative unknown in the industry and besides s37 has not been included as a reason to refuse the request. Section 32 as offered by DCC should not apply to the refusal to release this document and I therefore request that the Ombudsman review the contract document against s32 with a focus on s32(1d,3&4) and substantiate the validity of the DCC claim for rejecting the release of this document.

Item number four:

DCC has offered s32 in refusing this RTI No. 4 and in relation to the Exclusivity Agreement requested as RTI No. 6 that DCC has advised forms part of the MOU requested here. My understanding is, just like the initial Providore Place head lease agreement, no legal advice was sought by DCC in relation to the MOU. Again the document of itself is simply the tool to formalise the arrangements that DCC agreed to with Fairbrother and those terms should not be deemed confidential. DCC advised that this document also includes the two-year Exclusivity Agreement in favour of Fairbrother to commence building the hotel which is now nearing completion. One could assume that this agreement expired on the signing of the land sale agreement during March 2019; over 3 years ago. Noting DCC has not offered s37 as a reason to refuse release of these documents I request that the Ombudsman review the MOU against

s32 with a focus on s32(1d,3&4) and substantiate the validity of the DCC claim for rejecting the release of this document.

Item number five:

Again, my understanding is that the conditions of the land sale agreement have been fulfilled with the sale of the council owned land long finalised and construction of the hotel to be completed around October 2022. Again it is only the body of the conditions within the agreement being requested and not any council deliberations or decision made in Closed Session. My understanding is that DCC had provision for land buy-back if the hotel did not eventuate and DCC paid Fairbrother some \$170,000 to demolish the section of building remaining on DCC land and if the hotel didn't eventuate DCC would pay Fairbrother for demolishing the building on the proposed hotel site. I previously questioned DCC about selling just one section of the hotel site for an estimated \$750,000 less than the buy price to which the response was we don't keep those numbers. Accordingly, I request that the Ombudsman review the land sale agreement against s37 and substantiate the validity of the DCC claim for rejecting the release of this document.

Item number six:

Based on the advice that these terms and conditions are included in the Memorandum of Understanding requested in RTI No. 4 then this document RTI No. 6 now becomes part of the RTI Request No 4 above.

18 Mr Gardam concluded (verbatim):

The Devonport City Council's attitude to transparency relating to Living City decision making and agreements/arrangements made with private enterprise, almost exclusively done in Closed (secret) Session, has large sections of the community questioning those decisions and arrangements. This is largely due to Council's refusal to substantiate its representations and provide few real time disclosures other than those forced upon them.

Considering the operative life of the requested documentation is now at an end there should be no existing impediment to their release (albeit with redacted cost breakdown where appropriate) and I strongly urge you to direct DCC to do so to enable public scrutiny of the arrangements against what has been represented to the public by DCC.

If there is nothing untoward in the currently requested documents then DCC should embrace their release as a means of restoring trust, credibility and repair reputational damage caused by its

paranoia of Living City secrecy surrounding project arrangements and contracts with private companies.

- 19 On 26 May 2023, Mr Gardam provided further submissions in support of his application for external review of Council's decisions. He explained that these submissions were being made to provide background information and attached a letter of complaint to this office dated 26 November 2018 regarding Council's actions in relation to the project. These submissions mainly focused on the reasons for Mr Gardam's issues with Council's decisions and actions.
- 20 On 5 July 2023, Mr Gardam provided further submissions consisting of a letter, extracts of questions from Mr Gardam to the Council and Council's responses at its ordinary meeting on 26 June 2023, and an audio recording of Mr Gardam's question and Council's response. As before, these submissions mainly provided further context in relation to Mr Gardam's dispute with Council. In his letter, the main relevant comments were (verbatim):

Primarily Devonport City Council (DCC) relies on s32 and s37 in refusing RTI requests...with what appears to be scant regard for s3 Object of Act or clauses within s32 and s37 other than s32(1) relating to closed sessions and s37(1) relating to "trade secrets" and "competitive disadvantage". When it comes to ratepayers and members of the public it seems DCC is of the opinion that just quoting these sections/clauses, without justifying its application fully in accordance with the Act, is all that is needed. Fortunately, the Ombudsman does not accept DCC's assertions at face value; however, I suspect at least DCC senior staff understand the requirements of the Act but elect to put the public through the RTI process knowing full well that it will presently delay a decision by about three years. The belief that the public should accept everything that DCC states as correct has long passed. In my opinion this is a very convenient arrangement for DCC that allows it to refuse disclosures that might be viewed negatively by the public. However, it readily makes disclosures that it views as favourable to DCC's standing.

As detailed elsewhere in my submissions, for many years DCC has offered up that it has asked the private entity to an agreement if it will agree to disclose certain information (s37) and that the request has been refused by the other party and beneficiary of the arrangements.

...

All of the above responses are revealing as to the DCC's ongoing attitude to openness and transparency while it purports to champion good governance principles. How can the expenditure of public funds and granting of concessions to private entities by DCC possibly be classed indefinitely as commercial-in-confidence?

Analysis

Section 32 - Information related to closed meetings of council

21 Section 32(1) of the Act provides:

- (1) *Information is exempt information if it is contained in –*
 - (a) *the official record of a closed meeting of a council; or*
 - (b) *information proposed by an officer of a council or a councillor for the purpose of being submitted to a closed meeting of a council for consideration if the officer or councillor has contributed to the origin, subject or contents of that record; or*
 - (c) *information that is a copy of, or a copy of part of, information referred to in paragraph (a) or (b); or*
 - (d) *information, the disclosure of which would involve the disclosure of a deliberation or decision of a council made at a closed meeting of the council, other than information by which a decision of the council was officially published.*
- 22 Council has applied s32 to exempt from disclosure information responsive to item numbers one, three, four and six of Mr Gardam's application in full. This information consists of:
 - a lease dated 30 August 2019 between Council and PPD for the Providore Place Pavilion (Lease);
 - an agreement dated 25 October 2016 between Council and Fairbrother for the construction of Stage One of the project (Construction Contract); and
 - a memorandum of agreement dated 4 October 2017 between Council and Fairbrother for the purchase of land and commercial development works including financing, construction and potentially management of a waterfront hotel as part of Stage Two of the project (Memorandum of Agreement).
- 23 Council considered this information to be exempt under s32 because the relevant documents were considered at closed meetings of Council on 24 October 2016, 2 October 2017 and 9 September 2019.
- 24 Council has provided to this office meeting agendas for closed meetings of Council on 2 October 2017, 22 October 2018 and 9 September 2019, and a report to Council for a meeting on 24 October 2016. Upon review of these documents, I am satisfied that they demonstrate that the information Council has claimed to be exempt under s32 was considered at closed meetings of Council.

25 I have been clear in previous decisions, notably *Robert Vellacott and Devonport City Council*³ (*Vellacott*) and in the two previous decisions concerning the same parties, *Malcolm Gardam and Devonport City Council*⁴ (*Gardam No. 1 and Gardam No. 2*), that information is not exempt from disclosure under s32(1) merely because it was presented at a closed meeting of Council for consideration. Those decisions dealt with very similar information to the information in this review, which Council also claimed to be exempt under s32(1).

26 As I outlined in those decisions, s32(3) is clear that:

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

(a) was submitted to the closed meeting of a council for consideration;

...

if the information was not brought into existence for submission to the closed meeting for consideration, unless its disclosure would disclose a deliberation or decision of the closed meeting which has not been officially published.

27 Further, section 32(4) provides that:

(4) *Subsection (1) does not include purely factual information unless its disclosure would disclose a deliberation or decision of the closed meeting of a council which has not been officially published.*

Lease

28 I accept that the Lease was considered at a closed meeting of Council on 9 September 2019. It was attached as Attachment 2 to the agenda for that meeting and was clearly considered at that meeting. However, I am not satisfied that it was *created* for submission to the closed meeting. Rather, it was created to record the new commercial lease agreement between Council and PPD for the Providore Place food pavilion, which replaced the former lease agreement dated 1 November 2016 between the same parties (Former Lease).

29 As I have discussed in *Vellacott* and *Malcolm Gardam No. 2*, the Act clearly envisages legitimate circumstances where confidential discussions at closed meetings of Council should be exempt from disclosure. However, as with all exemptions, s32 should be interpreted in accordance with the Act's overarching pro-disclosure focus.

30 Under s7, a person has a legally enforceable right to information in the possession of a public authority, unless that information is exempt from

³ (6 April 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

⁴ (28 June 2023), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

⁵ (16 January 2024), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

disclosure. Pursuant to s3(4), the exemptions should be interpreted to further the Act's objects of improving democratic governance in Tasmania and *to facilitate and promote, promptly and at the lowest reasonable cost, the provision of the maximum amount of official information*. This is especially important for the exemptions, like s32, which are not subject to the public interest test under s33. An unduly wide interpretation of this exemption would be contrary to the purpose of the Act, and Parliament's intention that s32 should be interpreted narrowly is evident by the limitations contained at subsections (2), (3) and (4) of this provision.

- 31 In *Vellacott and Gardam No. 1*, I determined that the Former Lease was not exempt from disclosure. Although the Former Lease was considered at a closed session of Council, it was not created for the purpose of submission to the closed meeting of Council. It was a record of a commercial agreement, not a record of a closed session of the Council. Furthermore, nothing in the Former Lease disclosed deliberations of Council, and the decision by Council to enter into the Former Lease had been officially published by Council. Therefore, I determined that the Former Lease was not exempt under section 32.
- 32 Similarly, in this case, the fact that the parties entered into a new lease,⁶ as well as some of the key terms relating to rent for the first two years and renewal options⁷ have been published by Council. The remainder of the Lease appears to be on standard terms which would be expected for a lease of premises for use as a food pavilion, and I therefore do not consider it necessary to assess any part of it under an alternative exemption, such as s37. There is also nothing in the Lease which discloses deliberations of the closed session of Council.
- 33 Accordingly, I am not satisfied that Council has discharged its onus under s47(4) of the Act to show why this information should be exempt under s32, or any other section of the Act. I find that it is not exempt and should be released to Mr Gardam.

Construction Contract

- 34 I accept the Construction Contract was considered at a closed meeting of Council on 24 October 2016. It was the subject of a report marked 'confidential' for that meeting. Further, the report recommended that the Construction Contract be considered by Council at a closed meeting and it was executed shortly after. However, as before, I am not satisfied that it was created for the purpose of submission to the closed meeting. Rather, it was created to record the commercial agreement between the parties for the construction of Stage One of the project.

⁶ Devonport City Council, *New lease deal for Providore Place*, (13 September 2019), available at www.devonport.tas.gov.au, accessed 10 April 2024

⁷ Devonport City Council, *New lease deal for Providore Place*, (13 September 2019), available at www.devonport.tas.gov.au, accessed 10 April 2024

- 35 The fact that the parties entered into the Construction Contract has been officially published in the Auditor General's report, and the value of the contract is also contained in that report.⁸ The Construction Contract is on Australian Standard general conditions of contract for a design and construct contract, and I therefore do not consider it necessary to assess any part of it under an alternative exemption, such as s37. There is also nothing in the Construction Contract which discloses deliberations of a closed session of Council.
- 36 Accordingly, I am not satisfied that Council has discharged its onus under s47(4) of the Act to show why this information should be exempt under section 32, or any other section of the Act. I find that it is not exempt and should be released to Mr Gardam.

Memorandum of Agreement

- 37 I accept that the Memorandum of Agreement was considered at a closed meeting of Council on 2 October 2017. It was attached to the agenda for that meeting, was clearly considered at that meeting and was executed shortly after. However, as before, I am not satisfied that it was created for the purpose of submission to the closed meeting. Rather, it was created to record the terms agreed between the parties for the purchase of land and development, financing and construction of the hotel as part of the project.
- 38 The fact that the parties entered into the Memorandum of Agreement has been officially published in the Auditor General's report.⁹ The Memorandum of Agreement is a record of the preliminary terms agreed and is not the finalised position on the subject matter. As such, the terms are expressed generally and at a high level. Further, the Memorandum of Agreement is no longer current and appears to have expired in October 2019. I therefore do not consider it necessary to assess any part of it under an alternative exemption, such as s37. There is also nothing in the Memorandum of Agreement which reveals any deliberations of a closed session of Council.
- 39 Accordingly, I am not satisfied that Council has discharged its onus under s47(4) of the Act to show why this information should be exempt under section 32, or any other section of the Act. I find that it is not exempt and should be released to Mr Gardam.

Section 37 - information relating to business affairs of third party

- 40 Section 37(1) provides:

(1) *Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other*

⁸ Tasmanian Audit Office, *Report of the Auditor-General No. 1 of 2019-20, Procurement in Local Government*, September 2019, at [1.1], page 11, available at www.audit.tas.gov.au, accessed 10 April 2024.

⁹ Tasmanian Audit Office, *Report of the Auditor-General No. 1 of 2019-20, Procurement in Local Government*, September 2019, page 9, available at www.audit.tas.gov.au, accessed 10 April 2024.

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.*

- 41 For information to be exempt under s37(1) of the Act, I must be satisfied that it would disclose business related information acquired by the Council from a person or organisation other than Mr Gardam. I must also be satisfied that the information relates to trade secrets, or that disclosure of the information would be likely to expose the third party to competitive disadvantage.
- 42 If I find the information to be *prima facie* exempt under s37, I must then consider whether it is contrary to the public interest to disclose the information under s33, considering at least all the matters contained in Schedule 1 and disregarding all the matters contained in Schedule 2.
- 43 Council has applied s37 to exempt from disclosure information responsive to item number two of Mr Gardam's application in part, and item number five in full. This information consists of:
 - a letter of intent dated 20 June 2016 between the Council and Fairbrother for early works in Stage One of the project (Letter of Intent); and
 - an agreement dated 20 March 2019 between the Council and Fairbrother for the sale of land for the hotel at Best Street (Agreement for Sale).
- 44 The information subject to this external review does not contain trade secrets, so I will only consider section 37(1)(b) of the Act.
- 45 In relation to the meaning of *competitive disadvantage*, this was considered in the Supreme Court of Tasmania in *Forestry Tasmania v Ombudsman*:¹⁰

For the information to be exempt its disclosure needs to be likely to expose the undertaking or agency not to any disadvantage, but a disadvantage which relates to or is characterised by competition. The requirements in ss31 and 32 of the Act that the disadvantage relate to competition may have the preservation of the competitive process as a broad ultimate goal, but primarily the provisions are concerned with the potential impact on the undertaking or agency acting as a competitor in the market.¹¹

...

¹⁰ [2010] TASSC 39

¹¹ *Forestry Tasmania v Ombudsman* [2010] TASSC 39, per Porter J at [52]

The application of the correct approach involves an assessment of the facts, and findings as to likely exposure to the relevant disadvantage.¹²

- 46 The meaning of *likely* in this context, was considered to be a *real or not remote chance or possibility, rather than more probable than not*¹³.
- 47 I note here that in the New South Wales Supreme Court decision of *Kaldas v Barbour*, it was held the Ombudsman is not subject to the supervisory jurisdiction of the courts¹⁴. I have since considered and taken legal advice on the position in Tasmania. I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to section 33 of the *Ombudsman Act 1978* and that I am also not subject to the supervisory jurisdiction of the Supreme Court of Tasmania.
- 48 Accordingly, the value of *Forestry Tasmania v Ombudsman* as precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases *competitive disadvantage* and *likely to expose*, all of which are instructive and with which I agree.

Letter of Intent and Agreement for Sale

- 49 On internal review, Mr Atkins released the Letter of Intent to Mr Gardam with redactions applied to the cost breakdown of individual items comprising the total contract amount contained in Annexure B to that document. Therefore, for the Letter of Intent, I will only consider whether the redacted information is exempt from disclosure under section 37(1).
- 50 Both Ms Jordan and Mr Atkins indicated in their decisions that the redacted parts of the Letter of Intent, and all of the Agreement for Sale, were exempt from disclosure because Fairbrother did not consent to the release of the information and expressed substantial concern that disclosing the information would expose it to competitive disadvantage.
- 51 Section 37(2) contains an obligation to consult with a third party where Council considers that releasing its business information may be of substantial concern to that third party. However, section 37(3) is clear that Council retains discretion as to *whether* to disclose the information (subject to the expiry of the third party's review rights under sections 37(4)(c) and 37(5)). In determining this, Council must consider the requirements of section 37(1)(b), namely whether disclosing the information is *likely* to expose the third party to competitive disadvantage.

¹² *Forestry Tasmania v Ombudsman* [2010] TASSC 39, per Porter J at [59]

¹³ *Forestry Tasmania v Ombudsman* [2010] TASSC 39, per Porter J at [41], applying *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 31, per Deane J at 346; *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110 per Heerey J at [91]; *Seven Network Ltd v News Ltd* (2009) 182 FCR 160 at 330 [750]

¹⁴ [2017] NSWCA 275 (24 October 2017), per Basten JA at [318] and Macfarlan JA at [380]

- 52 However, Council has not provided any reasoning as to why disclosing the cost breakdown for the individual contract items in the Letter of Intent would be likely to expose Fairbrother to competitive disadvantage, and the total contract amount has already been disclosed to Mr Gardam. It is not otherwise apparent why this information would be exempt under s37, as these figures are over eight years old and any competitive disadvantage does not appear to meet the requirement of being likely. Accordingly, I am not satisfied that this information is exempt under s37. It is to be released to Mr Gardam.
- 53 Furthermore, Council has not indicated why disclosing the Agreement for Sale would be likely to expose Fairbrother to competitive disadvantage, and details about the sale of land for the hotel, including the contract price have already been published by Council.¹⁵ Again, it is not clear why this information would be exempt under s37. It would be rare for an entire document to be exempt under s37, and the appropriate approach would be to redact the parts Council legitimately considers to be exempt as being likely to cause competitive disadvantage to Fairbrother if released. It has not done so and it is not otherwise apparent, so I am not satisfied that this information is exempt under s37. It is to be released to Mr Gardam.
- 54 While it is not necessary for me to assess the public interest test in s33, as I have not found information to be *prima facie* exempt, I make the following comments regarding Council's assessment.
- 55 In a letter to this office dated 22 May 2023 as part of the external review, Council indicated how many of the Schedule 1 items it considered to weigh in favour of, and against, disclosing the information. However, Council did not apply the public interest test or detail in either of its decisions which of the Schedule 1 items it considered relevant to assessing whether disclosing the information would be contrary to the public interest. I am concerned that this approach does not meet the requirements of the Act. Sections 22(1)(a) and 22(2)(a) require Council to provide *reasons* for decisions when information is determined to be exempt, and under section 22(2)(d), the reasons should include the public interest considerations Council considered when applying exemptions that are subject to the public interest test.
- 56 There are several important purposes for a statement of reasons, including that:
- i. *they "encourage better and more rational decision-making";*
 - ii. *they "enhance government transparency and accountability and give legitimacy to a decision by showing that the decision was not made arbitrarily and that issues raised by interested parties are being adequately considered"; and*

¹⁵ Devonport City Council \$1.3m Hotel land sale settlement, (9 July 2020), available at www.devonport.tas.gov.au, accessed 12 April 2024

- iii. *in compliance with procedural fairness, they enable those affected by the decisions to decide whether the decision has been lawfully made and why they have not succeeded.*¹⁶
- 57 Guidance from the Australian Review Council states that a well written statement of reasons should contain the decision made, the findings on material facts, the evidence on which each material finding of fact is based, and the *reasons for the decision*:
- The actual reasons relied upon by the decision maker at the time of making the decision must be stated. Every decision should be amenable to logical explanation. The statement must detail all steps in the reasoning process that led to the decision, linking the facts to the decision.*¹⁷
- 58 In this case, Council did not apply the legislation to the facts, provide any reasoning, apply the public interest test or inform Mr Gardam of how it reached its decision. Council's approach does not meet the requirements of s 37(1), as it does not address why disclosing the information would:
- cause Fairbrother competitive disadvantage; and
 - be contrary to the public interest.
- 59 It is mandatory that Council complies with the terms of the Act and provides sufficient reasoning for its decisions. I urge Council to be more diligent in future regarding compliance with the Act.

Further issues

Redactions

- 60 In the Letter of Intent, Council appears to have removed the information it determined to be exempt from disclosure under s37 from the document, or applied white redactions on a white page. I am concerned that Council's approach to redacting information is not consistent with section 18(2), which requires that a copy of information provided to applicants with exempt information deleted must include a note to the effect that the copy is not a complete copy of the original information. Further enquiries were needed by my office as part of this external review to ascertain where information had been removed from the Letter of Intent, which is an additional indication that it was not sufficiently clear that information had been deleted.
- 61 Council's approach of removing the information is unnecessarily confusing, and the Ombudsman has consistently taken the position that it is appropriate that clear redactions, usually in black, are applied to information determined to be

¹⁶ Justice Melissa Perry, *Statements of Reasons: Issues of Legality and Best Practice*, 10 June 2020, available at www.fedcourt.gov.au (accessed 12 April 2024), at paragraph 2, in which Her Honour cites Professors Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis, 5th ed, 2019) at 1200-1202.

¹⁷ Administrative Review Council, *Decision Making: Reasons, Best Practice Guide 4*, (August 2007), at page 8

exempt. This ensures that it is clear that the redacted version of the document is incomplete. I urge Council to end this practice and clearly identify redacted information in future.

Internal review decision

- 62 When carrying out an internal review, a principal officer or a delegate is to review the initial decision and the fresh decision *is to be given in the same manner as a decision in respect of the original application*, as is required by section 43(4). This fresh decision must be in accordance with the requirements of the Act, which include that a full statement of reasons and an assessment of the public interest test (if relevant) is required. In this case, the internal review decision does not contain these elements and is not a standalone fresh decision. I am concerned that this does not meet the requirements of the Act and I urge Council to end this practice in order to ensure compliant internal review decisions are being made.

Preliminary Conclusion

- 63 For the reasons set out above, I determine that the exemptions claimed pursuant to sections 32 and 37 are not made out.

Submissions to the Preliminary Conclusion

- 64 As the above preliminary decision was adverse to Council, it was made available to it on 27 August 2024 under s48(1)(a) of the Act to seek its input prior to finalising the decision.
- 65 On 17 September 2024, submissions were received from Mr Matthew Atkins, General Manager of Council. Mr Atkins indicated Council would comply with the findings in the preliminary decision but provided submissions in response.
- 66 Mr Atkins set out that:

Whilst Council will oblige with the release of the documentation above as instructed by the Ombudsman in his preliminary decision, it contends that it does not agree with the interpretation requiring release of documentation subject to the Closed Session of Council meetings (as is permitted to be tabled as such under the Local Government (Meeting Procedures) Regulations 2015), and wishes to express its concern about the importance of preserving the confidentiality that it attaches to the records and deliberations of closed meetings of Council.

Further, Council wishes for the following points to be noted:

Point 25 – The Ombudsman asserts that he has been clear in 3 previous decisions in regard to exemptions not being made out under s32(1). Only one of those decisions, the Vellacott decision, was handed down prior to the conducting of our initial assessment and internal review of this application. Vellacott's decision was dated 6/4/2022, with subsequent Gardam decisions dated 28/6/2023 and 16/1/2024. This application was made 22 May 2022,

with response to initial application given on 24 June 2022, and affirmed Council's original decision, following an internal review, on 19/7/2022, all prior to the Gardam decisions being received.

Point 55 – *The assertion that Council did not undertake Public Interest Test assessment is incorrect. As indicated in letter of 22 May 2023, the Public Interest Test was applied to a number of items. Where the Public Interest Test was applied, comments were included, but perhaps not of sufficient detail. A number of items were not assessed against the Public Interest Test as it was Council's view that they were exempt items, not subject to the Public Interest Test assessment, and this was clearly documented. The original Public Interest Test assessment was reviewed as part of the Internal Review process, but there were found to be no material changes to the outcomes of the original assessment following the Internal Review. The Ombudsman's comments however are noted.*

- 67 Council also noted the comments regarding redactions at paragraph 60 and the internal review decision at paragraph 62.
- 68 I have considered Council's submissions and appreciate the indication that it will implement my decision. I note its comments but do not consider that any change to my decision is warranted. In relation to closed sessions of Council, I do not consider that there is any conflict between the *Local Government (Meeting Procedures) Regulations 2015* and my determination under the Act. These regulations explicitly contemplate the Act and indicate that any confidentiality is subject to the Act's provisions. I maintain my position that information which was not brought into existence for submission to a closed meeting and does not disclose unpublished deliberations or decisions of that closed session of council cannot be exempt under s32(3).
- 69 Accordingly, my conclusions remain unchanged.

Conclusion

- 70 For the reasons set out above, I determine that the exemptions claimed pursuant to sections 32 and 37 are not made out.
- 71 I apologise to the parties for the delay in finalising this external review.

Dated: 18 September 2024



Richard Connock
OMBUDSMAN

Attachment 1 – Relevant Legislation

Section 32. Information related to closed meetings of council

- (1) Information is exempt information if it is contained in –
 - (a) the official record of a closed meeting of a council; or
 - (b) information proposed by an officer of a council or a councillor for the purpose of being submitted to a closed meeting of a council for consideration if the officer or councillor has contributed to the origin, subject or contents of that record; or
 - (c) information that is a copy of, or a copy of part of, information referred to in paragraph (a) or (b); or
 - (d) information, the disclosure of which would involve the disclosure of a deliberation or decision of a council made at a closed meeting of the council, other than information by which a decision of the council was officially published.
- (2) Subsection (1) ceases to apply after the end of the period of 10 years commencing on the date of the creation of the information referred to in that subsection.
- (3) Subsection (1) does not include information solely because it –
 - (a) was submitted to the closed meeting of a council for consideration; or
 - (b) is proposed by an officer or councillor to be submitted to the closed meeting of a council for consideration –
if the information was not brought into existence for submission to the closed meeting for consideration, unless its disclosure would disclose a deliberation or decision of the closed meeting which has not been officially published.
- (4) Subsection (1) does not include purely factual information unless its disclosure would disclose a deliberation or decision of the closed meeting of a council which has not been officially published.
- (5) In this section –
closed meeting of a council means a meeting of a council which is formally closed to the public for a purpose specified in regulations made under the Local Government Act 1993 and includes a closed meeting of a council committee.

Section 37. Information relating to business affairs of third party

- (1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party") and –
 - (a) the information relates to trade secrets; or
 - (b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.
- (2) If –
 - (a) an application is made for information under this Act; and
 - (b) the information was provided to a public authority or Minister by a third party; and
 - (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of substantial concern to the third party –

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

 - (d) notify the third party that the public authority or Minister has received an application for the information; and
 - (e) state the nature of the information applied for; and
 - (f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.
 - (3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f), decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party of the decision.
 - (4) A notice under subsection (3) is to –
 - (a) state the nature of the information to be provided; and
 - (b) if the decision was made on behalf of a public authority, state the name and designation of the person who made the decision; and
 - (c) inform the third party of –
 - (i) its right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and

- (iii) the time within which the application must be made.
- (5) A public authority or Minister must not provide the information referred to in a notice given to a third party under subsection (3) –
- (a) until 10 working days have elapsed after the date of notification of the third party; or
 - (b) if during those 10 working days the third party applies for a review of the decision under section 43, until that review determines that the information should be provided; or
 - (c) until 20 working days after notification of an adverse decision under section 43; or
 - (d) if during those 20 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided; or
 - (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (iv) during 20 working days after the notification of the decision; or
 - (v) where the third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 33. Public interest test

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

SCHEDULE 1 – Matters Relevant to Assessment of Public Interest

1. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:
 - (a) the general public need for government information to be accessible;
 - (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
 - (c) whether the disclosure would inform a person about the reasons for a decision;

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

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

**Right to Information Act Review****Case Reference:** R2202-078**Names of Parties:** Meg Webb and Department of Treasury and Finance**Reasons for decision:** s48(3)**Provisions considered:** s35

Background

- 1 On 30 April 2020, the then Premier of Tasmania, the Honourable Peter Gutwein MP, announced the establishment of the Premier's Economic and Social Recovery Advisory Council (PESRAC). This body was established pursuant to s24C of the *Emergency Management Act 2006* to provide advice to the Tasmanian Government concerning the recovery from the COVID-19 pandemic.
- 2 The Honourable Meg Webb MLC is an independent member of the Parliament of Tasmania representing the electorate of Nelson in the Legislative Council.
- 3 On 19 July 2021, Ms Webb made an application for assessed disclosure under s13 of the *Right to Information Act 2009* (the Act) to the Department of Treasury and Finance (the Department) seeking information relating to PESRAC:
 1. *The following documentation for all formal meetings held by the Premier's Economic and Social Recovery Advisory Council (PESRAC), for the duration the Council was operating:*
 - a) Meeting Agendas;
 - b) Meeting minutes;
 - c) Standing Notice of Interest declarations submitted by PESRAC members, including the date of update and submission of declaration; and
 2. *All government and departmental guidelines regarding:*
 - a) independent oversight of PESRAC submitted Standing Notice of Interests declarations;
 - b) guidance to PESRAC members; and
 - c) administration, maintenance and storage of any submitted Notice of Interest declarations.

- 4 On 30 July 2021, Mr Tony Ferrall, the Secretary of the Department, wrote to Ms Webb, relevantly:

After reviewing your application, I have determined that parts of the scope of your application includes information that has already been assessed by Treasury, in a previous application made by you under the RTI Act.

...

I have ... determined that the information requested at items 1(a), (b), (c) and 2(a) of the current application be refused under section 20 of the RTI Act, as the information requested is the same or similar to the information produced as a result of the former application; and that the application, on its face, does not disclose any reasonable basis for again seeking access to the same or similar information.

- 5 Information identified as responsive to the remaining parts of the request was released to Ms Webb with some personal information found to be redacted as exempt under s36 of the Act.
- 6 On 10 August 2021, Ms Webb requested external review of the decision to refuse parts 1 and 2(a) of her application under s20(a), and her external review was accepted under s45(1)(a) of the Act.
- 7 Following work by my office to try to resolve the external review, the Department agreed to issue a fresh decision and no longer rely on s20(a) of the Act.
- 8 On 29 January 2024, Ms Jacqueline Nicholls, a delegate for the Department issued a further decision to Ms Webb. Ms Nicholls identified 37 records as being responsive to the unaddressed parts of the request. 22 of these were released in full and 15 were released in part. The Department relied upon s35 (internal deliberative information) and s39 (information obtained in confidence) to exempt some information.
- 9 On 28 March 2024, Ms Webb advised my office that she considered a full external review was no longer necessary, however wished to seek review of the exemptions applied pursuant to s35 of the Act. Ms Webb later confirmed that these records were numbered 21, 22, 23, 24, 25, 26, 28, 30, 31, 32 and 33. Ms Webb advised she did not require a review of the exemptions applied pursuant to s39.

Issues for Determination

- 10 I must determine whether the relevant information is eligible for exemption under s35 of the Act (internal deliberative information).
- 11 As s35 is contained within division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that should I determine

that the information is *prima facie* exempt under s35, I am then required to determine whether it would be contrary to the public interest to release it having regard to, at least, the matters contained within Schedule 1.

Relevant legislation

- 12 I attach a copy of ss35 and 33 of the Act, along with Schedule 1 as Attachment 1.
- 13 I also attach a copy of s24C of the *Emergency Management Act 2006* as in force on 30 April 2020 as Attachment 2.

Submissions

Applicant's submissions

- 14 In her initial request for external review on 10 August 2021, Ms Webb relevantly submitted:

The PESRAC was established on 30 April 2020, via a determination under section 24C of the Emergency Management Act 2006, specifically as the Recovery Taskforce detailed in that section, to support recovery during the identified coronavirus pandemic emergency.

The PESRAC Terms of Reference were determined by the Premier in consultation with the ministerial Committee for Emergency Management, which was established under section 6A of the Emergency Management Act 2006. As such, although PESRAC itself existed outside the formal public sector, it was established within the State Emergency legislative framework, and was also housed and received administrative support within government departments, with the specific purpose to advise on critical public policy for the Tasmanian government.

The Tasmanian government has stated its intention to adopt all the PESRAC Interim Report (2020), and the Final Reports [sic] (2021) recommendations.

- 15 In an email to my office on 28 March 2024, Ms Webb submitted:

The ... records' partial redaction appears to be based on the interpretation in part that the Premier's Economic and Social Recovery Advisory Council (PESRAC) is a public authority, with subsequent considerations stemming from that initial assumption.

However, PESRAC was not formulated as such by the then-Premier Peter Gutwein MP, and it no longer exists in any form. Hence, it is arguable that the first point that needs to be examined and determined, in order to then assess its

records against the public interest test, is whether PESRAC was an official public authority. I contend PESRAC was not a public authority, but was a mechanism established by government to outsource a particular short-term function, by which to inform the public policy in the COVID-19 pandemic state emergency context.

Department's submissions

16 The Department did not make specific submissions beyond the reasoning of Ms Nicholls' decision.

17 Ms Nicholls' reasons include that the records in question contain:

... minutes from the Council meetings ... and includes recordings of opinions, recommendations and deliberations of individual Council members and not final recommendations made collectively as the Premier's advisory council.

I have determined that [the records] contain information which is a record of consultation or deliberations between officers of a public authority together with information which is the opinion and recommendation of Council members.

...

I am satisfied that the information in [the records] contain [sic] records of deliberations, recommendations and opinions of members of the Council. I am further satisfied that the information does not contain a final decision or information which is purely factual. I am satisfied that the information is internal deliberative information and exempt from release, subject to the public interest test set out in section 33.

18 Ms Nicholls went on to consider the public interest test in s33:

In applying the public interest test to [the records] I considered whether the release of internal deliberative information would be of benefit to the public. Specifically, I considered:

- *whether the disclosure of the information would meet the public interest need for government information to be accessible (Schedule 1(a));*
- *whether the disclosure would enhance scrutiny of government administrative processes (Schedule 1(g));*

- whether the disclosure would promote or harm the interest of an individual or group of individuals (Schedule 1(m)); and
- whether the disclosure would prejudice the ability to obtain similar information in the future (Schedule 1(n)).

I have determined that the release of the information ... would:

- meet the public interest need for government information to be accessible, and
- could enhance scrutiny of decision making and administrative process.

...

In considering whether the disclosure could harm the interest of an individual or group of individuals I applied the principle at paragraph 38 of Lake maintenance [sic] Pty Ltd and home [sic] Tasmania R2202-30 which found that the frank and robust analysis and assessment of applications may harm the interest of applicants should it be released. I am satisfied that the release of the frank and robust discussions reflecting individual members' opinions recorded in the minutes could harm those who were the subject of the discussions along with those Council members who participated in the discussions.

In considering whether the disclosure would prejudice the ability to obtain similar information in the future I considered whether industry leaders would be dissuaded from participating on government boards and councils and particularly in participating in robust, open and frank discussions on those councils. The members of the Council were selected as prominent Tasmanian industry experts specifically for their ability to contribute to and advise the Premier as a collective on the economic and social recovery from COVID. The Council members contributed in a meaningful way to discussions of the Council in their capacity as industry leaders. I take the view that the release of information which was provided by Council members in deliberation of a final recommendation, in the confidence of a Council meeting room as a personal opinion which is based on industry experience, and not as a final decision of the Council as a collective is contrary to the public interest would be likely to prejudice Treasury from obtaining similar information in the future.

In considering all the matters together, whilst [sic] I am satisfied that the release of information in [the records in question] would be contrary to the public interest.

Analysis

Section 35 – Internal deliberative information

- 19 For information to be exempt under s35 of the Act, I must be satisfied that it consists of (relevantly):
 - (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.*
- 20 When one of those subsections is met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative processes related to the official business of PESRAC.
- 21 The exemption outlined above does not apply to the following:
 - purely factual information;
 - a final decision, order or ruling given in the exercise of an adjudicative function; or
 - information that is older than 10 years.
- 22 As to the meaning of purely factual information, I refer to *Re John Edward O'Brien Waterford and the Treasurer*¹ where the Administrative Appeals Tribunal (AAT) observed that the word purely in this context has the sense of simply or merely and that the material must be factual in *fairly unambiguous terms*.
- 23 The meaning of the phrase deliberative processes has also been considered. In *Re JE Waterford and Department of Treasury (No 2)* the AAT adopted the view that this phrase refers to an agency's ... thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.²
- 24 If I am then satisfied that the information is for a deliberative purpose relating to official business of a public authority, a Minister or the Government, I must have regard to the public interest test in s33.

PESRAC

- 25 In her submissions of 28 March 2024, Ms Webb raised the possibility that PESRAC was not a public authority. If this is the case, the information in question might not be a record of consultations or deliberations between officers of public authorities or eligible for exemption under s35.

¹ [1984] AATA 518 at [14]

² [1984] AATA 67 at [58]

26 The definition of “public authority” in s5(1) of the Act includes:

...

(e) a body, whether corporate or unincorporate, that is established by or under an Act for a public purpose; or

(f) a body whose members, or a majority of whose members, are appointed by the Governor or a minister of the Crown.

...

27 On 30 April 2020 the then Premier, the Honourable Peter Gutwein MP, announced in Parliament the establishment and membership of the Premier’s Economic and Social Recovery Advisory Council. He advised that:

... [PESRAC would] provide advice to the Government on strategies and initiatives to support the short to medium and the longer-term recovery from the COVID-19 pandemic. The Recovery Council will provide advice and recommendations on how to best mitigate the economic and social impacts of the pandemic. It will also identify opportunities for economic and social renewal.

...

The Recovery Council will be made up of individuals from across the business and community sectors, and will leverage the experience, knowledge and resourcefulness of these business and community leaders to provide advice on the opportunities for economic and social initiatives to build a stronger and more resilient Tasmanian community and to strengthen and resurrect the Tasmanian economy.

...

I have tasked the Recovery Council with providing actions and initiatives to the Government ... so that it can inform the development of the 2020-21 Budget later this year. ... However, the final report will be timed to inform the 2021-22 Budget.³

28 Section 24C of the Emergency Management Act 2006, as it was in force on 30 April 2020 provided:

³ Tasmania, Parliamentary Debates, House of Assembly, 30 April 2020, 68 (Peter Gutwein, Premier).

24C. Recovery Taskforce

(1) The Premier may determine that a Recovery Taskforce is to be established to support recovery during or after an emergency.

...

- 29 I am satisfied that PESRAC comes within the definition of a public authority under the Act, as it was a body established under legislation for a public purpose and its membership was appointed by the Premier.
- 30 The information which is the subject of this external review consists entirely of records of discussions between PESRAC members recorded in minutes and draft minutes of meetings of PESRAC in 2020 and 2021. Accordingly, the information which is the subject of this review can be characterised as not being purely factual, being less than 10 years old and containing opinion, advice or recommendations of officers of PERSAC or a record of consultations and deliberations between such officers.
- 31 Accordingly, I am satisfied that it is *prima facie* exempt pursuant to s35(1)(a) and/or (b). I will now consider the public interest test to determine whether this information should be released.

Section 33 – Public interest test

- 32 The information which the Department has sought to exempt is all of the same type and the Department has undertaken a global public interest test assessment regarding the information it found *prima facie* exempt in Records 21, 22, 23, 24, 25, 26, 28, 30, 31, 32 and 33. For simplicity and clarity of understanding, I will adopt a similar general approach.
- 33 As set out previously in this decision, the Department considered the matters in Schedule 1 of the Act. It indicated that it considered all factors and found that matters (a) and (g) weighed most particularly in favour of release and matters (m) and (n) weighed against, concluding that it would be contrary to the public interest to release the relevant information. It was particularly considered with the potential adverse effect release of the information may have on frank and robust early discussions prior to reaching a settled conclusion, within a body such as PESRAC.
- 34 I consider that matter (a) – the general public need for government information to be accessible – is always relevant and weighs strongly in favour of disclosure.
- 35 I also consider matter (b) – whether disclosure would contribute to or hinder debate on a matter of public interest – is relevant. The COVID-19 pandemic disrupted almost every aspect of Australian society. The plans of the Tasmanian Government to recover from the pandemic and its approach to assisting society and the economy is clearly a matter of great public interest

impacting the whole of the State. Discussions surrounding the formulation of recommendations and priorities would greatly contribute to public discussion relating to COVID-19 recovery. This factor weighs strongly in favour of disclosure.

- 36 Matter (d) – whether disclosure would provide the contextual information to aid in the understanding of government decisions – is relevant. The reasons given by the then Premier in Parliament, which I quote at the start of this decision, indicate why this factor is important. The experience, knowledge and resourcefulness of the members of PESRAC were leveraged to provide advice and recommendations, to identify opportunities for economic and social renewal and they informed the State budget for two years. Whilst I acknowledge the reports of PESRAC are already in the public domain, the development of PESRAC's advice and recommendations contained in those reports provides valuable context, especially considering the importance of the Council's work and its significant impact upon the future direction of Tasmania. This factor weighs in favour of disclosure.
- 37 Matter (g) – whether the disclosure would enhance scrutiny of government administrative processes – is relevant and I agree with the Department's determination that this weighs in favour of disclosure.
- 38 I also consider matter (k) – whether the disclosure would promote or harm the economic development of the State – is relevant. The Premier very closely aligned future economic (and social) policy with the recommendations of PESRAC and a timeline of discussions within the Council would inform the wider community regarding the factors which were considered from an early stage of proceedings and aid in an understanding of policy development. This factor weighs in favour of disclosure.
- 39 In relation to matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals, I agree that this is relevant. In concluding that the release of information would be contrary to the public interest, the Department relied heavily upon the reasoning in my decision of *Lake Maintenance Pty Ltd and Homes Tasmania*,⁴ and in particular at paragraph 38. In that decision, the release of a frank and robust discussion surrounding the merits or otherwise of individual identified tender applicants for a government contract was considered capable of harming the interests of those applicants, unless the information was de-identified.
- 40 I do not agree that the situation is particularly analogous here, as the identities of the PESRAC members in attendance at each meeting have already been released and the information does not relate to an application for a contract in their professional capacity. Further, the individual contributions of each member to the general discussion are not, with very few exceptions, identified in the minutes. The minutes are presented as a list of topics which were discussed by the group as a collective. Hence, the overriding concern behind

⁴ 6 July 2023, available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

the decision in *Lake Maintenance Pty Ltd and Homes Tasmania* has been negated because the individual contributions of Council members are not attributable and it is not clear how they could cause harm to a particular individual. Even when it is noted that there is some disagreement, or where some members have different views, the opinions of specific individual Council members are not disclosed. It is to be expected that a Council undertaking such important work will consider and explore differing opinions and priorities. This factor therefore weighs against disclosure, but only slightly.

- 41 In relation to matter (n) – whether the disclosure would prejudice the ability to obtain similar information in the future – I agree that this is relevant. It was considered by the Department to weigh against disclosure. It has been my consistent position that matter (n) is not often relevant to s35 because to suggest that public servants would be reluctant to do their regular, paid duties or would not do these properly if records of their actions were disclosed under the Act is not something I will readily accept.⁵
- 42 The situation here is different in that the members of PESRAC, although supported by permanent public servants, were not permanent public servants themselves, but prominent Tasmanians from the business and community sectors selected for the specific and limited purpose of providing advice on the State's economic and social recovery from the pandemic. I agree that if contributions from individuals at an early stage of discussions were released it may have the effect of inhibiting participation by qualified people on similar bodies in the future. This concern can be mitigated if individual contributions are de-identified so that prominent people with a history of economic and social contribution to the community will be comfortable serving on councils such as PESRAC, if requested. This de-identification has in most cases already occurred in the relevant information. Accordingly, this factor weighs against disclosure, but only slightly.
- 43 I also consider that the inherent reasons for the s35 exemption, to allow for early thinking processes to be explored and options tested prior to settling on a final direction, also weigh against the release of some of this information. The effectiveness of councils such as these would be undermined if some internal deliberative material was released and truly innovative thinking might be curtailed if all early ideas, often later abandoned, were disclosed. This must always be balanced with the need for transparency regarding government operations, however.
- 44 The assessment and weighting of the various public interest factors set out in Schedule 1 involves a consideration of competing factors, always taking into account s3:

⁵ See, for example, *Tarkine National Coalition and Department of Natural Resources and Environment Tasmania*, available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions at [74].

Object of Act

- (1) *The object of this Act is to improve democratic government in Tasmania –*
 - (a) *by increasing the accountability of the executive to the people of Tasmania; and*
 - (b) *by increasing the ability of the people of Tasmania to participate in their governance; and*
 - (c) *by acknowledging that information collected by public authorities is collected for and on behalf of the people of Tasmania and is the property of the State.*
 - (2) *This object is to be pursued by giving members of the public the right to obtain information held by public authorities and Ministers.*
 - (3) *This object is also to be pursued by giving members of the public the right to obtain information about the operations of Government.*
 - (4) *It is the intention of Parliament –*
 - (a) *that this Act be interpreted so as to further the object set out in subsection (1); and*
 - (b) *that the discretions conferred by this Act be exercised so as to facilitate and promote, promptly and at the lowest reasonable cost, the provision of the maximum amount of official information.*
- 45 On balance, after considering Schedule 1, I do not believe that the Department has discharged its onus under s47(4) to demonstrate that the release of much of this information is contrary to the public interest. This determination is subject only to the limited exceptions discussed below.
- 46 Records 21-25, 32 and 33 are not exempt and are to be released in full to Ms Webb.

RECORD 26 – Meeting 9

- 47 I agree that the last bullet-point on page 3 and the first bullet-point on page 4 of Record 26 are exempt under s35(1)(b) and should not be released to the applicant. The remainder of Record 26 is to be released.

RECORD 28 – Meeting 12 Workshop 3 (Phase 2)

- 48 I agree that the redacted list of discussion points on page 4 of Record 28 is exempt under s35(1)(b) and should not be released. The remainder of Record 28 is to be released.

RECORD 30 – Meeting 14

- 49 On page 4 of this record, the final bullet-point of Part 11 (Major Projects “Must Have”) identifies an individual’s offer to discuss their views and is exempt under s35(1)(a) and should not be released to the applicant. The remainder of Record 30 is to be released.

RECORD 31 – Meeting 15

- 50 On page 4 of this record, the last two paragraphs of part 12 (Final Report Approach), following ... *proposed approach the Secretariat would undertake* identify actions of individual members and are exempt under s35(1)(b) and should not be released to the applicant. The remainder of Record 31 is to be released.

Preliminary Conclusion

- 51 For the reasons given above, I determine that exemptions claimed pursuant to s35 are varied.

Conclusion

- 52 As the above preliminary decision was adverse to the Department, it was made available to it on 24 May 2024 to seek its input before finalisation, pursuant to s48(1)(a) of the Act.
- 53 On 5 June 2024, Mr Gary Swain, Secretary of the Department, advised that he *will not be providing further submissions before the decision is finalised*.
- 54 Accordingly, my findings remain unchanged. I determine that exemptions claimed pursuant to s35 are varied.
- 55 I apologise to the parties for the significant delay in finalising this matter.

Dated: 5 June 2024



Richard Connock
OMBUDSMAN

Attachment I

Section 35 - Internal deliberative information

- (1) Information is exempt information if it consists of –
- (a) an opinion, advice or recommendation prepared by an officer of a public authority; or
 - (b) a record of consultations or deliberations between officers of public authorities; or
 - (c) a record of consultations or deliberations between officers of public authorities and Ministers –
- in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.
- (2) Subsection (1) does not include purely factual information.
- (3) Subsection (1) does not include –
- (a) a final decision, order or ruling given in the exercise of an adjudicative function; or
 - (b) a reason which explains such a decision, order or ruling.
- (4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 33 - Public interest test

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

Schedule 1 - Matters Relevant to Assessment of Public Interest

- I. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:
- (a) the general public need for government information to be accessible;
 - (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
 - (c) whether the disclosure would inform a person about the reasons for a decision;
 - (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
 - (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
 - (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
 - (g) whether the disclosure would enhance scrutiny of government administrative processes;

- (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
- (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
- (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
- (k) whether the disclosure would promote or harm the economic development of the State;
- (l) whether the disclosure would promote or harm the environment and or ecology of the State;
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

Attachment 2

Emergency Management Act 2006

Version current from 27 March 2020 to 5 May 2020

Section 24C - Recovery Taskforce

- (1) The Premier may determine that a Recovery Taskforce is to be established to support recovery during or after an emergency.
- (2) If the Premier is not available to make a determination under subsection (1), the Ministerial Committee may determine that a Recovery Taskforce is to be established to support recovery during or after an emergency.
- (3) If the Premier or Ministerial Committee makes a determination under subsection (1) or (2), the Secretary responsible to the Premier is to establish a Recovery Taskforce in accordance with that determination.

**Right to Information Act Review****Case Reference:** R2202-058

O2111-166

Names of Parties: O and Department of Premier and Cabinet**Reasons for decision:** s48(3)**Provisions considered:** s45(1)(d) and (e)

Background

- 1 In 2015, Coroner Olivia McTaggart determined that O's sister P died unexpectedly at home in February 2014. The Coroner was satisfied that *the investigation into the death of [P] was appropriate and thorough and that there were no suspicious circumstances indicating involvement if any other person*. The Coroner concluded that she could not determine the cause of death, except to exclude foul play.¹
- 2 In 2016, Chief Magistrate Michael Brett reviewed the Coroner's decision. The Chief Magistrate reiterated the Coroner's findings that *the investigation disclosed nothing that would suggest foul play or the presence of another person at the time of death* and he went further to say that there was *no basis upon which [he] would be authorised to reopen the investigation*.²
- 3 O, however, remains concerned about the circumstances of her sister's death and the subsequent investigation by Tasmania Police. O continues to seek access to the maximum amount of information, directly or indirectly relevant to her continuing inquiries, as may be held by various public authorities. Within the past year I have issued three external review decisions regarding O's requests for information from the Department of Police, Fire and Emergency Management (DPFEM).³ This application was made to Digital Strategy and Services (DSS), a division of the Department of Premier and Cabinet (the Department) but indirectly relates to Tasmania Police and DPFEM.

¹ Record on investigation into death (without inquest) of [P], 2015.

² Decision of the Chief Magistrate issued under section 58 of the Coroners Act 1995, 2016.

³ See O and Department of Police, Fire and Emergency Management (R2202-037) released in June 2023, O and Department of Police, Fire and Emergency Management (No 2) (R2202-086) released in August 2023 and O and Department of Police, Fire and Emergency Management (No 3) (R2202-084) released in August 2023, all available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

- 4 On 20 September 2021, O made an assessed disclosure request under the Right to Information Act 2009 (the Act) to DSS. The application was accepted and the fee waived. The information sought by O, as outlined in her assessed disclosure application, was as follows (verbatim):

I want every single email with the surname [family name] and the including the first names of [P] and/or [O] in it. Those emails will be about [P] my sister and/or me.

I want emails to and from Antony Peters (Tony Peters) and Bridget Tyson regarding [P].

I have previously requested these emails with the Police Department and was rejected due to the fact that they don't exist which is complete lie.

On the attached document the mx records show the email is hosted with firstwave.com.au and you can find those emails on those servers or the previous servers that hosted the email server.

- 5 On 19 October 2021, Ms Carmen Kelly, a delegate of the Department under the Act, released the assessed disclosure decision dated 15 October 2021 to O. Ms Kelly noted that:

It is understood that the emails that you seek are emails that you believe were exchanged with the Department of Police, Fire and Emergency Management and between Police Officers, and are not emails sent to or from the Department of Premier and Cabinet or within the Department of Premier and Cabinet.

- 6 No information was released in response to the request on the basis that Ms Kelly found *the Department is not in possession of any information relevant to your request*. She further commented that:

... under section 10(2) of the Act a person is not entitled to information contained in backup systems, or information that has been disposed of in compliance with an approved disposal schedule issued under the Archives Act 1983. The information that you seek, if it existed, would have been disposed of under the Archives Act, and in any event was not information in the possession of the Department.

By way of background information, the electronic system known as 'Firstwave' is an email security filtering system put in place in June 2020, and is not an email recordkeeping system of the Department. Similarly, previously used email security filtering systems are not email recordkeeping systems of the Department and any associated data is not available.

- 7 On 25 October 2021, O requested internal review, setting out (verbatim):

I know those emails exist whoever told her they don't lied to her. I spoke to a email server administrator and he said he had access to all the email and could search them.

I want a search done for the surname '[family name]' on the current email servers for all government departments that fall under tas.gov.au.

I want a search done for the surname '[family name]' on the previous email servers (if they have not been copied over to the current servers) for all government departments that fall under tas.gov.au.

I have been researching the timeframe of keeping emails it is between 7-12 years.

- 8 On 25 November 2021, Ms Pip Shirley, a delegate of the Department under the Act, released the internal review decision to O. In the decision, Ms Shirley noted that she had *made fresh enquiries to determine whether the relevant information exists*. She went on to add that the decision was confined to the original assessed disclosure request but that she had *taken a broad interpretation of the request in undertaking a search of the DPAC [the Department] records management system as well as making enquiries in relation to the email server identified as firstwave*.
- 9 As a result of the search, Ms Shirley released:
- a. *one email exchange between [P] and the then Premier, Lara Giddings, which consists of two emails and is contained in Attachment One to this letter. Both emails are released in full.*
 - b. *Numerous emails between yourself and the Department or Ministers [sic] Offices from 8 December 2014 to 13 May 2021. You will already have received these documents but for the sake of completeness they are released in full. These emails are contained in Attachment Two.*
- 10 A total of 80 pages of information was released by Ms Shirley (two pages and 78 pages respectively for Attachments One and Two). No other information was identified as being held by the Department that would be responsive to the request for information.
- 11 On 26 November 2021, O sought external review by my office. Her application was accepted under s44, as she was in receipt of an internal review decision and sought review within 20 working days of receiving it.
- 12 Further information was lodged with my office by O in support of her application. This included supporting information about DSS, government policies, details about the email service FirstWave and further submissions.

- 13 On 13 January 2022, O emailed this office requesting priority processing of her pending external review applications including this one. She was advised on 25 January 2022, that I was *not satisfied that there was a genuine and compelling need to expedite* the external review applications and as such her application for priority had been declined.
- 14 On 26 October 2022, O made a request to my office to modify the scope of the request to be inclusive of emails for the period 1 January 2013 to 1 July 2022.
- 15 On 17 July 2023, O again requested priority processing of this application. This was declined by me on 21 July 2023 due to the absence of any new basis for priority being granted.
- 16 On 6 March 2024, consistent with s47(2) of the Act, my office requested a copy of the advice referred to in the internal review decision. This was provided with some related emails by Ms Shirley on 14 March 2024.
- 17 On 13 March 2024, my office made enquiries of FirstWave, the Telstra operated email service, and received further information about the operation of its service.

Issues for Determination

18 The issues for determination are, whether:

- the information requested was, or was not, in the possession of the Department (s45(1)(d)); and
- there was any insufficiency in searching for information requested (s45(1)(e)).

Relevant legislation

19 Relevant to this review are ss45(1)(d) and (e) of the Act.

20 A copy of s45 is provided in Attachment 1.

Submissions

Applicant

- 21 O has provided considerable information in support of this external review application. Although not reproduced in full here, for the purposes of this external review I have had regard to the:
 - a. applicant's assessed disclosure request with attachments;
 - b. application for internal review;
 - c. application for external review;
 - d. three data script documents of 13 pages annexed to the application – 'Address lookup' of 5 pages; 'From – Thu Nov 25' of 4 pages; and 'Address lookup' of 4 pages;

- e. ‘Executive Summary: [P] Born [date of birth] – Sydney’ undated;
 - f. PowerPoint document ‘Right to Information’ with 9 slides;
 - g. email of 20 December 2021 with policy attachments:
 - i. ‘Tasmanian Government Information Security Policy and Manual’ marked as approved April 2011 but watermarked *Review Pending*;
 - ii. ‘Tasmanian Government Open Data Policy’ issued 2016;
 - iii. ‘Tasmanian Government Cloud Policy’ version 2.0 March 2020;
 - iv. ‘Tasmanian Government Cybersecurity Policy’ version 1.0 December 2018; and
 - v. ‘Administrative Data Exchange Protocol for Tasmania: A framework of principles and guidelines’ marked ADEPT VO.G; and
 - h. various other correspondence with my office, notably of 20 December 2021, 11 January 2022, 5 September 2022.
- 22 On the application form for external review O wrote that the request related to the *Tasmania Government and all departments below that including Tasmania Police*. Under the heading *Summary* she wrote:
- Here is some of the proof I have that the emails should be stored on the tape backup of the exchange servers for the mx *email servers.*
- 23 She continued, verbatim:
- They ignore what I tell them and complete a work around that does not full disclose the information I am after. For some reason they think I am have no technical experience or knowledge. all emails to tas.gov.au get delivered to what ever the mx record is listed below.*
- [two and a half pages of data script omitted]
- They think this email no longer exist which is not true. All emails are saved why. Evidence of where it came from. This email from Pip Shirley originated from I have more evidence...*
- 24 Under *Other Desired Outcomes*:
- I want every single email with the surname or word of [family name] in it from the 1 January 2014 to today with all the attachments. I WANT THEM ALL. NO EXCEPTIONS.*

25 From further correspondence O sent to my office, the following is relevantly extracted:

a. 11 January 2022

Thank you for your letter, much appreciated. I have supplied data from the Central Ops website on who owns the domain name tas.gov.au. This domain name and subsequent email addresses are owned by Tasmania Government and the Premier Department. This is managed by the sub-branch of the Tasmania Government called Digital Strategy and Services.

...

Tasmania Government has hired an outside firm to provide an email server to accept emails for all government departments with emails ending in tas.gov.au.

Any employee of the Tasmania Government can send a request to First Wave and a keyword search for the surname '[family name]' can be run for all emails sent or received from the first email created for tas.gov.au to today.

These emails can be saved to disk or USB or saved to the cloud with a username and password for me to access.

All my RTI applications have been rejected due to the fact of either they don't exist or they don't have access which is completely untrue. When I spoke to the First Wave Support person they just wanted an email from tas.gov.au so they can run the search.

I supplied all the Central Ops - Domain Dossier for each application and every time I go to that website information changes. The MX records have now been removed. I keep all the emails I send which show the changes I am talking about.

b. 5 September 2022

I requested emails from 2013-4 to the date of request because I want the emails [P] sent to any government department or person with the email address ending in tas.gov.au with our surname in the subject box or in the body of the email.

I rang FirstWave support to see if such a search request can be done they said YES.

I don't want emails from desktops, laptops, or electronic devices I want them from the mail server.

c. 26 October 2022

The email server is hosted at First Wave.

...

Any government employee can send an email to this support email address and ask for a search to be completed. This is my request in basic detail. The search was for the surname [family name] in the subject field and body of the email.

All my requests would have had [P] so it makes sense that many emails would be found. The Premier ignored this and just provided emails from staff computers. I requested a copy of my father's file which has never arrived from the Hydro department.

I requested all emails with [family name, and FAMILY NAME]. Not a selected few. And the time period was from 2013 to the current time of my request.

This information about the server is open access from this website.

[Computer script omitted]

I want all the emails with [family name] for the period of 1/1/2013 to 01/07/2022 inclusive.

This time period would include emails from [P] and if she had any issues with St Helens Police Station. This would include emails sent from Bridget Tyson to any witnesses in [P's] case, it would show if she bullied anyone. This would include emails sent to and from Coroner McTaggart and Magistrate Michael Brett.

This particular request would give me everything about my sister's case and how it was treated and who influenced who via email.

Department

- 26 The Department did not provide specific submissions in response to this external review, beyond the reasoning of its decisions. I have primarily had regard to the internal review decision which relies on fresh searches undertaken by the delegate.
- 27 Ms Shirley's reasoning in her internal review decision under the heading *Result of Search of the Department's Record System* is relevantly extracted as follows:

There were no other emails, to which your application refers, located on the Department's records system. For the sake of completeness, I advise that the search was conducted in relation to [P] under the following name derivations:

- Anthony Peters
- Tony Peters

- *Sgt Peters*
- *Sergeant Peters*
- *Bridget Tyson*
- *Constable Tyson*

I have also received to [sic] advice from senior personnel in the Department's Information and Technology Services, which is part of Digital Strategy and Services, area about whether the information you request is held on a current or previous mail server. I have sought further information to better understand that advice.

My enquiries have determined that the information you request, and related to server searches, is not held by the Department of Premier and Cabinet.

By way of explanation, the current process is that all Tasmanian Government emails pass through an email security filtering service which is operated by a company external to Government. Having passed through that system they are automatically distributed to individual Agencies and a copy is not held centrally by the Tasmanian Government. The external company does hold a temporary copy of all emails but only for a very short period.

For this reason, any emails written to the Department of Police and Emergency Management (DPFEM), or any other Department (Agency), would have been forwarded to that Agency and you have indicated you have already been provided with a Right to Information decision in relation to a similar request for information by DPFEM.

I have been further advised that the current filtering service that you refer to, Firstwave, has only been in place since the last part of 2020. Prior to the Firstwave service a similar service was offered by a company external to government and operated under the same conditions. I am also advised that the logs and backups of this service would no longer be in existence.

I am sorry that we have not been able to locate the information you request via the server for an assessment under the Act.

Therefore, my assessment is that the information you requested is not in the possession of the Department of Premier and Cabinet. That is, the Department has no record of the emails you refer to on the external server. As previously noted, I understand that a request for the information you request was previously made to the DPFEM and that you have received a decision in relation to that request.

Analysis

Preliminary matters

- 28 It is necessary for me to address some preliminary matters before addressing ss45(1)(d) and (e).
- 29 First, in order to understand the organisational relationship between DSS and the Department, I was assisted by the Department's Annual Report 2022-2023:⁴

The role of Digital Strategy and Services (DSS) is to support the State Service to achieve the best possible outcomes for the Tasmanian community. DSS coordinates and integrates data and digital strategies and services across government, collaborates to identify common needs and synergies and creates value and efficiencies for government. DSS actively engage in a number of collaborative partnerships with industry and other public sector organisations. As part of our commitment to the national governance arrangements for cyber security DPAC provides representatives to the National Cyber Security Committee and its associated sub-committees, which operates in conjunction with the Commonwealth and other State and Territory governments.

DSS objectives include:

- *delivering contemporary customer focused services*
- *striving to be a leader and highly valued partner for data, digital and cyber security initiatives*
- *to be acknowledged by staff and peers as a great place to work, and*
- *providing a future and longer-term vision for digitalisation.*

- 30 It is clear that DSS is a division of the Department and therefore the expanded scope of the search to include the Department as a whole, as undertaken by Ms Shirley, is appropriate.
- 31 Given that the internal review covered the Department as a whole, and that included DSS, it is not necessary for me to distinguish between DSS and the Department for the purposes of my decision making.
- 32 The second preliminary matter is the scope of the external review. In the progression of the application through to external review, O appears to have attempted to expand her request beyond the emails initially requested.
- 33 The internal review request is for assessed disclosure to include *all government departments that fall under tas.gov.au* and then on the external review to cover the *Tasmania Government and all departments below that including Tasmania Police*.

⁴ Department of Premier and Cabinet, 'Annual Report 2022-2023,' page 22, available at www.dpac.tas.gov.au, accessed 7 March 2024.

- 34 This broadening of scope was also reflected in the external review application.
- 35 O also requested, by email of 26 October 2022, the search period be modified to cover 1 January 2013 to 1 July 2022 and in correspondence to my office she sets the period as 1 January 2013 to 31 December 2022.
- 36 This attempted expansion is not possible, as it goes beyond the date of O's original application for information. I therefore proceed on the terms of the initial request for information in the possession of the Department, which confines the date range to the period of 1 January 2013 to 20 September 2021.

Possession of information – section 45(1)(d)

- 37 In turning to address whether the information sought would be in the Department's possession I must consider the scope and whether it is information that ought to reasonably be expected to be held by the Department.
- 38 I understand O's position is that the Department has responsibility for whole-of-government information management systems including the storage, retention and management of all tas.gov.au emails across the State Government. Furthermore, that means the Department, through the work of the DSS division:
 - a. is in possession of, or can access, all emails across the State Government, and specifically of Tasmania Police or DPFEM; and/or
 - b. has access, or should be able to access, and interrogate metadata in relation to that email traffic across the State Government, and specifically of Tasmania Police or DPFEM.
- 39 In support of her position O has provided data script, various government policies and submissions about email metadata and services such as FirstWave, a service for which DSS has some responsibility.
- 40 I had regard to the various Government information management systems and cybersecurity policies provided and relied upon by the applicant. Although not directly relevant to the task of assessing information under the Act, those policies supplied by O indicate that the Head of Agency retains responsibility for information management and cybersecurity even when the Department, through DSS, is responsible for delivery of particular services under a whole-of-government approach. For example, in the document 'Tasmanian Government Information Security Policy and Manual' under *1.3 Roles and Responsibilities* it says:⁵

Each Tasmanian Government Head of Agency is responsible for implementation of the Policy and Procedures in their agency. While Procedures reference legislation relevant to information security, this

⁵ Department of Premier and Cabinet, 'Tasmanian Government Information Security Policy and Manual,' Version 1.0 approved April 2011, Version 1.1 abridged pending review January 2020, page 4, available at [Tasmanian Government Cybersecurity Policy \(dpac.tas.gov.au\)](http://Tasmanian%20Government%20Cybersecurity%20Policy%20(dpac.tas.gov.au)), accessed 7 March 2024.

does not reduce the requirement for each agency to be aware of the full extent of legislation that applies to its business or activities.

Agencies that deliver or manage contracts for the delivery of whole-of-government services are responsible for the implementation of the Policy for the whole-of-government components of those services.

The agency that is the original custodian of information is responsible for the security of that information where it is part of a service delivered by another agency.

- 41 As reflected in the policies, it is both a requirement and practice that individual Departments of the State Government are responsible for maintaining their own information technology services. This is necessary for security and management of confidential information. For example, the information management services for my office are managed by the Department of Justice and would not be accessible to DSS or the Department.
- 42 Contrary to the applicant's position, I do not accept that the Department has access to the email traffic of other public authorities. I find that the role of DSS is one of oversight for consistency in important digital and information management services that are then utilised by the State Government; as opposed to being the provider of those services.
- 43 With respect to FirstWave, on 13 March 2024, my office spoke to Mr Greg Maren, its Global Alliances Director, who provided the following background and operational information, in a lay sense, about FirstWave and the email delivery services previously provided to the Tasmanian State Government:
 - At the relevant time, FirstWave provided the Telstra platform for email service delivery of tas.gov.au emails. It was in effect the conduit for the email traffic, including outbound and inbound emails:
 - between Department domains, such as tas.gov.au emails from Department staff to DPFEM staff; and
 - from or to external parties, such as members of the community.
 - Consistent with the service agreement, there was no permanent storage of tas.gov.au emails held by FirstWave. There was a time limited repository service for those inbound and outbound emails. FirstWave would automatically capture a copy of the original email at the time of transmitting it through to the recipient. The maximum period that FirstWave retained a copy of any email was 32 days then it would automatically perish.
 - There is no retrieval service that can be provided by FirstWave support to access or retrieve perished emails and there would be no meaningful residual information to retrieve in terms of trace data.

- FirstWave did not capture, and hold in the repository, a copy of tas.gov.au emails internal to a Department domain, such as Department staff emailing each other.
- 44 This overview helpfully provided by Mr Maren aligns with the Department's internal advice provided to Ms Shirley. I am mindful of the Department's cybersecurity considerations and it is unnecessary to repeat the advice provided to me, other than to confirm that FirstWave operated as *an email filtering service* through which inbound and outbound emails would pass, with some messages blocked as *spam or malicious content*.
- 45 I am satisfied that neither DSS nor the Department, by virtue of having responsibility for whole-of-government information management and cybersecurity systems, is responsible for the IT services of another public authority for the purposes of storage, retention, management, archiving, access or retrieval of tas.gov.au emails.
- 46 Accordingly, I find that, for the purposes of O's assessed disclosure application, it could not be expected that the Department would be able to access emails of Tasmania Police or DPFEM. I further find that it would be inconsistent with the ordinary operations of government for the Department to do so.
- 47 Having regard to the matters addressed above, I find that O's expectation that she could access information, namely emails, of Tasmania Police or DPFEM through the Department is mistaken.
- 48 The external review therefore is necessarily confined to information responsive to the request that is actually in the possession of the Department.

Sufficiency of search – section 45(1)(e)

- 49 Section 45(1)(e) provides for external review where *the applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the public authority*.
- 50 Guidance on what is required when searching for information responsive to a request is provided in the 'Guideline in relation to searching and locating information'.⁶
- 51 Ms Shirley undertook to search the Department's records for the information requested by the applicant:
- a. *every single email with the surname [family name] and the including the first names of [P] and/or [O] in it; and*
 - b. *emails to and from Antony Peters (Tony Peters) and Bridget Tyson regarding [P].*

⁶ Ombudsman Tasmania, 'Guideline in relation to searching and locating information,' 24 January 2013, available at www.ombudsman.tas.gov.au/right-to-information/rti-publications.

- 52 As set out in the internal review decision, Ms Shirley went about the task of making her own assessment of the request. This included obtaining internal advice about the IT systems, to which I have had regard.
- 53 In making the fresh decision, I am satisfied that Ms Shirley undertook a systematic approach to the assessment of information held by the Department. Some information responsive to the request was identified and released in full to O as a result of the searches conducted.
- 54 Having the benefit of being able to review the internal correspondence provided by Ms Shirley, I am satisfied that both delegates undertook the searching task consistently with their obligations and the objects of the Act. All reasonable steps were taken to identify and collate information responsive to the request and those steps were documented. I consider the approach taken to represent best practice.
- 55 I am, therefore, satisfied that the searches undertaken in response to O's request for information were sufficient.

Preliminary Conclusion

- 56 In accordance with the reasons above, I determine that:
 - a. a sufficient search was undertaken in response to the request for assessed disclosure; and
 - b. the information sought by the applicant was not in the possession of the Department.

Further Considerations

- 57 On 26 March 2024, consistent with s48(1)(b) of the Act, I made the above preliminary decision available to both parties with the opportunity to provide further input, if any, prior to finalisation.
- 58 On the same day, Ms Kelly advised that no further input would be provided by the Department.
- 59 O sought additional time to respond to the preliminary decision. On 6 May 2024, O emailed my office indicating general dissatisfaction with the outcome of the preliminary decision. She also expressed dissatisfaction with a number of earlier external review decisions. While I have carefully considered the matters raised by O in her email, these did not raise specific issues or submissions in response to this decision and my findings remain unchanged.
- 60 I acknowledge that O is disappointed with this outcome, however, I am satisfied that the information she sought to obtain through her assessed disclosure application is simply not available from the Department.

Conclusion

61 Accordingly, I determine, for the reasons set out above, that:

- a. a sufficient search was undertaken in response to the request for assessed disclosure; and
- b. the information sought by the applicant was not in the possession of the Department.

62 I apologise to the parties for the delay in finalising this application.

Dated: 8 May 2024

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

**Richard Connock
OMBUDSMAN**

Attachment I**Relevant legislation****Section 45 Other applications for review**

- (1) A person who has applied for information in accordance with section 13 may also apply to the Ombudsman for a review of a decision if –
- (a) the decision which may otherwise be the subject of an application for an internal review under section 43 has been made by a Minister or principal officer of a public authority and as a consequence the applicant cannot make an application under section 43 ; or
 - (ab) the decision relates to an application made to a Minister in accordance with section 13 and is a decision in relation to which a written notice must be given under section 22 ; or
 - (b) a Minister or public authority has made a decision that the information requested was not in existence on the day the application was made; or
 - (c) a Minister or public authority has made a decision to give access other than in the form requested by the applicant, except where to do so would breach copyright; or
 - (d) a Minister or public authority has decided that the information requested is not in the possession of the Minister or public authority; or
 - (e) following a decision being made by a Minister or public authority, the applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the Minister or public authority; or
 - (f) notice of a decision on an application under section 13 has not been received by the applicant and the period specified in, or calculated under, section 15 has elapsed.
- (1A) A person who is an external party may apply to the Ombudsman for a review of –
- (a) a decision if the decision, which may otherwise be the subject of an application for an internal review under section 43(2) or (3) , has been made by a Minister or principal officer of a public authority and as a consequence the external party cannot make an application under section 43 ; or
 - (b) a decision to provide, in accordance with an application made to a Minister in accordance with section 13 , information –
 - (i) relating to the personal affairs of the person; or
 - (ii) that is likely to expose the person to competitive disadvantage.
- (2) If person has applied for information in accordance with section 13 , another person may apply to the Ombudsman for review if –
- (a) a Minister or public authority has decided not to consult the person under section 36(2) or section 37(2) and the person believes that he or she is a person who was required to be consulted; or
 - (b) a decision has been made on a review under section 43 and a person, other than the person who applied for the review, is adversely affected by the decision.

(3) If a notice of a decision has been given under this Act, an application referred to in subsection (1) must be made within 20 working days of the day on which the applicant received notice of the decision.

(4) If a notice of a decision to which subsection (1A) relates has been given under section 36(3) or section 37(3) to an external party, the external party may only make an application under subsection (1A) in relation to the decision within 20 working days of the day on which the external party received the notice.

OMBUDSMAN TASMANIA
DECISION



Right to Information Act Review

Case Reference: R2311-003

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

Reasons for decision: s48(3)

Provisions considered: s6, s30, and s36

Background

- 1 In February 2014, O's sister P unexpectedly died at home. Coroner Olivia McTaggart determined P died between 2 and 5 February 2014. The Coroner could not determine the cause of death but did rule out foul play.¹
- 2 A review of the Coroner's decision was conducted by Chief Magistrate Michael Brett in 2016. In the review, the Chief Magistrate affirmed the Coroner's findings, and refused to reopen the investigation.²
- 3 O remains concerned with the handling of P's death by the Tasmanian authorities and has made several requests for information from the Department of Police, Fire and Emergency Management (the Department) and other public authorities.
- 4 As next of kin, O is able to request information from the Department under the *Right to Information Act 2009* (the Act) that would otherwise have been available to her sister, P.
- 5 On 26 June 2023, O made an application for assessed disclosure under the Act to the Department for information held by Tasmania Police pertaining to the investigation of her sister's death. Under *Reasons information sought* O wrote (verbatim):

*To demonstrate actions by police officers attending my sister's death scene did have and wrote in police notebooks correctly.
To demonstrate, a investigation did take place.*

¹ Record on investigation into death (without inquest) of [P], 2015.

² Decision of the Chief Magistrate issued under section 58 of the *Coroners Act 1995*, 2016.

- 6 There were a number of categories of information sought by O, including documents prepared by staff assigned to her sister's death, police notebooks, a running sheet and evidence. For the purposes of this decision, the only relevant part of the request relates to emails (verbatim):

If DPFEM, didn't assign anyone to investigate [P's] death, I would like all emails with the word '[family name]' in it and the metadata from the email servers from and to Police Officers and other parties inclusively. I want the emails from the email servers saved during 2014 and 2015 for all of DPFEM inclusively. Currently, they are hosted at: Digital Strategy and Services ...

Previously, the email servers are hosted by FirstWave in North Sydney, NSW. These emails would not be considered work products of the Coroner's Office, especially after the Coronial Brief had been delivered to the Coroner's office. I do not want emails from Police Officers desktops, laptops or devices. I want the emails from the email servers saved during 2014 and 2015 for all of DPFEM inclusively (@dpfem.tas.gov.au and @justice.tas.gov.au with [family name] in the subject line or body of the email.

- 7 Attached to the application were two documents containing domain information – a two page document titled *Domain Dossier* and a single page document titled *MX Records*.
- 8 The assessed disclosure application was accepted by the Department and the fee waived.
- 9 On 3 July 2023, Sergeant Jessica Walshe, a delegate of the Department under the Act, wrote to O about the scope of her application and included, relevantly to this external review:

Finally, I confirm that during our telephone conversation on 3 July 2023 that in reference to your request involving emails on the server during 2014 and 2015, that you are seeking those emails that relate to [P]. You are not for example seeking general emails that contain reference to [family name and text] or other persons with the surname [family name]. The searches will be conducted accordingly, and you will be advised of the outcome of this in due course.

- 10 There were further exchanges between the parties about refining scope and the release of information by the Department responsive to the other categories of information.
- 11 On 12 July 2023, O sent an email to the Department with an attachment titled *reply 2 RTI 267* (undated). This is set out in the applicant's submissions below.

- 12 On 7 September 2023, a decision was released to O by Sergeant Walshe. Sergeant Walshe responded to other parts of the assessed disclosure request (set out in the Department's submissions below). Nine pages of information were released to which s36(1) had been applied to exempt some personal information of people other than the applicant.
- 13 The applicant then applied for internal review of that decision.
- 14 On 9 October 2023, Inspector Luke Manhood, a delegate of the Department under the Act, released an internal review decision (set out in Submissions below). The focus of the internal review decision was limited to the matters raised by O in the internal review application. Inspector Manhood affirmed the original decision relying on ss6 (excluded persons or bodies), 30 (information relating to the enforcement of the law) and 36 (personal information) as they relate to email information sought by O.
- 15 Three categories of emails were identified by the delegates, and exemptions applied, as follows:
 - a. three emails that were identified as suitable for release, with some information exempted under s30(1)(c) and (e), and s36(1); and
 - b. thirteen emails in which personal details of deceased persons, other than P, were considered exempt under s36(1); and
 - c. other emails that related to P's death that Inspector Manhood determined contained information of the Coroner and thus excluded from the jurisdiction of the Act under s6.
- 16 On 1 November 2023, O lodged an external review request with Ombudsman Tasmania. The application was accepted, as O was in receipt of an internal review decision and lodged her external review request within 20 working days of receiving that decision.
- 17 On 3 July 2024, my office confirmed with Sergeant Walshe that the scope of the internal review was confined to the emails. She confirmed that was the situation following the release of information in the course of other related right to information applications, plus release of information by the Coroners Office, and the engagement between the parties as to scope.
- 18 On 24 July 2024, consistent with my dispute resolution powers under s47(1)(g) and (h) of the Act, my office contacted the Department in relation to certain information to which s6 had been applied.
- 19 On 26 July 2024, Sergeant Walshe helpfully reconsidered and released further information to the applicant. This included two email chains in which O was a sender and recipient, and three internal email messages of O's inbound calls to Tasmania Police in her capacity as next of kin. Section 6 was relied on over part of one email where it had been forwarded internally as part of the inquiries into P's death.

Issues for Determination

- 20 The issues for determination are, whether:
- a. s6 has been properly applied to exclude the information held by the Department; and
 - b. any of the requested information is eligible for exemption under ss30, 36 or any other relevant sections of the Act.
- 21 Because s36 is contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that should I determine the information is *prima facie* exempt under this section, I must then determine whether it is contrary to the public interest to disclose it having regard to, at least, the matters in Schedule 1 of the Act.

Relevant legislation

- 22 The relevant sections of the Act to be considered are ss6, 30, and 36. A copy of these sections are attached at Attachment 1.
- 23 Section 33 and Schedule 1 of the Act are also relevant and copies are attached.

Submissions

Applicant's submissions

- 24 On 2 November 2023, O forwarded the following which was an attachment to an email she had sent to the Department on 14 September 2023. I have had regard to it as submissions supporting the external review.
- 25 Relevantly extracted:

I would like to have the decision by the RTI Section for RTI 267/23 reviewed.

I requested – all emails with my surname in it. Which would include emails I sent to the RTI Section since the beginning of time until now?

It seems like an easy clear request but no I didn't get the email I sent to any Police Officer or section.

Not one email!!! that I sent.

Who cares about [family name], NT?

My goal was to get emails between [Constable Bridget] Tyson and her other companions at [P's] death scene with attachments of their statements to be added to the Coronial Brief.

1 Detective signed and dated his in 2014.

The others all signed theirs in 2015 and want to see if there were other versions of their statements that are dated 2014.

Clearly, in the minds of the RTI Section, they think I shouldn't have access. Well, that is a breach of Section 50 of the Act. I didn't get the emails I sent to Tyson.

I have requested all emails from the Premier's Office and they failed to deliver as well. The Ombudsman has a hard drive full of the email. If the emails were properly generated as per my original request and those emails could have been compared with the email you should have supplied and if it was perfect then I would consider that great but what I received today is completely 100% wrong.

I suggest that all staff gain training and keep themselves updated on emails – Google apps and mobile data because what I have seen in [P's] alleged investigation is completely worst effort ever.

If they were culled to prevent me from seeing them I hope that the Ombudsman issues fines for each email that was denied to me under Section 50 of the RTI Act. \$181 per unit and the maximum is 50 units for one email.

- 26 I have had full regard to the matters raised in the applicant's document titled *reply 2 RTI 267*. Relevantly including:

In reference to the email request, I want a complete set of all emails with [family name] in it, regardless of whether it has been involved in [P]'s death. I want to see the actions of the investigator's intentions; any redaction will be appealed fully by me because the investigation was poorly done. Anthony Peters, who was assigned to the role of Coroner's Associate and told me of three errors that were not investigated properly. Covering up a poor investigation by redacting parts of the email will prove a conspiracy.

Department's submissions

- 27 The Department was not required to provide any submissions in response to this external review, beyond the reasoning of its decisions. I primarily had regard to the internal review decision of Inspector Manhood, but also considered the original decision of Sergeant Walshe and her supplementary decision of 26 July 2024.

28 Relevantly extracted from the original decision, Sergeant Walshe wrote:

Enquiries and searches of Department of Police, Fire and Emergency Management (DPFEM) information systems have located information relevant to part of your application.

The recent decisions of the Ombudsman in O and DPFEM No 1 and No 2 have been reviewed and applied in relation to this request, specifically as it relates to point 3 and 4 as discussed below. I am aware that you have been supplied a copy of that decision. Section 6 of the Act lists a number of authorities who are exempt from the Act. These include a court and a magistrate. The Coroner's Court is therefore exempt from the Act and in addition to this all coroners are also magistrates. To seek information from the Coroner's Court you can make application directly to them.

...

Following receipt of your application this office contacted you via phone and clarified whether you were requesting emails that only related to [P]'s death. At this time, you confirmed that to be the case. On 3 July 2023 we wrote to you confirming our conversation. You responded to this correspondence in writing and amongst other things stated, "I want a complete set of all emails with [family name] in it, regardless of whether it has been involved in [P]'s death".

Given the above I have reviewed all emails downloaded from eDiscovery with the word "[family name]" included in the searching parameters. There are emails related directly to the Coronial matter. These emails are in possession of DPFEM due to police officers providing services for the purposes of assisting a coroner under the Coroners Act 1995, including preparation of the coroner's file. I therefore apply section 6 exemption to these emails. I consider that these emails also contain a record of consultations or deliberations between officers of public authority and opinions prepared by officers of public authority, whilst preparing the coroner's file. Section 35(1) exemption also applies to these emails.

Three emails related to an all-state dissemination intelligence report. These emails contained the surname [family name] (the person of interest in this report had the surname [same family name] but was not [P]). These emails did not relate to [P] in any way. I

exempt those emails on the basis of section 30(1)(c) and (e) and also section 36(1).

Thirteen emails relate to a spreadsheet that DPFEM possess that lists the deaths that have occurred in Tasmania. [P] was included on this list, it lists her name, address and date of death only. No other information relating to [P] is listed within this spreadsheet. The list otherwise did not contain any other reference to [family name]. There are large number of other names and address on this spreadsheet which spans a number of years. I have included the attachment with information only as it relates to [P]. The remainder of the information in the attachment is exempt pursuant to section 36(1).

I recognise that your application is attempting to source information that will provide you an insight and understanding into the investigation completed into your sister's death. The disclosure of the emails and attachments I have included in this assessment, which do not relate to [P], are provided based on your letter to this office where you stated you wanted 'a complete set of emails with [family name] in it, regardless of whether it has been involved in [P]'s death'.

I have printed the relevant pages which include [family name] as attachments, as some emails were voluminous and contained information not relevant to your request. If you require the full attachments to any of the provided documents, please contact this office. The other pages were considered not relevant to your application.

- 29 In relation to the three emails, and relying on s30(1)(c) and (e), Sergeant Walshe decided:

The information assessed includes information contained within an all-state dissemination intelligence report. The information requested contains information gathered and collated into a product vital in assisting Tasmania Police to appropriately detect, investigate and prevent offences. Disclosing such information would be reasonably likely to prejudice methods and procedures relating to the prevention, detection or investigation of matters arising from breaches or evasions of the law.

Further to this, this information is also classified as intelligence, in that it is information of a confidential nature that has been collected, analysed and

subsequently developed into a product to assist Tasmania Police in its business of law enforcement. This information was provided to Tasmania Police with the likely expectation that it would be used for a specific purpose.

Therefore, an exemption pursuant to sections 30(1)(c) and (e) of the Act have been applied to that information.

30 Then, Sergeant Walshe went on to consider the s36 exemption:

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

Section 36(2) of the Act directs that I consult with third parties whose information is held by Tasmania Police and where it is my belief that the party may be reasonably concerned about the release of that information. In your application you have indicated that you do not require third party information through consultation.

In this instance, I am satisfied it would be contrary to the public interest to disclose some of the third party’s personal information and if disclosed without consent would be of concern to that third party. Therefore, an exemption pursuant to Section 36(1) of the Act has been applied to some of this information.

Refer also to ‘Public Interest Test’ in this letter.

Public Interest Test

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

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

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

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

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

I am satisfied that it would be contrary to the public interest to disclose information that has been provided in confidence to Tasmania Police by third parties, who reasonably expected that it would not be disclosed. There is a reasonable public expectation that this information would not be disclosed, and its release may be reasonably likely to affect the physical, emotional and or psychological safety and wellbeing of third parties.

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

I am satisfied that it would be contrary to the public interest to disclose the aforementioned third parties' information as it is personal information that is private. The information is provided in confidence and would not reasonably be expected to be disclosed. In my view disclosing information provided by or about third parties without their consent would cause a breach of their confidence and prejudice the ability for Tasmania Police to obtain similar information in the future and therefore hinder police processes.

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

I am satisfied that it would be contrary to the public interest to disclose the above mentioned third party's personal information, as this information is not related to information you require in your application as it does not relate to [P].

(u) whether the information is wrong or inaccurate.

Information contained within the email include investigating officer's personal opinions, advice and recommendations made at a time when the coronial matter was not yet complete, and all facts not known. I am satisfied that it would be contrary to the public interest to disclose the aforementioned information as its absolute accuracy cannot be substantiated and may be misinterpreted.

For the reasons provided, on the balance, I am satisfied that it would be contrary to the public interest to disclose the exempt information. I consider the remaining matters in Schedule 1 of the Act to be non-relevant to your application.

- 31 Relevantly extracted from Inspector Manhood's internal review decision is the following:

...Right to Information Services provided you with material in response to this application, and in your application for review your concern is regarding the disclosure of the emails you sought in the original application. Given this situation, I have limited my review to this issue.

Your original application sought emails from the Department of Police, Fire and Emergency Management's email servers containing the word ['family name'] from the years 2014 and 2015, for all of DPFEM, inclusive of @dpfem.tas.gov.au and @justice.tas.gov.au.

Firstly, in respect of this request, I advise that the Department of Police, Fire and Emergency Management does not operate email accounts for the domain @justice.tas.gov.au. This email domain belongs to the Department of Justice, and any emails held on these email accounts would be in the possession of that department, not DPFEM.

In your application for review, you noted that you did not receive any emails that had been sent by you. You highlighted that this would have emails you sent to Right to Information Services from the beginning of time until now. In response to this, I advise that the search that was conducted was for emails generated in the years 2014 and 2015, in accordance with your application, which explains why you were not provided

emails between yourself and Right to Information Services.

In respect to emails generated in the years 2014 and 2015, there are limits to what emails can be recovered from the email servers. The storage space of individual mailboxes assigned to email accounts is not unlimited. Although that storage space has increased over time, in 2014-2015 it was more limited. Consequently, as mailboxes fill, there was a necessity for users to delete email from them, or this may simply have occurred as emails were actioned. Deleted email is held on the server for a period, until being permanently deleted to free up space. Currently, the Department of Police, Fire and Emergency Management is only able to retrieve email that is currently saved on the server, or that has been deleted by a user in the last 24 months.

That said, the search conducted in relation to your application did identify emails containing the word [‘family name’] in the years 2014 and 2015 that fell within the above criteria. Several of these have been disclosed to you.

As noted, three emails related to an intelligence report, unrelated to your sister, which I agree is exempt from release by virtue of sections 30(1)(c), 30(1)(e), and 36(1) of the Act, in that it discloses police methodology that would be compromised by its release, contains material collated for intelligence purposes, and its release would disclose personal information of another person.

Thirteen emails relate to a spreadsheet that lists the identification of persons who have died in Tasmania. The records are limited to the individual’s identity, address, and date of death. Your sister is recorded on this list, and the information relevant to her has been disclosed to you. I agree the remainder of this list is exempt in accordance with section 36(1) of the Act, as its release would disclose personal information of another person.

While the remainder of the emails found do relate to the death of your sister, I am of the view they are excluded from the operation of the Right to Information Act 2009. Section 6 of the Act provides that the Act does not apply to information in the possession of particular 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, [emphasis original] unless the information

relates to the administration of the relevant public authority.

Persons and bodies to whom this section refers include a court and a magistrate. As such, the Coronial Division of the Magistrates Court, and a coroner (who is a magistrate), are excluded from the operation of the Act. This exclusion then extends to persons whose services are provided for the purpose of assisting the Coronial Division or a coroner.

Having reviewed the remaining emails, they are excluded on the basis that they were written only for the purposes of assisting the coronial investigation of your sister's death. The involvement of staff of the Department of Police, Fire and Emergency Management in responding to your sister's death was limited to aiding the Coroner in that coronial investigation. This includes the actions of the investigating police. Under section 16 of the Coroners Act 1995, all police officers are appointed as coroner's officers, and the officers involved in the investigation of your sister's death were acting in this capacity, rather than in their capacity as a police officer.

Given the exclusion of the Coronial Division from the Right to Information Act 2009, any request for information relating to a coronial matter should be directed to the Coroners' Office.

- 32 In the supplementary decision accompanying the release of seven pages of information, Sergeant Walshe wrote:

*I have not included personal information (being the direct emails addresses of police officers) in these disclosed documents as this would be information that DPFEM would otherwise determine as personal information pursuant to section 36 of the Right to Information Act 2009. The officers' identity is reasonably apparent from their email address and therefore this type of contact detail is 'personal information' as defined in section 5(1) of the Act. The disclosing of the individual contact details of Tasmanian Police officers has the potential to allow release to the 'world at large' and may unduly harm their interest by exposing them to direct harassment. I find that this information is *prima facie* exempt under section 36 of the Act, subject to the public interest test in Schedule 1 of the Act.*

In relation to the public interest test I consider the following matters in Schedule 1 of the Act to favour

non-disclosure of the exempt information, being direct email addresses of police officers:

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

I am satisfied that it is not in the public interest to disclose the direct contact details of police officers. The fact that Tasmania Police provides generic phone numbers and email addresses for the public's use means that there is little to be gained, in terms of Schedule 1 public interest matters, by disclosing the individual contact details. Having considered all the matters contained in Schedule 1 I can find none that favour the release of the information.

I have also redacted one email as it remains DPFEM's position that this is information forms part of the work conducted by police assisting the coroner, as contemplated by section 6, which is excluded from the Right to Information Act 2009.

DPFEM is the custodian of the information you seek and is required to comply with the Act and the Personal Information Protection Act 2004.

Please note that at this time there is no further information that DPFEM can release in relation to application 267/23.

Analysis

- 33 There are some preliminary matters that I must address before assessing the information subject to this review.
- 34 First, as noted above, I am satisfied from the external review application, the applicant's correspondence, Inspector Manhood's internal review decision, and the confirmation from Sergeant Walshe, that the only issue that I am required to determine is in relation to the emails requested by O. This is the scope therefore of my external review.
- 35 Second, the applicant sought emails from the Department *inclusive of @dpfem.tas.gov.au and @justice.tas.gov.au*. I accept the representation of Inspector Manhood, in the internal review decision, that the Department does not have access to or control over any emails of another Tasmanian Government department, namely the Department of Justice. That part of the request which relates to emails in the possession of the Department of Justice is therefore excluded from my considerations.
- 36 Third, in relation to O's submissions about emails stored with the service FirstWave, I have had regard to my earlier decision of O and Department

*of Premier and Cabinet.*³ As addressed in that decision, FirstWave is a cybersecurity service that was previously engaged by Digital Strategy and Services, which is a division of the Department of Premier and Cabinet that manages the email delivery services for the Tasmanian State Government.⁴ FirstWave is *an email filtering service*, not a backup email system, and the maximum period of retention is 32 days before the record automatically perishes.⁵ There is, therefore, no avenue of searching for emails available through FirstWave.

- 37 Fourth, the scope of the period of the assessment in O's application was for *emails from the email servers saved during 2014 and 2015 for all of DPFEM inclusively*. At a later stage the applicant sought to expand the range to the *beginning of time until now*. This attempted expansion after an application has been accepted is not permissible and I therefore proceed on the terms of the original request which confines the date range to 2014 to 2015.
- 38 I appreciate that this may be disappointing for the applicant, however it is not open to an applicant to expand the scope of their request at a late stage in the progress of the application. It may have been a matter for discussion between the parties when they were initially discussing scope, but is not something that can occur unilaterally after a matter has progressed to a decision being made, as has occurred here.
- 39 Fifth, Inspector Manhood identifies that there may be emails that are no longer accessible because of the passage of time. In relation to the retrieval of emails for the relevant period, he wrote:

In respect to emails generated in the years 2014 and 2015, there are limits to what emails can be recovered from the email servers. The storage space of individual mailboxes assigned to email accounts is not unlimited. Although that storage space has increased over time, in 2014-2015 it was more limited. Consequently, as mailboxes fill, there was a necessity for users to delete email from them, or this may simply have occurred as emails were actioned. Deleted email is held on the server for a period, until being permanently deleted to free up space. Currently, the Department of Police, Fire and Emergency Management is only able to retrieve email that is currently saved on the server, or that has been deleted by a user in the last 24 months.

That said, the search conducted in relation to your application did identify emails containing the word '[family name]' in the years 2014 and 2015 that fell within the above criteria. Several of these have been disclosed to you.

³ See O and Department of Premier and Cabinet (R2202-058) released in May 2024, available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

⁴ See Note 3, paragraphs 29 to 31 and 38 to 44.

⁵ See Note 3, see paragraphs 43 to 44.

- 40 I am satisfied that, despite those limitations, the Department has been thorough in undertaking the searches for information.

Section 6 – Exclusions of certain persons or bodies

- 41 Before undertaking an assessment of the information that has been identified, collated and assessed that is responsive to the application, it is convenient to deal with the Department's reliance on s6, which provides that the Act does not apply to certain persons or bodies.
- 42 The Department has relied on s6 as it relates to information it holds by virtue of assistance provided by police officers to the Coroner, under the *Coroners Act 1995*. Section 6 provides that:

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

...

(b) a court; ...

(g) a magistrate; ...

- 43 The interpretation of s6 as it relates to the Department's position was addressed at length in the decision *O and Department of Police, Fire and Emergency Management*.⁶
- 44 The Department has argued that:

[p]ersons and bodies to whom this section refers to [sic] include a court and a magistrate. As such, the Coronial Division of the Magistrates Court, and a coroner (who is a magistrate), are excluded from the operation of the Act. This exclusion then extends to persons whose services are provided for the purpose of assisting the Coronial Division or a coroner.

- 45 It is to be noted that the Department is not itself excluded as a public body under s6, but the information held by individual officers for the Coroner is excluded. The information the Department has in its possession may therefore fall into one of two classes, information that is subject to the Act or information excluded by virtue of s6.
- 46 Although I do not have jurisdiction to assess information excluded by s6, it is both appropriate and necessary for me to determine whether the information identified by the Department has been properly characterised as falling into the second class of excluded information. Consistent with s47(1)(j) and (k) and s47(2) of the Act I am able to consider the information in order to satisfy myself of whether the

⁶ (21 June 2023), available at www.ombudmsn.tas.gov.au/right-to-information/reasons-for-decisions.

information is in fact information of the Coroner and therefore excluded or is otherwise information of the Department to which the Act applies.

- 47 As I have previously found, when considering s6 there is no exclusion by default. There must be some tangible connection between the information and the functions performed as a coroner's officer. The information must pertain directly to and be identifiable as work of the Coroner. For example, investigations that are conducted to solely assist the work of the Coroner or the preparation of a coronial file, as opposed to other unrelated policing work.
- 48 Aside from confirming that the Department provided a folder of various internal emails that related to the inquiries into P's death and the investigation that was undertaken, I am unable to further particularise the information over which s6 has been claimed. This is because I am satisfied that the information claimed to be excluded under s6, is in the possession of the Department by virtue of a police officer assisting the Coroner.⁷ It is information that is properly characterised as excluded from review under the Act.
- 49 O raised concerns that she *didn't get the emails [she] sent to Tyson*. I agree with the applicant's position that those emails she personally exchanged with the police should have been made available to her. I note, however, that they were subsequently released to her.
- 50 I therefore find that the balance of the information which the Department has excluded pursuant to s6 is not reviewable under the Act.
- 51 I further note that when I am unable to review information that is held by the Department for the Coroner due to the operation of s6, an application would need to be made to the Coroner's Office for access to it. The onus would similarly be on the Department to provide the Coroner's Officer with copies of any emails exchanged internally by police officers but which are not yet in the possession of the Coroner. Assessment of the information would then be subject to the Coroners Act.

Section 30 Information relevant to the enforcement of the law

- 52 The Department excluded three emails identified as being responsive to the request on the basis they were exempt under ss30(1)(c) and 30(1)(e). Section 30(1) of the Act allows for exemption of *information relating to enforcement of law*.
- 53 Those three emails were responsive in so far as they have the same family name as was requested by the applicant. The attachments however are interjurisdictional BOLO (Be on the lookout) bulletins relating to a person with the same family name but entirely unrelated to the inquiries and investigation related to P.

Section 30(1)(c)

- 54 The Department, in relying on s30(1)(c), argued that the release of information *would, or would be reasonably likely to – disclose methods*

⁷ See Note 3.

or procedures for ... 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.

- 55 I am satisfied that s30(1)(c) is relevant to the information in question. I must therefore determine whether disclosure of the information would be reasonably likely to *prejudice the effectiveness of those methods or procedures*.
- 56 The information here relates to police procedures which would have a prejudicial impact on the effectiveness of those methods if disclosed.
- 57 The disclosure of the information, in my view, is indeed reasonably likely to prejudice the effectiveness of those methods or procedures. The information is therefore exempt under s30(1)(c).
- 58 For the benefit of the applicant, I confirm that the information exempt under this provision was not relevant as it was unrelated to P, simply information containing the same family name.

Section 30(1)(e)

- 59 In relying on s30(1)(e), the Department argued that the disclosure of the information *would be reasonably likely to – disclose information gathered, collated or created for intelligence, including but not limited to databases of criminal intelligence, forensic testing or anonymous information from the public*.
- 60 As I was satisfied that the information sought is exempt pursuant to s30(1)(c), it is not necessary for me to determine whether alternative exemptions claimed by the Department are applicable. For completeness, however, I will make a determination on the application of s30(1)(e).
- 61 The information sought would indeed reveal gathered and collated information and I accept the Department's position that it should not be released. This information would therefore also be exempt under s30(1)(e), and no further consideration of these emails is required.

Section 36 – Personal information of person

- 62 For information to be exempt under s36, I must be satisfied that its release would reveal the identity of a person other than O or P, or that the information would lead to that person's identity being reasonably ascertainable.
- 63 Section 36 was applied to nine pages of information released to the applicant and to the thirteen emails with attachments.
- 64 The applicant does not appear to have raised concerns with the application of s36 to the pages of information that were released to her. It is accordingly not necessary for me to consider each of those redactions.

- 65 In relation to the thirteen emails, twelve emails attach lists of individuals who had died in Tasmania within the relevant period. The relevant extract of the death list that included P was provided to the applicant and the remainder of the emails are various iterations of similar lists. I am satisfied that the information withheld contained personal information of people other than O and P, who have not been dead for more than 25 years.
- 66 The thirteenth email attaches a large Microsoft Excel workbook document containing a seized and found money register. It appears to have been redacted in full and not disclosed to the applicant. In the event that the portion relating to P has not been released, I find that it should be disclosed to O. The remainder of the workbook sheet on which P's information is found contains the personal information of others and is *prima facie* exempt under s36. The remainder of the workbook is out of scope of the request.
- 67 In the supplementary decision, the direct emails of police officers are redacted on the basis of being personal information that is exempt after considering the public interest test. I agree that direct emails addresses are personal information and are *prima facie* exempt pursuant to s36.

Section 33 – Public Interest Test

- 68 Because I have deemed information *prima facie* exempt under s36 of the Act, and because s36 is contained within Division 2 of the Act, I must now consider whether it would be contrary to the public interest to disclose it.
- 69 The internal review decision did not expressly consider the public interest test, however I have considered the original decision of the Department as set out above.
- 70 Consideration was given to all factors under Schedule 1, with weight being given to the following:
- (a) *the general public need for government information to be accessible;*
 - (m) *whether the disclosure would promote or harm the interests of an individual or group of individuals;*
 - (n) *whether the disclosure would prejudice the ability to obtain similar information in the future;*
 - (v) *whether the information is extraneous or additional information provided by an external party that was not required to be provided; and*
 - (u) *whether the information is wrong or inaccurate.*
- 71 The basis for finding it would be contrary to the public interest to disclose this information was that the information was provided in confidence by third parties under the assumption that it would remain confidential. Additionally, the release of such information had the potential to cause

physical, emotional, and psychological harm. Finally, the information did not relate to P's death in any way.

- 72 I agree with the Department that the disclosure of information relating to other citizens who had died in Tasmania is 2014-15 and others who had money seized or found would be contrary to the public interest in the circumstances. There is potential for harm to the interests of those individuals and their families and it does not add context to the information request. This information is exempt under s36 and is not required to be disclosed to O.
- 73 In relation to the email addresses of police officers, the Department is not seeking to exempt the names of its staff, only the direct emails on the basis it would be contrary to the public interest to release them.
- 74 As I have considered in previous decisions, direct contact details of public service staff are eligible for exemption when these are not routinely provided to the public. It is reasonable for communication channels to be determined by the public authority and direct contact with staff through other channels can lead to harassment or workplace issues. I am satisfied that direct email addresses are exempt under s36 in this instance and these are not to be released to O.

Other matters

- 75 There are some further related matters that I find it convenient to address, primarily for O's benefit to respond to concerns she raised in her external review application.
- 76 The applicant has raised dissatisfaction with the assessment and handling, by the Department, of her request for information. She has asked that consideration be given to the offence provisions under the Act. I am, however, not satisfied that any conduct has occurred that warrants a recommendation for prosecution being made to the Director of Public Prosecutions and I decline to do so.
- 77 O has asserted that my office is in possession of a hard drive of information that relates to her application. This is incorrect. I reassure the applicant that there is no hard drive of information which I have ignored or failed to assess.
- 78 I acknowledge that the outcome of this external review may be disappointing to O. I reiterate, consistent with prior decisions, that the correct avenue to seek to access for information held by, or for, the Coroner is the Coroner's Office.

Preliminary Conclusion

- 79 For the reasons provided, I determine that:
 - a. the Department correctly relied upon s6 to exclude the jurisdiction of the Act in relation to the information it holds for the Coroner; and
 - b. exemptions claimed pursuant to ss30 and 36 are affirmed.

Conclusion

- 80 On 21 November 2024, consistent with s48(1)(b) of the Act, I made the above preliminary decision available to both parties to give them the opportunity to provide further input, if any, prior to finalisation.
- 81 The Department advised on 10 December 2024 that it did not seek to make any submissions in relation to the proposed decision.
- 82 O did not respond to the request (or a follow up request) for her input, if any.
- 83 Accordingly, my findings remain unchanged.
- 84 For the reasons provided above, I determine that:
- a. the Department correctly relied upon s6 to exclude the jurisdiction of the Act in relation to the information it holds for the Coroner; and
 - b. exemptions claimed pursuant to ss30 and 36 are affirmed.
- 85 I apologise to the parties for the delay in finalising this external review.

Dated: 17 December 2024



Richard Connock
OMBUDSMAN

Attachment 1
Relevant Legislation

Section 6 Exclusions of certain persons or bodies

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

- (a) the Governor;
- (b) a court;
- (c) a tribunal;
- (d) the Integrity Commission;
- (e) a judge;
- (f) an associate judge;
- (g) a magistrate;
- (h) the Solicitor-General;
- (i) the Director of Public Prosecutions;
- (j) the Ombudsman;
- (ja) the Custodial Inspector;
- (k) the Auditor-General;
- (ka) the Legal Profession Board of Tasmania;
- (l)
- (la) the Parole Board;
- (m) the Anti-Discrimination Commissioner;
- (ma) the Commissioner for Children and Young People;
- (n) the Public Guardian;
- (o) the Health Complaints Commissioner;
- (p) Parliament;
- (q) a Member of Parliament.

(2) This Act does not apply to the Law Society of Tasmania (the "society") established under the Law Society Act 1962 and continued as a body corporate under the Legal Profession Act 2007 except –

- (a) in relation to the performance and exercise of the society's functions and powers under Parts 8 and 9 of the Legal Profession Act 1993 ; and
- (b) in relation to the performance and exercise of the society's functions and powers as a prescribed authority under Part 3.2 of Chapter 3 and Chapter 5 of the Legal Profession Act 2007.

(3) This Act does not apply to information that –

- (a) is in the possession of –
 - (i) the Independent Review; or
 - (ii) a person acting for, or on behalf of, the Independent Review; and
- (b) was given to, or received or brought into existence by, the Independent Review, or a person referred to in paragraph (a)(ii) , for the purposes of the Independent Review.

(4) For the avoidance of doubt, an application made under section 13 is void if the application was made –

- (a) in respect of information referred to in subsection (3) ; and
- (b) before the commencement of that subsection.

Section 30 – Information relating to enforcement of the law

- (1) Information is exempt information if its disclosure under this Act would, or would be reasonably likely to –
- (a) prejudice –
 - (i) the investigation of a breach or possible breach of the law; or
 - (ii) the enforcement or proper administration of the law in a particular instance; or
 - (iii) the fair trial of a person; or
 - (iv) the impartial adjudication of a particular case; or
 - (b) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of law; or
 - (c) disclose methods or procedures for preventing, detecting or investigating, or dealing with matters arising out of, breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
 - (d) endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person; or
 - (e) disclose information gathered, collated or created for intelligence, including but not limited to databases of criminal intelligence, forensic testing or anonymous information from the public; or
 - (f) hinder, delay or prejudice an investigation of a breach or possible breach of the law which is not complete.

- (2) Subsection (1) includes information that –

- (a) reveals that the scope of a law enforcement investigation has exceeded a limit imposed by law; or
- (b) reveals the use of an illegal method or procedure for preventing, detecting or investigating, or dealing with a matter arising out of, a breach or evasion of the law; or
- (c) contains a general outline of the structure of a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or

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

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

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

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

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

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

Section 36 – Personal Information of a Person

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

(2) If –

(a) an application is made for information under this Act; and
(b) the information was provided to a public authority or Minister by a third party; and

(c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party – the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –

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

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

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

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
- (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.

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

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

33. Public interest test

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

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

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

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

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

- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information



Right to Information Act Review

Case Reference: R2202-050

Names of Parties: O and TT-Line Company Pty Ltd

Reasons for decision: s48(3)

Provisions considered: s36

Background

- 1 In February 2014 O's sister, P, unexpectedly died at her home. The death has been investigated by Coroner Olivia McTaggart and a finding made that the cause of death could not be determined, though foul play was excluded. This finding has been reviewed and upheld by the Chief Magistrate, who declined to reopen the investigation.
- 2 Despite the coronial findings, O maintains her belief that P was a victim of foul play. Consequently, O has made numerous applications for assessed disclosure under the *Right to Information Act 2009* (the Act) searching for details that might be relevant to her sister's death.
- 3 On 6 January 2022, O submitted an application for assessed disclosure under the Act to TT-Line Company Pty Ltd (TT-Line). As part of this application, O requested the following information relating to the Spirit of Tasmania ferry:
 1. . . . the list of passengers and/or car registration numbers for the 30 January 2014 to 1 February 2014.
 2. . . . the list of passengers and/or car registration numbers for the 2 February 2014 to 10 February 2014.
- 4 On 18 January 2022, Ms Kym Sayers, TT-Line Company Secretary and a delegate under the Act, issued a decision on O's application for assessed disclosure. Ms Sayers identified ship manifests for the periods of 30 January 2014 to 1 February 2014, and 2 February 2014 to 10 February 2014 as being responsive to O's application. Ms Sayers held that this information was exempt from disclosure in full pursuant to s36 of the Act. This was on the basis that this information would identify a person other than the person making the application or would make their identification reasonably ascertainable.
- 5 On 19 January 2022, O sought internal review of Ms Sayers' decision to exempt from disclosure the requested car registration numbers. In making her application for internal review, O explained that she did not seek a review of

Ms Sayers' decision to exempt the names of passengers included in the ship manifests from disclosure:

To be clear, I am not seeking the name of the person/passenger who booked the vehicle, I am merely seeking the registration plate information. Without a police power or a court order, there is no way a member of the public can cross reference a registration plate number to an individual.

- 6 On 25 January 2022, Mr Bernard Dwyer, then Chief Executive Officer of TT-Line and its principal officer under the Act, issued an internal review decision. He affirmed the original decision by Ms Sayers and found that the car registration details were exempt from disclosure pursuant to s36 of the Act.
- 7 On 29 January 2022, O submitted an application for the external review of Mr Dwyer's decision to Ombudsman Tasmania. This application was accepted, as it was made within 20 working days of her receipt of an internal review decision on her application.

Issues for Determination

- 8 First, I must determine whether the information requested by O is eligible for exemption under s36 of the Act.
- 9 Second, should I determine that the information is *prima facie* exempt from disclosure under s36, I am then required to determine whether it would be contrary to the public interest to release it by applying the public interest test contained in s33. In making this assessment I must have regard to, at least, the matters contained in Schedule 1.

Relevant legislation

- 10 Relevant to this review is s36 of the Act, and I attach a copy of this section to this decision at Attachment 1. Copies of s33 and Schedule 1 of the Act are also attached at Attachment 1.

Submissions

The Applicant

- 11 O contended that because car registration details are publicly available, they cannot be considered exempt from disclosure under the Act:

. . . I do not accept that the vehicle registration numbers is [sic] exempt under s36.

Vehicle registration numbers must be publicly displayed on all vehicles that wish to use public roads. They are publicly displayed on purpose and the mere reference to a vehicle's registration does not make a person's identity apparent nor would it make it reasonably identifiable. If that were true, then the personal information is

already in the public domain by way of the fact all registration plates are public information.

- 12 O went on to submit that the release of this information would not identify a person other than the applicant, or make their identity reasonably ascertainable:

I have searched my own registration plate and the only information I can publicly gather is the make and model of the vehicle, including its unique identification number. To identify the person to which the vehicle is registered, I would need a court order or police power to ascertain that person's identity, neither of which are open to me.

- 13 On 1 September 2022, O wrote to Ombudsman Tasmania advising that she changed her mind, and that she now requested copies of the names of passengers included in on the ship manifests:

I would like to amend my complaint in regards to Spirit of Tasmania.

I have been thinking that if the speaker system is in use and calls out passengers name I would be entitled to the list of passengers as everyone on the ship knows who is on the ship.

I want the list of passengers and rego numbers absolutely. No redactions at all.

- 14 On 26 October 2022, O wrote to Ombudsman Tasmania, setting out:

I believe this one holds the most important information that I need. As the Car Rego numbers are not covered by the Privacy Act due to

- Vehicles are not living persons.*
- There are apps out there that provide simple information to anyone with a mobile and every state government sells this information to anyone there is no need to protect this information.*
- Vehicle number plates can be seen on any street or road anywhere at any time.*
- They are not covered by the right to privacy.*

TT-Line

- 15 Mr Dwyer's internal review sets out that:

I have determined that vehicle registration numbers are personal information and as such are exempt from disclosure under section 36(i). Using vehicle registration numbers in an online search in isolation may not be able to identify an individual related to the vehicle registration, however this information, taken with other reasonable steps, could result in an individual's identity being reasonably ascertainable.

- 16 In considering the public interest test, Mr Dwyer set out in relation to considered Schedule 1 matter a) – the general public need for government information to be accessible:

I accept that, in accordance with the objects of the Act, there is a general public need for government information to be accessible, particularly as it relates to matters of public interest. However, in my opinion there is no general public need for access to the Identified Information. Accordingly, I have determined that this factor mitigates against disclosure of the Identified Information.

- 17 Though Mr Dwyer did not identify any matters contained within Schedule 1 of the Act as weighing against disclosure, he still found it to be contrary to the public interest for the car registration details to be made available to the applicant.

Analysis

Preliminary issue one- out of scope information

- 18 Before proceeding with my analysis of TT-Line's use of s36 to exempt from disclosure passenger's car registration details, I find it necessary to pass comment on TT-Line's handling of information that is outside the scope of the applicant's request.
- 19 The applicant's internal review request was confined to car registration details. These details are contained on two separate check-in manifests. One manifest is 568 pages long and the other is 778 pages long, together these documents total 1,346 pages of information. TT-Line has applied s36 to exempt from disclosure the car registration details of passengers in these documents in full.
- 20 However, there is other information contained in these documents that TT-Line's internal review decision does not pass comment on. As the applicant's internal review request is confined to the car registration details, the correct approach is to apply s36 to the car registration details and make explicit that the remainder of the information contained in these manifests is not being provided as it is outside the scope of the applicant's request.

Preliminary issue two- O's request for passenger names

- 21 As I have mentioned, O's original application for assessed disclosure included a request for the names of passengers who boarded the Spirit of Tasmania between 30 January and 10 February 2014. Ms Sayers' original decision found this information exempt from disclosure under s36 of the Act.
- 22 When applying for the internal review, O explicitly indicated that she was not seeking a review of Ms Sayers' decision to exempt the names of passengers that boarded the Spirit of Tasmania from disclosure. She set out that she was only seeking the review of Ms Sayers' decision to exempt from disclosure the car registration details of vehicles that boarded the Spirit of Tasmania.

Accordingly, Mr Dwyer's internal review decision was restricted to this aspect of Ms Sayers' decision.

- 23 On 1 September 2022, as part of her external review request, O emailed my office to say that she now wanted access to the passenger list and the decision to refuse this to be reviewed.
- 24 Unfortunately, this is not an action I am able to take. As the internal review was confined to the car registration details, at O's explicit request, I am unable to review TT-Line's original decision to exempt the passenger names from disclosure. This external review is confined to what was decided on internal review.

Section 36 – personal information of a person other than the applicant

- 25 I now turn to assess whether the car registration details contained in each ship manifest are exempt from disclosure under s36 of the Act. For information to be exempt under s36, I must be satisfied that its release would reveal the identity of a person other than O, or that the information would lead to that person's identity being reasonably ascertainable.
- 26 Having considered the positions by both parties and reviewed the information, I am satisfied that the release of the requested car registration details would lead to a person other than the applicant being identified, or would make their identity reasonably ascertainable.
- 27 I consider that if a person had prior knowledge of a passenger's car registration details, then the release of this information would confirm that their car boarded the Spirit of Tasmania within the dates specified in the applicant's application for assessed disclosure. Though the identification of a car does not necessarily identify its owner as a passenger on the Spirit of Tasmania, I find it to be the most rational inference to draw. Accordingly, I am satisfied the car registration details requested by the applicant are *prima facie* exempt from disclosure under s36 of the Act.
- 28 Finally, I note the applicant's submissions that requested information cannot be considered exempt because car registration details are already displayed publicly on number plates. I do not accept this position, however, as the test in the Act is not whether the information is publicly displayed but whether it may identify a person. I will, however, consider the visibility of this information in relation to whether it would be contrary to the public interest to release it.

Section 33 – Public Interest Test

- 29 Section 36 is subject to the public interest test contained in s33, so I now turn to consider whether it would be contrary to the public interest to release the car registration details which I have found to be *prima facie* exempt from disclosure. In making this assessment I am required to consider all relevant matters. At a minimum, I am to have regard to the matters contained within Schedule 1 of the Act.

- 30 On internal review, TT-Line considered Schedule 1 matter (a) to be relevant, however it found that this matter weighed against disclosure. TT-Line reasoned there was *no general public need for access* to the car registration details, and as such this mitigated against disclosure. As I previously noted, the decision did not find any other matters to weigh against disclosure, despite finding it contrary to the public interest to release this information.
- 31 I agree with TT-Line that matter (a) - the general public need for government information to be accessible – is relevant. However, I find that this matter weighs in favour of disclosure. Given the explicit object of the Act, I consider that this always weighs in favour of disclosure and cannot agree with TT-Line's view.
- 32 I find that matter (h) - whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government – to be relevant and weighs against disclosure. TT-Line requires passengers to provide car registration details for identification and public safety purposes. Passengers would not expect their car registration details, or their travel movements, to be made publicly available through the right to information scheme unless exceptional circumstances applied. I am not satisfied that such exceptional circumstances apply here.
- 33 I find that matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – to be relevant and that it weighs against disclosure. If these details were to be made public, the travel movements of individuals would be made public. Users of a commercial ferry service would reasonably expect that details of their individual travels or movements would not be made public unless exceptional circumstances apply. As mentioned, such circumstances are not evident here, and so I find that the interest of passengers could be harmed if their car registration details are made available to the public.
- 34 I accept O's argument that the harm to the interests of individuals would be low, as registration numbers are publicly displayed and, to some extent, searchable online. It is one of the lower categories of personal information and I accept that it is not highly sensitive data. However, it still renders people identifiable and I note that number plates are often blurred if captured on online mapping services or television footage.
- 35 Overall, having considered these competing considerations, I am satisfied that it is contrary to the public interest for the car registration details of all passengers travelling on the relevant dates to be released. This information is exempt under s36.

Preliminary Conclusion

- 36 Accordingly, for the reasons given above, I determine that exemptions claimed by TT-Line pursuant to s36 are upheld.

Submissions to Preliminary Conclusion

- 37 On 27 March 2024, my preliminary decision was made available both O and TT-Line to seek their input before finalisation pursuant to s48(1)(b) of the Act.
- 38 Input was not provided by TT-Line, however, on 3 April 2024, O made the following submissions in response to my preliminary decision. These were (verbatim):

I believe the decisions made by Kym Sayers - TT-Line Company Secretary & Bernard Dwyer - TT Line Chief Executive Officer.

The names of owners of a vehicle are not free and update information in this case it is historical information. The vehicles have changed owners and it costs money to purchase for information on current owners. I am not interested in any owners who currently own this car.

I thought it was reasonable about the names of passengers but now I do not. My only goal is to prove who killed my sister, considering that her face was smashed in and the killer turned over her body so she would suffocate to death. That makes it review in the Public Interest.

Your actions along with Ombudsman staff publish names of people who have asked for reviews on your website.

I refer to your comments on R2202-024 sections 40, 41, 42 and 44-5. You release TT-Line staff members' names to Mr Stott.

Your actions along with Ombudsman staff have asked Tasmania Police to provide me with names of Police Officers who attended Ashley Detention Centre which they have done in the last few weeks.

One of those Police Officers has the same surname as the Tasmanian Premier. This was done at your office's request.

I have received other names of Police officers from Tasmania Police through the RTI process.

The land titles office sells information about land and house owners via websites of Information Providers to create a revenue stream for the State Government to make money for its purposes.

Missing person's names are released to the public using social media which is used for good.

I can call any Court in Tasmania and obtain information about anything appearing before the court, they supply names and businesses which are before the court via the court websites.

The recent apprehension of an alleged murderer in Ballarat saw his

defense team try to his name published by all media because his father is an AFL player in Victoria. This was dismissed by the Magistrate.

Lost money lists are available for State Government and Federal agencies which can be searched by anyone.

Australian Electoral Commission has open-access computers in every office in Australia and anyone can search for a person and their address.

All of these things are legal. I have an Information Account with one of the Information Services which gives me access to any state, Land titles offices, and Courts around Australia.

I have to pay for the information which is fine as I do family history. I can obtain a will from the State Archives Office and I can search for Torrens title for a property owned by one of my ancestors or a living person.

If a statement from the Coronial Brief gives a name to you and you find it in the list of passengers and you know that the statement was signed at a NSW Police Station then you know it to be untruthful you have to report this information to Tasmania Police and NSW Police under section 28 of the Ombudsman Act 1978.

I want an Excel document created from this data so how many pages it is is important and sent to me on CD via the mail service provided by Australia Post.

Further Analysis

- 39 In relation to O's submissions regarding not being interested in any owners who currently own this car if a car had changed ownership, this is not a matter which I can consider. I am only able to assess the specific information responsive to her request.
- 40 O further noted previous occasions where I had decided that information revealing the names of individuals should be released, in past decisions under the Act.
- 41 I note that these examples raised by O all relate to occasions where I have found information revealing the names of public officers, in circumstances where they are performing their ordinary work duties, to not be exempt from disclosure. The situation in this instance is distinct from such circumstances, in that O is requesting information that might reveal the identity of private individuals who were simply passengers on the Spirit of Tasmania. These individuals are not officers of a public authority and so different considerations apply. Accordingly, these submissions do not alter my finding.
- 42 O also submitted that she should be provided the requested car registration details as these are available online in Tasmania, following payment of a fee to

the State Government. I acknowledge there is a free *Tas Rego Check* process¹ operated by the Department of State Growth, by which the registration plate number of any vehicle can be searched and details of the make, model, registration status etc are available. There is also a registration and licence search process, which attracts a fee. However, I was aware of these processes while making my preliminary decision and, consequently, this submission does not change my findings.

- 43 In relation to the submissions made by O explaining how a range of personal information can be accessed by the public through various mechanisms (such as the Land Titles Office, courts, social media, and the electoral roll), these similarly do not change my findings. That other data is available through other mechanisms is not the matter I am considering, I must focus on the specific information sought in O's request for information. None of that information can be sought through the mechanisms O references, so I do not consider these submissions relevant to my decision here.
- 44 I acknowledge the importance of this information to O in light of her sister's death and her concerns regarding foul play. But it is not open for me to consider these matters beyond my assessment of the public interest test, I am only able to consider the information in question which is held by TT-Line and the application of s36 to that particular information. Due to this, I cannot consider the remainder of O's submissions which are not related to this assessment.

Conclusion

- 45 Accordingly, for the reasons given above, I determine that exemptions claimed by TT-Line pursuant to s36 are upheld.
- 46 I apologise to the parties for the inordinate delay in finalising this decision.

Dated: 10 April 2024



Richard Connock
OMBUDSMAN

¹ See *Check my vehicle registration*, available at www.transport.tas.gov.au, accessed 10 April 2024.

Attachment I – Relevant Legislation

Section 36 – Personal information of a person

- (1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13.
- (2) If –
 - (a) an application is made for information under this Act; and
 - (b) the information was provided to a public authority or Minister by a third party; and
 - (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party –
the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –
 - (d) notify that person that the public authority or Minister has received an application for the information; and
 - (e) state the nature of the information that has been applied for; and
 - (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.
- (3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f), decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.
- (4) A notice under subsection (3) is to –
 - (a) state the nature of the information to be provided; and
 - (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
 - (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.
- (5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) –
 - (a) until 10 working days have elapsed after the date of notification of that person; or
 - (b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or

- (c) until 20 working days after notification of an adverse decision under section 43; or
- (d) if during those 20 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided.

Where :

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

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

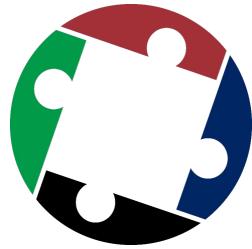
Section 33 – Public Interest Test

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

Schedule 1 – Matters Relevant to Assessment of Public Interest

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

- (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
- (k) whether the disclosure would promote or harm the economic development of the State;
- (l) whether the disclosure would promote or harm the environment and or ecology of the State;
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

**Right to Information Act Review****Case Reference:** R2212-009**Names of Parties:** Peter Jacobson and Department for Education, Children and Young People**Reasons for decision:** s48(3)**Provisions considered:** s30, s31, s36, s39

Background

- 1 In 2009 and 2013, Mr Peter Jacobson was issued with two letters by the then Department of Education, now the Department for Education, Children and Young People (the Department).
- 2 The first letter was dated 3 June 2009 from Mr Greg Glass, Deputy Secretary (Corporate Services). This letter informed Mr Jacobson that he was excluded from the grounds and buildings of all the Department's schools and colleges, and that he was not permitted to contact any schools or colleges (the 2009 letter).
- 3 The second letter was dated 11 June 2013 from Mr Greg Morgan, Acting Principal of Launceston College. This letter reiterated that Mr Jacobson was excluded from, and not permitted to contact, Launceston College (the 2013 letter).
- 4 On 22 December 2022, Mr Jacobson applied to the Department for assessed disclosure of information under the *Right to Information Act 2009* (the Act) in relation to the 2009 letter and 2013 letter.
- 5 Regarding the 2009 letter, he requested (verbatim):

Part 1

On 3 June 2009 Deputy Secretary (Corporate Services), Mr Glass, alleged:

"... It has been reported to me to me [sic] that you have been contacting schools by phone, email, letter and that you have visited schools seeking information in relation to newsletters from year 2002-2004, staff transfer information and photographs of staff ..." (Glass, 3/06/09).

Accordingly, I request file copies of any relevant emails and/or letters in relation to when I contacted schools and / or

visited the schools at issue. I seek hand-written or electronic notes/ memos being held on file, and made in relation to my phone conversations.

Should a file record not exist, then please confirm this fact.

Part 2

On 3 June 2009 Deputy Secretary (Corporate Services), Mr Glass, alleged:

"...I am further advised that you also sought information from the State Library in relation to a school trip to Thailand by students and teachers from Port Dalrymple School, including the names of the students attending..."
(Glass, 3/06/09).

I was a school teacher based at Port Dalrymple School in 2003-2004 years.

Nevertheless, I request any hand-written and/ or electronic notes, memos and letters that were forwarded to the Department by the various State Libraries.

Should a file record not exist, then please confirm this fact.

Part 3

On 3 June 2009 Deputy Secretary (Corporate Services), Mr Glass, alleged:

"... I understand that you have visited Kings Meadows High School, Lilydale School, Prospect High School and Brooks High School claiming variously that you are undertaking a PhD researching transfer policies, that you are gathering information to put forward for your candidature for a PhD at the University of Tasmania, that you are undertaking a 'project' and undertaking 'research' ..." (Glass, 3/06/09).

During the early 2000's I was a post-graduate student at Curtin University.

Nevertheless, herein I request any relevant hand-written and / or electronic notes, memos and letters forwarded to the Department of Education by the named schools - that suggest or allege I was undertaking a 'project' and/ or 'research'.

Should a file record not exist, then please confirm this fact.

Part 4

On 3 June 2009 Deputy Secretary (Corporate Services), Mr Glass, alleged:

"... I am advised that you have also contacted Yolla District High School and Sheffield District High School, by phone, email and letter advising them you would be visiting the school and requesting school newsletters be made available to you when you visit ..." (Glass, 3/06/09).

I request file copies of the referred emails and letters that indicate I contacted these schools. I seek hand-written letters or electronic notes and memos made in relation to my phone conversations with these schools.

Should a file record not exist, then please confirm this fact.

Part 5

On 3 June 2009 Deputy Secretary (Corporate Services), Mr Glass, alleged:

"... Similarly, you have also contacted New Norfolk High School and Huonville High School requiring them to forward information to you by post ..." (Glass, 3/06/09).

I request file copies of any emails and letters to indicate I contacted these schools. I seek hand-written or electronic notes and memos made in relation to my phone conversations with these schools.

Should a file record not exist, then please confirm this fact.

Part 6

On 3 June 2009 Deputy Secretary (Corporate Services), Mr Glass, alleged:

"... I am also advised that you have again contacted Lilydale School and suggested that you be allowed to work through its archives on your own to obtain information you are seeking ..." (Glass, 3/06/09).

I request file copies of any electronic notes, memos, emails and/ or letters that indicate I contacted Lilydale School. Notwithstanding that, to indicate I had contact with Lilydale School on at least two occasions.

Should a file record not exist, then please confirm this fact.

Part 7

On 3 June 2009 Deputy Secretary (Corporate Services), Mr Glass, alleged:

"... On all occasions you failed to produce any supporting evidence of ethics approval from the Department of Education which would authorise you to have the information you have sought to conduct this research ..." (Glass, 3/06/09).

I request file copies of any electronic notes, emails and/ or hand-written letters that do indicate a Department official did expressly require that I produce an ethics approval to him/her.

Should a file record not exist, then please confirm this fact.

Part 8

On 3 June 2009 Deputy Secretary (Corporate Services), Mr Glass, alleged:

"... Furthermore your behaviour on these occasions has been reported by staff to be intimidating, bullying and aggressive and staff involved have felt uncomfortable and upset by your manner ..." (Glass, 3/06/09).

I request copies of any electronic notes, emails, memos, and/ or hand-written letters that were forwarded to the Department to evidence that my manner and behaviour at the aforementioned schools was 'intimidating: 'bullying', and 'aggressive'.

I request any file copy of a Department letter that was written for the purpose of seeking my response in relation to these serious and concerning allegations.

Should a file record not exist, then please confirm this fact.

- 6 Regarding the 2013 letter, he requested (verbatim):

Part 1

On 11 June 2013 the A/ Principal, Mr Morgan, alleged:

"... I remind you of the letter sent to you in June 2009, copy attached, by the Department of Education's Deputy Secretary. The instructions outlined to you in that letter still apply ... you are excluded from all Launceston College property ..." (Morgan, 11/06/ 13).

Accordingly, herein I request file copies of any documents/ records that do indicate I visited Launceston College in 2009, 2010, 2011, and 2012, respectively. That evidence may be pay advice slips. I recall that I supervised TQA exams in November at Launceston College in each of these years.

The Deputy Secretary's letter dated 3 June 2009 required that I negotiate with the Manager, Legal Services Unit. This occurred before the 2009 exam at LC. My recollection is that the Department of Education withdrew the letter (because of its oppressive nature).

But if the Department happened to (again) write to me between 7 June 2009 - 10 June 2013, and for the express purpose of precluding me from entering its property, then I request a copy of the (revising) letter.

Should a file record not exist, then please confirm this fact.

Part 2

On 11 June 2013 the A/ Principal, Mr Morgan, alleged:

"... On 6 May 2013 a Launceston College staff member came to me visibly distressed following an unsolicited phone call from you ..." (11/06/13).

I request copies on file of hand-written and/ or electronic notes, memos and letters forwarded to the Department in relation to the phone call that allegedly occurred on 6 May 2013.

Should a file record not exist, then please confirm this fact.

Part 3

On 11 June 2013, in relation to the LC staff member, Ms P Bishop, the A/ Principal, Mr Morgan alleged:

"... harassing behaviour is not acceptable ... you did not behave in a reasonable and respectful way during that phone call ..." (11/06/ 13).

I request any hand-written and /or electronic notes, memos and letters forwarded to the Department of Education by Launceston College - that do indicate I spoke with the staff member [P Bishop] on more than one occasion.

Should a file record not exist, then please confirm this fact.

Part 4

On 11 June 2013 the A/ Principal, Mr Morgan, alleged:

"... your behaviour was aggressive and menacing, to the extent that the staff member [Peta Bishop] has referred the matter to the Police ..." (11/06/ 13).

- (a) *I request a copy on file of the staff member's referral to Tasmania Police.*
- (b) *If the Department did ask me to respond to the allegation of "aggressive and menacing" behaviour, then I request a copy of the Department's letter.*

Should a file record not exist, then please confirm this fact.

- 7 On 11 November 2022, Ms Antonia O'Brien, a delegate of the Department under the Act, issued a decision to Mr Jacobson. Ms O'Brien released some information to him. She also determined that some information was exempt from disclosure under s30 (information relating to law enforcement), s31 (legal professional privilege) and s39 (information obtained in confidence), or otherwise out of scope, and this was not released to him.
- 8 On 18 November 2022, Mr Jacobson applied to the Department for internal review of the decision. On 21 December 2022, Ms Andrea McAuliffe, a delegate of the Department under the Act, issued an internal review decision. Ms McAuliffe affirmed the initial decision and determined that the same information was exempt from disclosure under ss30, 31 and 39. She did, however, release some further information to Mr Jacobson responsive to Part 1 of his application in relation to the 2013 letter.
- 9 Mr Jacobson applied to this office for external review of the decision on 22 December 2022. His application was accepted pursuant to s44 of the Act, as he was in receipt of an internal review decision and sought external review within 20 working days of this decision.

Issues for Determination

- 10 I must determine whether the information not released by the Department is eligible for exemption under ss30, 31 and 39, or any other relevant section of the Act.
- 11 As s39 is contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in section 33. This means that, should I determine the information is *prima facie* exempt from disclosure under this section, I must then determine whether it would be contrary to the public interest to release it. In doing so, I must, at least, consider all the matters contained in Schedule 1 and disregard all the matters contained in Schedule 2.

Relevant legislation

- 12 The Department has relied on ss30, 31 and 39 of the Act to exempt information from release in its decision. I attach copies of these sections to this decision at Attachment 1.
- 13 I consider it appropriate to also assess some information under s36, and I also attach a copy of this section.
- 14 Copies of s33 and Schedule 1 of the Act are also attached at Attachment 1.

Submissions

The Department

- 15 The Department did not provide any submissions to this external review, beyond the reasoning of its decisions which is set out as follows.

Initial decision

- 16 In the initial decision, Ms O'Brien determined that some information responsive to Part 2 of the application in relation to the 2013 letter was exempt from disclosure under s30, as (i) it comprised information relating to enforcement of the law; and (ii) it would be contrary to the public interest to release the information (after considering matters (a), (j), (m) and (n) of Schedule 1 of the Act). Ms O'Brien advised:

I consider the emails and statements made by officers to be exempt in full under section 30(d) on the basis it is information that could increase the likelihood of harassment or discrimination of a person should the information be released.

I find sub-section (b) also applies due to the confidential and sensitive nature of such information, including names and personal details of individuals that could identify a confidential source of information.

...

The public interest test may apply to the release of information considered exempt under section 30 in a limited

number of circumstances. Schedule 1 of the Act includes matters to be considered but is not limited to those matters. I find to be of particular relevance in Schedule 1:

- (a) *the general public need for government information to be accessible;*
- (j) *whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;*
- (m) *whether the disclosure would promote or harm the interests of an individual or group of individuals;*
- (n) *whether the disclosure would prejudice the ability to obtain similar information in the future;*

Whilst I acknowledge there may be general public interest or benefit around some information being released, in this instance disclosure may result in release of sensitive information which may affect the psychological safety of a person and for this reason I consider it, on balance, contrary to the public interest to disclose the information.

- 17 She also considered that some information responsive to Part 8 of the application in relation to the 2009 letter was exempt under s31, as it comprised information that was protected by legal professional privilege:

I am satisfied that some information is exempt on the basis that it is information relating to the seeking of, and the provision of legal advice to the Department. Section 31 of the Act provides that information is exempt 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. Legal professional privilege protects the confidentiality of certain communications made in connection with giving or obtaining legal advice or in the provision of legal services, such as representation in legal proceedings. I am satisfied that the information exempted under this section was either created for the purpose of obtaining legal advice or actually contains legal advice and is therefore exempt in full. Section 31 is not subject to the public interest test and accordingly has not been considered in the application of this provision.

- 18 Finally, she determined that some information responsive to Parts 1, 3, 4 and 6 of the application in relation to the 2009 letter, and some information responsive to Part 2 of the application in relation to the 2013 letter, was exempt under s39. This was because she considered it

comprised information obtained in confidence (after considering matters (a), (n) and (m) of Schedule 1):

The information I have decided is exempt are responses provided to the Department by employees providing statements on their own personal experience and opinions concerning their interactions with yourself. I have treated these emails and statements as confidential because I consider that commentary of this nature was provided for a specific purpose and for a specific audience, namely the senior managers, legal officers and associated staff responsible for providing legal advice. In my view, to disclose the frank and open statements such as these provided in the context of seeking advice would be likely inconsistent with the individual's understanding of how their statements would be used. I also hold concern that some information contained in these responses would be likely to reveal individuals' identity, personal and/or psychological/emotional circumstances.

In order for the information to be exempt it must also satisfy section 39 (l)(a) or (b). To disclose this information would be likely to hinder the Department's ability to obtain similar information again and would likely impair the ability of the Department to seek open and frank input. There is a risk that staff would no longer have the confidence in the Department to honour undertakings and manage staff commentary and opinion in a confidential manner. Thus I consider the information exempt as it satisfies the Act's requirement under section 39(l)(b).

...
In considering Schedule 1 of the Act I have decided that in this case the following matter that weighs in favour of disclosure is most relevant:

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

It is the public's expectation that government decision-making processes are open, transparent and accessible. However, I am of the opinion that the details I propose to withhold would not inform the public to any greater extent than the information that is being disclosed or which is already in the public domain would.

I find the following matters in Schedule 1 which weighs against disclosure of the information to be relevant:

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

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

This matter is relevant to members of the public and to Departmental officers. Disclosure of exempt information pursuant to section 39 of the Act could be reasonably expected to inhibit individuals' open and frank communication with the Department, thereby harming the agency's ability to obtain confidential information in the future. I consider these statements were provided by people who were on [sic] the understanding that these responses would be treated confidentially. I also consider that the release of such information in a broader way may cause harm to those individuals. Maintenance of the public's trust and confidence is critical to ensuring the provision of confidential information to Government departments into the future. I have decided that the Department's obligations to honour its confidentiality undertakings outweigh the public interest in favour of disclosure.

For the reasons stated above, on balance, I consider that it would be contrary to the public interest to disclose the information and consequently that it qualifies as exempt information under section 39 of the Act.

Internal review decision

- 19 In the internal review decision, Ms McAuliffe did not repeat the reasoning of Ms O'Brien, but provided additional comments in relation to the information determined to be exempt under s30 and s39.
- 20 In relation to the information determined to be exempt from disclosure under s30, she provided:

Having considered the information itself as well as your representations, I consider the emails and file notes provided by officers of the Department to be exempt in full under s.30(d) of the Act. I am satisfied that the circumstances indicate that this information was provided by various staff members in confidence for the specific purpose of documenting their interactions with you. In all the circumstances, I am satisfied that to disclose the information would increase the likelihood of harassment of those individuals. The schedule of documents lists all the schools you approached, and the statements of staff document their interactions with you. Given that you are pursuing information on this matter well over 10 years since some of the incidents occurred, I cannot be satisfied that there is no longer a likelihood of harassment should the information be disclosed. Further, I also find that subsection 30(b) applies where noted,

as the information consists of names and personal details that could identify a confidential source of information.

- 21 In relation to the information determined to be exempt from disclosure under section 39, she reasoned:

Having considered the information in question, which is statements of personal experiences and opinions, I have formed the view that it was provided in confidence for the purpose of seeking advice from other staff members, including seeking legal advice. To disclose this information to you would be contrary to that purpose and is very likely to be inconsistent with the understandings of staff around how this information would be used. Further, I think it is very likely that disclosing this information would hinder the Department's ability to obtain similar information in future and I have considered this issue further below as it is relevant to the public interest test.

- 22 Ms McAuliffe then applied the public interest test in relation to the information determined to be exempt under s30 and s39 and determined that matters (a), (j), (m) and (n) of Schedule 1 were relevant:

In favour of disclosure, I acknowledge the general public need for information to be accessible and for government decision making process [sic] to be open and transparent. However, I do not believe that releasing the information which has been exempted would provide any further assistance to the public in understanding decision making processes.

Weighing against disclosure, as noted above, is the fact that I have formed the view that the information was provided in confidence and for a specific purpose. It is in the public interest that officers within government agencies are able to have frank and open conversations and exchanges of information, particularly when seeking advice on dealing with situations as this. To disclose the information would be very likely to inhibit the Department's ability to obtain similar information in future and may result in staff not providing all relevant information when seeking advice, including legal advice.

She concluded:

For these reasons, and for the reasons provided by Ms O'Brien, I am of the view that it would be contrary to the public interest to disclose the information and therefore that it is exempt under sections 30 or 39, as noted in the schedule.

Mr Jacobson

23 Mr Jacobson provided submissions both in his internal review application made to the Department, and in his external review application made to this office.

24 In his internal review application, firstly, he raised that he considered that the Department's reliance on the s31 exemption for legal professional privilege was inappropriate. This was because:

As I understand it, the document dated 8 May 2009 is not from Crown Counsel or the DPP. As such, it may not be regarded as being true legal advice.

25 Secondly, he raised that the Department's reliance on the s39 exemption for information obtained in confidence was inappropriate because:

- *The information requested by this Assessed Disclosure has occurred one decade (or more) ago. It may reasonably be said the officers (and people) involved have moved on. Clearly, a need for the DOE to obtain similar information in the future (s.39 of the Act) is now a non-event.; and*
- *I understand that most communications withheld under s.39 of the Act specifically were not headed "confidential" and nor were they expressly provided to the DOE "in confidence".*

26 Thirdly, that in relation to the Department's reliance on the s30 and s39 exemptions, he asserted that:

In relation to the matter of "harassment" the Department had no evidence to release at Parts 3 and Parts 4 with this Assessed Disclosure.

It is a decade ago since I spoke with Ms Peta Bishop at Launceston College. If there is suggestion, that I may harass Ms Bishop in the future, then it is groundless and therefore it is strongly rejected by me.

27 Fourthly, he claimed that the names of Department staff members were already in the public domain and should therefore be released:

The Tasmanian Government Gazette regularly publishes the names of government officers who are recruited, transferred, promoted or retired. The name of numerous government officers is in the public domain for one reason or another. Public school newsletters often do publish teacher names.

I suggest the name of a person or officer, of itself, is not personal information to be withheld from release.

28 Finally, he argued that:

The information withheld by the RTI delegate contains information that is about my personal affairs. Therefore, it is reasonable and fair to know what is being said about me.

Notwithstanding that, I am also being denied an opportunity to check/ ensure the agency file record is accurate, up-to-date, complete and not misleading.

- 29 In his external review application, Mr Jacobson raised that due to the extent of the redactions applied by the Department, he was unable to determine if the Department's application of s39 was reasonable.
- 30 I have considered Mr Jacobson's remaining submissions in both his internal and external review applications, however I do not consider that they raise any relevant matters requiring further consideration. For example, some of Mr Jacobson's submissions related to parts of the Act not relied on by the Department in its application of the exemptions and I do not therefore consider them to be relevant to the matters I must determine as part of this external review.

Analysis

Section 30 – Information relating to enforcement of the law

- 31 The Department has determined that parts of two documents responsive to Part 2 of the application in relation to the 2013 letter are exempt from disclosure under:
- s30(1)(b), on the basis that disclosing the information would, or would be reasonably likely to, disclose or allow Mr Jacobson to ascertain the identity of a confidential source of information in relation to law enforcement; and
 - s30(1)(d), on the basis that disclosing the information would, or would be reasonably likely to, increase the likelihood of harassment or discrimination of staff members,
- after applying the public interest test in s33.
- 32 These documents consist of the following emails between Department staff members:
- an email from Mr Morgan to Ms Linda Eaton appearing partly at page 51, and fully at pages 75-76 of the document bundle. For ease of reference, I will refer only to pages 75 and 76 but my comments will also apply to page 51; and
 - the first page of an email between Ms Catherine Gavan to Ms Eaton appearing at pages 77-78.

33 Section 30(b) provides:

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

(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.

34 Section 30(1)(d) provides:

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

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

35 In relation to the Department's application of the public interest test in s33, this only applies to information which is could be exempt under s30(1), if it falls within the categories of information set out in s30(2). I am not satisfied that any of the information the Department has determined to be exempt under s30 could be included in the categories of information set out in s30(2). Consideration of the public interest test is therefore not required for this information. I consider that the Department erred in applying the public interest test in relation to the specific information it sought to exempt pursuant to s30, as it did not provide any reasoning as to why it considered it fell within one of the categories in s30(2).

36 The Department has determined that the fourth and fifth paragraphs on page 76, and all of page 77 are exempt from disclosure. I am satisfied that s30 is relevant to this information. I must therefore determine whether disclosure of the information meets the criteria for the exemption to apply, as set out in s30(1)(b) and/or (d).

37 I do not agree that releasing the information to Mr Jacobson would reveal the *identity of a confidential source of information* in relation to law enforcement under s30(1)(b). This section is intended to protect a confidential source of information in connection with law enforcement; and it is the *source*, rather than the information, which is confidential.

38 In the internal review decision, Ms McAuliffe provided brief reasoning on why she considered s30(1)(b) applied:

Further, I also find that subsection 30(b) applies where noted, as the information consists of names and personal details that could identify a confidential source of information.

- 39 However, it is not clear whose details the Department considers it necessary to keep confidential. Given that the names of the authors in both emails have been released to Mr Jacobson already and are therefore evidently not confidential, it appears that the Department is referring to the staff member who allegedly spoke to Mr Jacobson on the phone.
- 40 Mr Jacobson is already aware of the staff member's name and uses it in his application and submissions. This is likely due to the fact that the Department has already provided sufficient information to Mr Jacobson to make it possible for him to determine the identity of the source of information relating to law enforcement. In the 2013 letter, Mr Morgan provided details of the events leading to the police report, and also indicated that the staff member had referred the matter to the police:

On 6 May 2013, a Launceston College staff member came to me visibly distressed following an unsolicited phone call from you demanding she meet you to discuss a proposal you wanted to put regarding a driver mentor program. One of the purposes of writing to you now is to inform you that I am cancelling the meeting you proposed with the staff member for later in June.

...
I believe, on reasonable grounds, that you did not behave in a reasonable and respectful way during that phone call, and that in fact your behaviour was very aggressive and menacing, to the extent that the staff member referred the matter to the Police.

Due to this, I do not consider that the Department can reasonably rely on s30(1)(b), because the necessary quality of confidence has been lost.¹ There may be other reasons this information is exempt, but the Department has not discharged its onus under s47(4) to demonstrate that the information should be exempt under s30(1)(b).

- 41 In relation to s30(1)(d), as I have determined previously, the words *increase the likelihood of harassment or discrimination of a person* must be read in the context of the whole provision, including the preceding words of that subsection regarding endangering the life or safety of a person. It is my view that these words denote a risk of sufficiently serious harm.²
- 42 This approach is consistent with Parliament's expressed intention that the Act be interpreted to further the object set out in s3(1) *to improve democratic government in Tasmania -*

¹ *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437

² See, for example, *Karl Willrath and Dorset Council*, (30 August 2023), at [43]-[44], available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

- (a) by increasing the accountability of the executive to the people of Tasmania; and
 - (b) by increasing the ability of the people of Tasmania to participate in their governance; and
 - (c) by acknowledging that information collected by public authorities is collected for and on behalf of the people of Tasmania and is the property of the State.
- 43 The s3 object is to be pursued by *giving members of the public the right to information held by public authorities* and further, that any discretions conferred by the Act (such as the exemptions) be exercised so as to *facilitate and promote, promptly and at the lowest reasonable cost, the provision of the maximum amount of official information*.
- 44 As I have determined previously, the words *would, or would be reasonably likely to* in s30(1)(d) require an objective assessment of whether there is a reasonable possibility that disclosing the information would increase the likelihood of harassment or discrimination of the officers involved, rather than a possibility that is irrational, absurd or ridiculous.³
- 45 I do not agree that disclosing the information to Mr Jacobson would lead to harassment or discrimination of staff members to the extent required to enliven s30(1)(d). In the internal review decision, Ms McAuliffe provided brief reasoning about why she considered that there was a risk that Mr Jacobson would harass staff members. This was based on how he allegedly interacted with them when he approached schools in 2009 and 2013, and that he was requesting information in relation to incidents which occurred over ten years ago:
- In all the circumstances, I am satisfied that to disclose the information would increase the likelihood of harassment of those individuals. The schedule of documents lists all the schools you approached, and the statements of staff document their interactions with you. Given that you are pursuing information on this matter well over 10 years since some of the incidents occurred, I cannot be satisfied that there is no longer a likelihood of harassment should the information be disclosed.*
- 46 However, the Department has not provided any information to support its suggestion that Mr Jacobson is likely to harass staff members if the information were disclosed to him. For example, it has not provided any detail of the type and extent of the risk of harassment, nor has it

³ See, for example, *Simon Cameron and Department of Natural Resources and Environment Tasmania*, (21 January 2022), at [48], applying *Centrelink v Dykstra* [2002] FCA 1442, at [24]-[25], where the Federal Court considered the equivalent provision in the *Freedom of Information Act 1982* (Cth) - s37(1)(c), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

identified the staff members who are likely to be at risk of being harassed. Furthermore, the comments about Mr Jacobson's intention to harass staff members over ten years after the events took place, are merely speculative. Mr Jacobson has known the identity of the complainant from Launceston College and other relevant Department staff for over ten years and it is not alleged that he has harassed them beyond the incidents which led to his exclusion.

- 47 The Act is explicit in s7 that the public has a right to government information, unless it is exempt. As section 30(1) is not subject to the public interest test in s33, it must be interpreted narrowly and only applied when truly necessary. Given the pro-disclosure focus of the Act, there is a high threshold for information to be exempt under this section.
- 48 Accordingly, I do not consider that the Department has discharged its onus under s47(4) to demonstrate that the information should not be disclosed and it is not exempt under s30(1)(d).
- 49 However, as the fourth paragraph on page 76 contains a staff member's personal information beyond that of them performing their regular duties, I consider it appropriate to assess this information under s36 (exemption for personal information).
- 50 I also consider that the fifth paragraph on page 76 and all of page 77 contain details of legal advice received by and provided to Mr Morgan. It is therefore appropriate to assess this information under s31 (exemption for legal professional privilege).
- 51 The Department has determined that the remaining paragraphs of the email at pages 75-76 are out of scope and these have been withheld from disclosure. However, it is unclear why this information would be out of scope. It consists of Mr Morgan's understanding of events leading to a complaint made by Mr Jacobson to the Department in 2013, including an account of Mr Morgan's interaction with Mr Jacobson in 2009, and a discussion of why the 2009 letter was reissued to Mr Jacobson with the 2013 letter. This information appears to be responsive to Parts 1, 3, 6 and 7 of the application in relation to the 2009 letter, and Part 2 of the application in relation to the 2013 letter. I will assess this information under s36.

Section 31 – Legal professional privilege

- 52 For information to be exempt under s31, I must be satisfied that it *is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege*.
- 53 I am not required under the Act to consider the public interest in relation to communications that are exempt by reason of legal professional privilege. As the Courts have noted, legal professional privilege exists to serve the public interest in the administration of justice by promoting free

disclosure between clients and their lawyers and to enable lawyers to give proper legal advice.⁴

- 54 The Department has determined that one document responsive to Part 8 of the application in relation to the 2009 letter is fully exempt from disclosure under s31. This is an email (appearing at page 68) and an attachment (appearing at pages 69-70) from a staff member of the Department to a lawyer at the Office of the Crown Solicitor.
- 55 Legal professional privilege is a common law principle which protects the confidentiality of communications made between a lawyer and their client, if they were made for the dominant purpose of giving or obtaining legal advice.⁵
- 56 I am satisfied that this email, including the attachment, is a communication from a client to a lawyer which was made for the dominant purpose of obtaining legal advice. However, legal professional privilege does not attach to a document *per se*, but to the communication recorded within it.⁶ Accordingly, only the sections of the email and attachment containing the *substance* of the communication are protected under s31.
- 57 I therefore consider the subject line of the email, the name of the attachment and the substantive content of the email, as well as all of the attachment to be exempt from disclosure under s31. Ancillary information, namely, who the email was to and from; who was copied in; and the name and position title of the author (Ms Katharine O'Donnell) is not exempt from disclosure. I also note that the Department has disclosed the last page of the attachment to Mr Jacobson, possibly in error, and as such, this page is not exempt from disclosure under s31.
- 58 In relation to Ms O'Donnell's telephone numbers, I instead consider it appropriate to assess this information under s36.
- 59 In relation to Mr Jacobson's submission in his internal review application that since the email is not from *Crown Counsel or the DPP*, it is not *true legal advice*, legal professional privilege does not just apply to communications from lawyers, it also protects the confidentiality of communications from clients if they were made for the dominant purpose of obtaining legal advice.
- 60 As I indicated earlier, whilst the Department relied on s30(1)(b) and s30(1)(d) to exempt information from disclosure, I consider that s31 is more appropriate. Ms Gavan is a Legal Services adviser in the Legal Services section of the Department, and legal professional privilege

⁴ *Grant v Downs* (1976) HCA 63, at [19], per Stephen, Mason and Murphy JJ.

⁵ *Esso Australia Resources Ltd v FCT* [1999] HCA 67, at [73] per Gleeson CJ, Gaudron and Gummow JJ

⁶ *Commissioner of Australian Federal Police v Propend Finance* (1997) 141 ALR, at [137] per McHugh J

applies to advice provided by in-house lawyers.⁷ I am satisfied that the fifth paragraph at page 76 relays the content of privileged legal advice received by Mr Morgan from Ms Gavan. Accordingly, it is exempt from disclosure and does not need to be released to Mr Jacobson.

- 61 I am also satisfied that paragraphs two to eleven, and the subject line of the email on page 77 relays legal advice provided to Mr Morgan by Ms Gavan. Accordingly, this information is exempt from disclosure and does not need to be released to Mr Jacobson.
- 62 I consider who the email was to and from, the date it was sent, who was copied in, the first line and the last paragraph to be ancillary information and not exempt from disclosure for the same reasons as outlined above. Accordingly, it should be released to Mr Jacobson.

Section 39 – Information obtained in confidence

- 63 The Department has determined that the remaining information withheld from Mr Jacobson is exempt from disclosure under s39(1), either in full or in part. This was on the basis that the Department considered it to be information communicated to the Department in confidence, and disclosure of the information would be reasonably likely to impair the Department's ability to obtain similar information in future.
- 64 For information to be exempt under s39(1), I must be satisfied that disclosing the information would reveal information communicated in confidence by or on behalf of a person to the Department.
- 65 I must further be satisfied under s39(1)(b) that disclosure of the information would be reasonably likely to impair the Department's ability to obtain similar information in future.
- 66 If I find the information to be *prima facie* exempt under s39, I must then consider whether it is contrary to the public interest to disclose the information under s33, considering at least all the matters in Schedule 1 and disregarding all the matters in Schedule 2.
- 67 The information the Department has determined to be exempt under s39(1) consists of Department staff members' accounts of their interactions with Mr Jacobson, including statements, emails, file notes and comments provided by staff members during a consultation with them regarding releasing their personal information to Mr Jacobson.
- 68 In the initial decision, Ms O'Brien indicated that this information was provided for specific recipients, namely *senior managers, legal officers and associated staff responsible for providing legal advice*. In the internal review decision, Ms McAuliffe said that this information was *provided in confidence for the purpose of seeking advice from other staff members, including seeking legal advice*.

⁷ AWB Ltd v Cole (No 5) (2006) 155 FCR 30

- 69 Generally, s39 only applies to information communicated to public authorities (or Ministers) from an external source, rather than by officers within a public authority. However, the Victorian Civil and Administrative Tribunal has accepted that in certain circumstances, the equivalent provision in the Victorian *Freedom of Information Act 1982* may apply to information communicated to a public authority by its own officers.⁸
- 70 Having considered the content and context of the information, I agree with the Department that the information appears to have been communicated in circumstances which would give rise to an expectation of confidentiality.
- 71 However, I am not satisfied that disclosing the information would impair the Department's ability to obtain similar information in future, as is required for the information to be exempt. For example, some of the statements have been provided by school principals who work in paid, senior positions within the Department. It is arguable that these staff members are obliged to provide this type of information to comply with the duties of their senior positions, including exercising higher levels of duty of care for staff members and pupils at the schools. In this context, it seems highly unlikely that the Department would be unable to obtain similar information from staff members working in paid, senior positions in future.
- 72 I consider s36 to be the most appropriate exemption, however, so will instead assess this information under this section.

Section 36 – Personal information of a person

- 73 For information to be exempt under s36(1), I must be satisfied that its release would reveal the identity of a person other than Mr Jacobson, or that the information would lead to that person's identity being readily ascertainable.
- 74 If I find the information to be *prima facie* exempt under s36, I must then consider whether it is contrary to the public interest to disclose the information under s33, considering at least all the matters in Schedule 1 and disregarding all the matters in Schedule 2.
- 75 As I indicated earlier, whilst the Department relied on s30(1)(b), s30(1)(d), s31 and s39(1)(b) to exempt information from disclosure, I consider that s36(1) is more appropriate and should be considered. I also consider it appropriate to assess the information the Department determined to be out of scope under this section.

Pages 5-6, 7-8, 15, 29, 30, 42, 49-50 and 79

⁸ *Sportsbet v Department of Justice* [2010] VCAT 8 at [71]-[78]; *XYZ v Victoria Police* [2010] VCAT 255 at [287]-[288]; *Birnbauer v Inner and Eastern Health Care Network* (1999) 16 VAR 9 at [15].

- 76 These are file notes and statements by staff members regarding interactions with Mr Jacobson. The Department has claimed that they are either fully or partly exempt under s39. I am satisfied that the substantive content of the statements, names (including names contained in the Department's stamps), signatures, position titles, places of work, workplace addresses, telephone numbers and email addresses are personal information of third parties, which would reveal their identities, or lead to their identities being readily ascertainable. As such, they are *prima facie* exempt, subject to the public interest test.

Pages 19-24

- 77 This is a record of consultations with staff members regarding releasing their personal information to Mr Jacobson. The Department has claimed the names of staff members and their comments are exempt under s39. The names of the staff members are clearly personal information. I also consider that the comments could be considered in conjunction with other information which has been disclosed in the table which could lead to staff members' identities being reasonably ascertainable. Therefore, both the names of, and the comments by staff members are *prima facie* exempt from disclosure, subject to the public interest test.

Page 26-27

- 78 This is a record of comments made by staff members as part of the consultation regarding releasing their personal information to Mr Jacobson. The Department has determined it is exempt in full under s39. I consider the staff member's name contained on pages 26 and 27 to be personal information which would reveal a third party's identity, or lead to their identity being readily ascertainable. As such, it is *prima facie* exempt from disclosure, subject to the public interest test.
- 79 However, the remaining information consists of general comments made by staff members and does not contain any identifying information which could link the comments made to any person. Accordingly, I do not consider them to be personal information, they are not exempt under s36 and should be released to Mr Jacobson.

Page 43

- 80 These are emails between staff members. The Department has claimed that all of the 6 May 2009 email, and a phone number in the 8 May 2009 email are exempt under s39. I am satisfied this information is *prima facie* exempt under s36, as it contains the personal information of third parties, which would reveal their identities, or lead to their identities being readily ascertainable.
- 81 The exception is the date and the last line of the 6 May 2009 email which do not contain any personal information. Therefore, they are not exempt under s36 and should be released to Mr Jacobson.

Page 68

- 82 This is an email from a staff member to the Office of the Crown Solicitor. As I indicated earlier, I consider it appropriate to assess the telephone numbers under s36. I consider that this is personal information of a third party which would reveal their identity or lead to their identity being readily ascertainable. Therefore, it is *prima facie* exempt, subject to the public interest test.

Pages 51 and 75-76

- 83 This is an email from Mr Morgan to Ms Eaton. As I indicated earlier, I consider it appropriate to assess this email under s36 (other than paragraph 5, which I have already found to be exempt under s31). I am satisfied that paragraphs 1-4 and 6-7 contain personal information of a third party which would reveal their identity, or lead to their identity being readily ascertainable. As such, they are *prima facie* exempt from disclosure, subject to the public interest test.
- 84 The last line of the email does not contain personal information. Accordingly, this information is not exempt under s36 and should be released to Mr Jacobson.

Public interest test

- 85 In relation to the information I have determined to be *prima facie* exempt under s36(1), I will now apply the public interest test in s33 and assess the Schedule 1 matters.
- 86 Matter (a) - *the general public need for government information to be accessible* is always relevant and will inevitably weigh in favour of disclosure in any public interest assessment. I also consider the following matters to weigh in favour of disclosing the information:
- (c) - *whether the disclosure would inform a person about the reasons for a decision;*
 - (d) - *whether the disclosure would provide the contextual information to aid in the understanding of government decisions;*
 - (f) - *whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation; and*
 - (g) - *whether the disclosure would enhance scrutiny of government administrative processes,*

There is benefit in terms of informing Mr Jacobson about the reasons for the decisions made by the Department to exclude him from the schools and colleges as outlined in the 2009 letter and the 2013 letter. Disclosing this information would also likely enhance scrutiny of the Department's

decision making and administrative processes, and improve accountability for, and participation in, government decisions.

- 87 In addition, I consider matter (j) - *whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law* to weigh particularly in favour of disclosure. The High Court has indicated that in *the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions*.⁹ The Department's decision to exclude Mr Jacobson from all Department schools/colleges clearly affected his interests - Mr Jacobson contacted the Department after receiving the 2009 letter to indicate he wished to be able to attend schools/colleges for unrelated purposes, and he was subsequently permitted to enter schools/colleges in certain circumstances.
- 88 Procedural fairness traditionally includes the right to a fair hearing, namely, that a decision maker afford a person an opportunity to present their case before making a decision affecting their interests.¹⁰ A fair hearing includes disclosure of the critical issues to be addressed, and of information that is credible, relevant and significant to the issues.¹¹ I note that Mr Jacobson raised in his internal review request that since the information concerned his personal affairs, he had a right to know what was being said about him. Arguably, providing Mr Jacobson with the Department's evidence which led to him being excluded from schools/colleges would provide him with details of the Department's evidence, and go towards providing him with procedural fairness.
- 89 However, in relation to the statements, file notes and emails recording details of staff members' interactions with Mr Jacobson, and the record of consultations with staff members regarding releasing their personal information to Mr Jacobson, I consider that the following matters weigh strongly against disclosure:
 - (i) - *whether the disclosure would promote or harm public health or safety or both public health and safety;*
 - (m) - *whether the disclosure would promote or harm the interests of an individual or group of individuals; and*
 - (n) - *whether the disclosure would prejudice the ability to obtain similar information in the future.*

⁹ *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40, at [30], per Kiefel, Bell and Keane JJ

¹⁰ *Eshetu v Minister for Immigration and Multicultural Affairs* (1997) 145 ALR 621, per Burchett J, quoting the meaning of *natural justice* as contained in the *Butterworths Australian Legal Dictionary*, edited by Profs. P. Nygh and P. Butt (1997)

¹¹ *Kioa v West* [1985] HCA 81, at [38], per Mason J

- 90 The information suggests that Mr Jacobson was seeking copies of newsletters from schools to conduct PhD research about the issue of Department staff transfers. The newsletters sought by Mr Jacobson contained the personal information of both students and staff members. Multiple accounts by staff members indicate that the way Mr Jacobson approached schools to request this information was highly concerning. For example, that he had compiled large volumes of information about schools, including staff members' personal information and photographs; he was unable to produce a PhD ethics approval when requested to do so; and that he behaved aggressively and forcefully to staff members when requesting information. Emphasised by the current focus on child safety,¹² it is clear that there is strong, and paramount, public interest in ensuring the safety and wellbeing of students and staff within the Department's schools/colleges.
- 91 In his internal review application, Mr Jacobson raised that the Department did not need to ensure it could obtain similar information in future from the staff members involved because the information was over ten years old, and these staff members would likely have moved on from their positions.
- 92 I do not agree with this. I consider that all staff, not just those involved in this case, *must* be able to report and record issues and concerns openly and honestly. If there was a possibility that their statements, views and personal information could be disclosed to third parties without their knowledge or consent through the right to information process, they may be reluctant to report issues or express concerns and opinions in future.
- 93 The statements (in particular) have been provided to senior management and the legal team as part of the Department's response to the incidents which led to the Department issuing Mr Jacobson with the 2009 letter and 2013 letter. They are formal in nature and record serious events and opinions. They appear to have been prepared as evidence to assist the Department respond to the incidents involving Mr Jacobson. If this information were to be disclosed to the subject person, staff members may be unwilling or fearful to co-operate or provide evidence in future investigations carried out by the Department. This could lead to a range of undesirable consequences, which would likely have a negative impact on the safety and wellbeing of students and staff members. There are significant public interest considerations in ensuring inappropriate conduct in schools/colleges is handled effectively and I consider that information relating to schools and colleges requires a heightened level of caution and protection.

¹² For example, Schedule 1 of the *Child and Youth Safe Organisations Act 2023* contains the *Child and Youth Safe Standards* with which organisations providing services to children must comply.

- 94 I have consistently found in previous decisions¹³ that in the absence of any specific and unusual circumstances, the personal information of current and former public authority staff generated while performing their regular duties is not usually exempt from disclosure under s36. Such information includes names, position titles, signatures, work telephone numbers and work email addresses. However, I consider that specific and unusual circumstances apply to most of this type of information in this case. As this information was generated in the context of reporting serious safety concerns to management and/or the legal department, or providing responses to a consultation with the Department, I consider it reasonable for staff members to expect this information would be kept confidential.
- 95 Another exception is the direct or personal telephone numbers of staff members, if this information is not routinely provided to the public. I accept that there is a potential for harm in the release of this type of information and consider it valid for public authorities to limit the release of direct contact numbers to enable contact from the public to be directed through specific channels.
- 96 The name of a third party appears twice in the email on page 43. When reporting a call she received to management, Ms Heather Jones had originally considered that she had spoken to this person. However, she clarified in a subsequent email that she instead considered the caller to be Mr Jacobson. I consider that matters (c), (m), and particularly, (u) - *whether the information is wrong or inaccurate* weigh against disclosing this information.
- 97 This person appears to have been named by Ms Jones in error and is apparently unrelated to matters involving Mr Jacobson and the Department. Naming this person linked in relation to an alleged incident involving Mr Jacobson has the potential to harm their interests. Furthermore, it will not provide any benefit to Mr Jacobson in terms of informing him about the reasons for the Department's decisions.
- 98 I therefore find that it is contrary to the public interest to disclose the file notes on pages 5-8; the statements on pages 15, 29, 30, 42, 49-50 and 79; the names and comments in the consultation record on pages 19-24; the email on page including the unrelated third party's name 43, the telephone numbers on page 68 (if these are direct telephone numbers which are not routinely provided to the public); and the fourth paragraph of the email at page 76. This information is exempt under s36(1).

¹³ See *Emma Hamilton and Department of Natural Resources and Environment Tasmania*, issued 24 November 2023, at [53]-[57], *Linda Poulton and Department of Natural Resources and Environment*, issued 24 November 2023, at [96]-[97], and *Tarkine National Coalition and Department of Natural Resources and Environment Tasmania*, issued 13 October 2023, at [84]-[86], all available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

- 99 However, in relation to the remainder of the email at page 75-76 which the Department had originally considered to be out of scope, I give weight to matters (c), (d) and (j) in favour of disclosing the information. As I have outlined previously, this is an email from Mr Morgan, providing information to Ms Eaton about his understanding of events leading to a complaint made by Mr Jacobson to the Department in 2013. Whilst it does appear to have been created for the purposes of assisting the Department respond to Mr Jacobson's complaint, it is not a final, formal statement. It is deliberative in nature, recording Mr Morgan's opinions, and if it were assessed under the exemption for internal deliberative information (s35), it would not be exempt because it was created over ten years ago.¹⁴
- 100 Mr Morgan sent this email in his capacity as school principal. As I discussed in my analysis of s39, it is arguable that he *must* provide this information to effectively exercise higher levels of duty of care for students and staff members that is required of his position. I consider it unlikely that disclosing this information to Mr Jacobson would impair the Department's ability to obtain similar information in future. Accordingly, the first, second, third, sixth, seventh and eighth paragraphs of this email are not exempt and should be released to Mr Jacobson.

Preliminary Conclusion

- 101 Accordingly, for the reasons set out above, I determine that:
- exemptions claimed by the Department pursuant to s30 are not made out;
 - exemptions claimed by the Department pursuant to s31 are varied;
 - exemptions claimed by the Department pursuant to s39 are not made out; and
 - exemptions pursuant to s36 apply.

Conclusion

- 102 As the above preliminary decision was adverse to the Department, it was made available to it on 20 September 2024 to seek its input before finalisation, pursuant to s48(1)(a) of the Act.
- 103 On 15 October 2024, Ms Roxana Jones of the Department confirmed that the *Department does not wish to make any submissions*.
- 104 Accordingly, my findings remain unchanged. I determine that:
- exemptions claimed by the Department pursuant to s30 are not made out;

¹⁴ As per s35(4) of the *Right to Information Act 2009*

- exemptions claimed by the Department pursuant to s31 are varied;
- exemptions claimed by the Department pursuant to s39 are not made out; and
- exemptions pursuant to s36 apply.

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

Dated: 15 October 2024

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

Richard Connock
OMBUDSMAN

Attachment 1 – Relevant Legislation

30. Information relating to enforcement of the law

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

(m) 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

(n) 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

(o) 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

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

(q) 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

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

(2) Subsection (1) includes information that –

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

(i) 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

(j) 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

- (k) 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
- (l) 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
- (m) is a report on a law enforcement investigation, if the substance of the report has been disclosed to the person or the body that is the subject of the investigation –

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

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

31. Legal professional privilege

Information is exempt information if it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.

36. Personal information of person

- (1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13 .
- (2) If –
 - (a) an application is made for information under this Act; and
 - (b) the information was provided to a public authority or Minister by a third party; and
 - (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party –

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

- (d) notify that person that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information that has been applied for; and
- (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
- (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.

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

- (a) until 10 working days have elapsed after the date of notification of that person; or
- (b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or
- (c) until 20 working days after notification of an adverse decision under section 43 ; or

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

39. Information obtained in confidence

- (1) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –
 - (a) the information would be exempt information if it were generated by a public authority or Minister; or
 - (b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.
- (2) Subsection (1) does not include information that –
 - (a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and
 - (b) relates to trade secrets or other matters of a business, commercial or financial nature; and
 - (c) was provided to a public authority or Minister pursuant to a requirement of any law.

33. Public interest test

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

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

SCHEDULE 1 – Matters Relevant to Assessment of Public Interest

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

- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.



Right to Information Act Review Case Reference: R2308-013

Names of Parties: Phil Harris and Tourism Tasmania

Reasons for decision: s48(3)

Provisions considered: s36

Background

- 1 Mr Phil Harris (the Applicant) operates an adventure tour company, Aardvark Adventures (Aardvark), specialising in activities such as abseiling and white-water rafting.
- 2 Between 27 July and 2 August 2019 cast and crew of the Channel Nine television programme *Travel Guides* filmed an episode in Tasmania. The production received support from Tourism Tasmania in the form of itinerary development and monetary sponsorship of \$30,000.00. One segment of the programme involved abseiling on Gordon Dam, Strathgordon on 28 July 2019. This activity was conducted by Aardvark.
- 3 In June 2023, Mr Harris was contacted by a journalist who asked about a safety incident during the abseiling activity.
- 4 On 3 July 2023, Mr Harris lodged an application for assessed disclosure under the *Right to Information Act 2009* (the Act) with Tourism Tasmania for information related to the general topic of:

Tourism Tas communications (emails etc.) between 1/6/19 and 1/1/20 relating to Channel Nine/Aardvark Adventures abseil at the Gordon Dam, Strathgordon on 28/7/19.

- 5 Specifically, the application sought:

As per my email sent to Tourism Tas 13/6/23:

Could you provide me with copies of the following please:

- (1) *All Tourism Tas communications (emails, letter, text messages) referring to Aardvark Adventures and the abseil with Channel Nine at the Gordon Dam, Strathgordon, from 1/6/19 to 1/1/20.*

- (2) *All Tourism Tas communication referring to any equipment allegedly dropped by Aardvark Adventures while filming on 28/7/19.*
 - (3) *All Tourism Tas communication to other parties referring to any equipment allegedly dropped by Aardvark Adventures while filming on 28/7/19.*
 - (4) *All communication to and from [Tourism Tasmania employee] regarding Aardvark Adventures from 1/6/19 to 1/1/20.*
- 6 On 26 July 2023, Tourism Tasmania requested an extension of time until 20 August 2023 to respond to the application, and Mr Harris agreed to this request.
- 7 On 22 August 2023, Mr Harris applied for external review as he believed Tourism Tasmania had exceeded the timeframe under the Act to release a decision.
- 8 On 28 August 2023, Ms Sarah Clark, Chief Executive Officer of Tourism Tasmania, released a decision to Mr Harris. Ms Clark identified 35 pages of information responsive to the application. Some information in the 35 pages was released, with the remainder being claimed to be exempt pursuant to s36 of the Act as personal information of a person other than Mr Harris. Ms Clark also indicated that some information was not in the possession of Tourism Tasmania, as the relevant person was no longer an employee of the organisation.
- 9 On 9 October 2023, Mr Harris confirmed that he wished to continue with the external review. His request was accepted pursuant to s46(2) of the Act.

Issues for Determination

- 10 I must determine whether the information not released by Tourism Tasmania is eligible for exemption under s36, or any other section of the Act. As s36 is contained in Division 2 of Part 3 of the Act, my assessment is made subject to the public interest test in s33.
- 11 This means that, should I determine that the requested information is *prima facie* exempt from disclosure under s36, or any other exemption provision contained in Division 2 of part 3 of the Act, I must then determine whether it would be contrary to the public interest for it to be disclosed. In making this assessment I must have regard to, at least, the matters contained in Schedule 1 of the Act.

Relevant legislation

- 12 I have included copies of s36, s33 and Schedule 1 of the Act with this decision at Attachment 1.

Submissions

Applicant

13 Mr Harris made no specific submissions regarding the application of s36. However, in an email communication on 22 August 2023 regarding his application for external review, Mr Harris raised some concerns regarding his interaction with Tourism Tasmania:

13/6/23 I emailed Tourism Tas asking for copies of their communications re an abseil incident which took place 28/7/19. At that time (mid to late 2019) they had alleged safety violations took place. No evidence was provide [sic] and no further action was taken. I never received any incident report/update/apology/evidence etc.

In early June this year I spoke to a reporter, who had been told of the alleged safety violations and had a copy of the incident report from Tourism Tasmania. I emailed Tourism Tas about this and asked for copies of their communications regarding the matter. ... I was interested to see what discussions took place about my company.

27/6/23 They took two weeks ... and sent me the incident report instead.

...

22/8/23 I have not received anything further from Tourism Tas since 29/7/23

Tourism Tasmania

14 Tourism Tasmania was not required to provide submissions for this external review, as it had included its reasoning in its decision.

15 In her decision, Ms Clark wrote:

I have also identified third party personal information through the information. The personal information consists of names, position titles, email addresses, work phone numbers, mobile phone numbers and qualifications where applicable, of:

- *members of the general public; members of a public authority, [sic]*
- *former executives and non-executive officers of Tourism Tasmania.*

...

It is clear that the information in issue includes third party personal information of individuals from which the identity of the

person is apparent (e.g. a person's name and associated contact details).

...
Section 36 also provides that if an application for third party personal information is made and the public authority decides that disclosure of the information may be reasonably expected to be of concern to the third party, it is to, if practicable and before deciding whether disclosure should occur, seek the views of the third party concerned. Third parties were not consulted as it was deemed impractical to do so.

16 Ms Clark considered the public interest test:

The Ombudsman has noted that there is a difference between matters that may be of interest to the general public, and the 'public interest'.

The public interest requires me to take into account all relevant matters, including those specified in Schedule 1 of the Act, while disregarding those matters set out in Schedule 2 of the Act.

In this case, the Schedule 1 items, both for and against disclosure, I considered most relevant were:

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

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

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

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

(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 related to the business affairs of a person which is generally available to the competitors of that person.

I have also taken into account the objects of the Act, which includes increasing 'the accountability of the executive to the people of Tasmania'. I have also noted that the Act does not

distinguish between private individuals and public servants in its description of personal information exempt under the Act.

I have also considered Tourism Tasmania's obligations under the Personal Information Protection Act 2004 to not disclose personal information for a purpose other than for which it was collected, as well as the Department's obligations as an employer to ensure the health and well-being of its staff.

17 Ms Clark then went on to apply the public interest test:

I am of the view that disclosure would be more likely to harm the interests of some individuals or groups than it would promote the interests of other individuals or groups. The disclosure of information provided in confidence would have significant negative impact on Tourism Tasmania's reputation as a trustworthy organisation and have the likely effect of deterring third party engagement.

With regard to the personal information, it is my view that the 'accountability of the executive' may reasonably extend to identifying individuals in contexts where they have exercised statutory or other decision-making authority, or have the capacity to make, or influence the making, of government policy. On this basis, I have made the decision to withhold personal information, of Tourism Tasmania staff, where that information appears in connection with routine duties and tasks. I consider that non-executive officers are entitled to be concerned about being identified, as doing so leaves them open to being held personally accountable by the public (as opposed to being accountable to their employer for the proper and diligent performance of their duties), where there is no reasonable basis for doing so. There is no suggestion of impropriety or other misconduct in connection with any of the officers' work in this case.

Further, I do not consider that disclosing personal information could reasonably be expected to provide further contextual information of benefit to the public and could harm the interests of the affected individuals, as well as Tourism Tasmania's interests more broadly.

The remaining personal information identified belongs to members of the general public. It is also my view that it would be reasonable for the persons identified to be concerned with their information being released.

In conclusion, after due consideration of all relevant matters, I have formed the view that there are more factors weighing

against disclosure than for it, and therefore it would be contrary to the public interest to disclose the information.

Analysis

Out of scope information

- 18 Tourism Tasmania has redacted some information which was identified as out of scope of the original application and has also released information which *prima facie* appears to also be out of scope. Within both these categories, s36 has been applied to exempt information. I am uncertain why Tourism Tasmania has taken this approach, however I will assess the application of s36 wherever Tourism Tasmania has indicated the exemption has been used.

Section 36 – Personal information of person

- 19 For information to be exempt under s36 of the Act, I must be satisfied that its release would reveal the identity of a person other than the person seeking the information, or that the information would lead to that person's identity being reasonably ascertainable.
- 20 Section 5 of the Act defines personal information as:
- any information or opinion in any recorded format about an individual –*
- (a) *whose identity is apparent or is reasonably ascertainable from the information or opinion; and*
- (b) *who is alive, or has not been dead for more than 25 years.*

- 21 Tourism Tasmania has identified information of this kind, such as names, position titles, email addresses, work phone numbers, and mobile phone numbers of public officers, members of the community and former executives and non-executive officers of Tourism Tasmania. Non-executive officers were defined as:

Officers of Tourism Tasmania below Senior Executive Service (SES) level; and Ministerial office staff below Chief of Staff level.

- 22 It is clear that all the identified information falls within the definition of personal information in s5 of the Act and there is no suggestion that the persons concerned have been dead for more than 25 years. I consider the information is *prima facie* exempt under s36 of the Act.

Public interest test

- 23 That the information may be considered personal information does not preclude it from release if doing so would not be contrary to the public interest.

Public officers and employees

- 24 When considering personal information, I have been consistent in my approach and my previously expressed view that the names of public officers performing their regular duties are not usually exempt under s36. The personal information of public authority employees, including name, position, and work contact details, will only be exempt when there are specific and unusual circumstances identified which justify it. Whether a person is a current or former employee of a public authority is irrelevant to this assessment.¹
- 25 I acknowledge Ms Clark's concern for the welfare of her staff. However, it must be remembered that s7 of the Act sets out that a *person has a legally enforceable right to be provided, in accordance with the Act, with information in the possession of a public authority or a Minister unless the information is exempt information.* It is vital for accountability and proper scrutiny that public servants at all levels should not be shielded from identification when they are undertaking their regular duties, unless specific justification for this is present.
- 26 The exception to this practice is direct contact details of public officers, which I have consistently found to be eligible for exemption under s36 where these are not routinely provided to the public. I am satisfied that it is valid for public authorities to limit the release of direct contact numbers and emails for staff to ensure public enquiries are able to be directed through appropriate channels.
- 27 Tourism Tasmania has not advanced any reason why specific information should be exempt, instead relying on a general argument that non-executive officers are *entitled to be concerned* about identification leading to being held personally accountable by the public. However, Ms Clark has acknowledged that no third parties were consulted to seek their views on the matter, and so no specific concerns have been identified. I also note Ms Clark's view that *[t]here is no suggestion of impropriety or other misconduct in connection with any of the officers' work in this case.* That being so, it is not clear why there would be concern from staff regarding the release of the information.
- 28 In relation to an apparent policy to treat executive and non-executive staff differently, I note that Schedule 2 of the Act specifically provides that *the seniority of the person who is involved in preparing the document or who is the subject of the document* is irrelevant to assessment of the public interest.
- 29 Accordingly, I am not satisfied that there are specific or unusual circumstances that justify the exemption of work-related personal information of current or former employees of Tourism Tasmania, Hydro Tasmania, City of Hobart, or Tasmania Parks and Wildlife Service. This information is not exempt under s36 and should be released to Mr Harris.

¹ See, for example, *Scott Bell and Department of State Growth* (August 2024); *Linda Poulton and Department of Natural Resources and Environment* (November 2023), available at <https://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions>

Personal information of others

Channel Nine

- 30 On pages 2, 5, 7 and 8 of the released documents, Tourism Tasmania applied s36 to exempt the name of a cast member in relation to an alleged safety issue during filming.
- 31 A Tourism Tasmania employee was present at the time and considered the matter of sufficient importance to record it in an incident report. In assessing whether disclosure of the name would be contrary to the public interest, I consider the following Schedule 1 matters to be relevant and weigh in favour of disclosure:
- (a) *the general public need for government information to be accessible;*
 - (b) *whether the disclosure would contribute to or hinder debate on a matter of public interest*, this being the observance of safety standards applied to adventure activities where permission is given for those activities to be operated by private companies on Hydro Tasmania facilities.
- 32 In my view these factors should receive greater weight than (m) – *whether the disclosure would promote or harm the interests of an individual or group of individuals*. I do not agree the other matters identified by Tourism Tasmania are relevant here. I do consider it relevant that the named person was a willing participant in a television programme being filmed at the time and that the programme went to air, making his participation in this activity public knowledge. Accordingly, I am not satisfied that the name of the cast member is exempt and it is to be released to Mr Harris.
- 33 On pages 12, 28, 29, 30, 31, 32 and 33 Tourism Tasmania has applied s36 to exempt the personal information of Channel Nine employees involved in organising and assisting with the production of the programme. Tourism Tasmania took the same approach to the exemption of personal information relating to employees of tourist facilities on pages 13, 16, 17, 18, 19 and 21.
- 34 The names and contact information of these third parties are incidental to the request and it is not apparent why this information would provide any further context to the Applicant. While matter (a) in Schedule 1, the general public need for government information to be accessible, is always relevant and weighs in favour of disclosure, I do not consider this a strong consideration here due to this tangential nature of this third party information to the focus of the information request. Accordingly, I consider that matter (m) in Schedule 1, in relation to whether the disclosure would promote or harm the interests of relevant individuals, weighs more strongly against disclosure. There is a slight risk of harm to the interests of the third parties through the release of their personal information and its release would not promote the interests of the Applicant.

35 I am satisfied that this information is exempt under s36 and not required to be released to Mr Harris.

Other matters

- 36 Information responsive to Part 4 of Mr Harris' request was identified as not in the possession of Tourism Tasmania. The reason provided was that the employee involved is no longer employed there and their emails were deleted 30 days after the cessation of employment in August 2021.
- 37 While this raises significant concerns about the records management practices of Tourism Tasmania, on this occasion, Tourism Tasmania provided my office with evidence of an unsuccessful attempt to retrieve the emails in question and advised that a search of its records management system did not locate any of the missing communications responsive to Mr Harris' application. Accordingly, I accept that the information has been lost and is not in the possession of the agency.
- 38 I encourage Tourism Tasmania to adopt policies and practices regarding information management which ensure that all information relating to its official business is appropriately handled and preserved. Failure to do so can stymie the operation of the Act.

Preliminary Conclusion

- 39 In accordance with the reasons set out above, I determine that the exemptions claimed pursuant to s36 are varied.

Response to the Preliminary Conclusion

- 40 As the above Preliminary Decision was adverse to the public authority, it was released to Tourism Tasmania on 7 November 2024 to seek its input prior to finalisation, pursuant to s48(1)(ab) of the Act.
- 41 On 19 November 2024, Ms Sarah Clark, CEO of Tourism Tasmania responded. She accepted all proposed findings in my draft decision, except in relation to the release of certain information under s36. She made some submissions regarding the reasons for this but asked that these not be published in this decision.
- 42 I have carefully considered these submissions and the matters raised. I agree that, in the specific and unusual circumstances provided, it is appropriate to exempt personal information relating to one employee. The addition of the name of the employee does not add significantly to the intelligibility of the information or the ability to scrutinise the actions of government in this instance, but the release of the name could cause harm to the interests of that individual.
- 43 Accordingly, the name in the final two dot points of the third complete paragraph on page 3 and the first name in the fourth paragraph is exempt under s36 and is not to be released to Mr Harris.

Conclusion

- 44 In accordance with the reasons set out above, I determine that the exemptions claimed pursuant to s36 are varied.
- 45 I apologise to the parties for the delay in finalising this matter.

Dated: 20 November 2024



Richard Connock
OMBUDSMAN

ATTACHMENT 1

Section 36 - Personal information of person

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

(2) If –

- (a) an application is made for information under this Act; and
- (b) the information was provided to a public authority or Minister by a third party; and
- (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party –
the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –
- (d) notify that person that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information that has been applied for; and
- (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
- (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.

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

- (a) until 10 working days have elapsed after the date of notification of that person; or
- (b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or
- (c) until 20 working days after notification of an adverse decision under section 43 ; or
- (d) if during those 20 worksng days the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or

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

Section 33 - Public interest test

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

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

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

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

- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.



OMBUDSMAN TASMANIA
DECISION

Right to Information Act Review

Case Reference: R2309-028

Names of Parties: Rebecca White and the Premier of Tasmania

Reasons for decision: s48(3)

Provisions considered: s35, s36, s45(1)(d)

Background

- 1 Controversy surrounded the circumstances in which Font PR partner, Ms Danielle McKay, was engaged by the State Government as a media advisor for the Premier, the Honourable Jeremy Rockliff MP, for eight weeks in 2023. Concerns were raised about the appointment processes to engage the services of Ms McKay, and whether the engagement would provide Font PR with inappropriate access to confidential information.¹
- 2 The applicant in this matter is the Leader of the State Opposition, the Honourable Rebecca White MP. On 18 July 2023, Ms White submitted an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the Office of the Premier requesting the following information:
 1. *From 30 June, 2023 until the date of this request, any emails from Danielle McKay to a Chief of Staff/the Chiefs of Staff of Ministerial Offices.*
 2. *From 30 June, 2023 until the date of this request, any emails from Danielle McKay to any partner or staff member of Font PR.*
 3. *From 30 June, 2023 until the date of this request, a copy of the diary of Danielle McKay.*
- 3 On 26 September 2023 Ms Bridget Hutton, a delegate of the Premier under the Act, issued a decision on parts two and three of Ms White's application for assessed disclosure. Ms Hutton advised Ms White that no information responsive to these parts of her request had been located. Ms Hutton advised Ms White that she was progressing a decision on part one of her application as

¹Lagenberg A, *Plan for PR firm partner to act as premier's media advisor 'obviously wrong', says integrity expert* – ABC (first published 1 July 2023 at 8:17am, updated 1 July 2023 at 9:01am), available at <https://www.abc.net.au/news/2023-07-01/font-pr-to-fill-gap-in-tas-government-communications-team/102546728>, accessed 8 December 2023.

quickly as possible. In her decision, Ms Hutton also requested an extension of time to finalise her decision on part one.

- 4 Ms White did not agree to provide Ms Hutton with more time and, on 28 September 2023, submitted an application for external review to Ombudsman Tasmania pursuant to s45(1)(d) and (f) of the Act. Ms White's application was accepted on the basis that 20 working days had passed since Ms White had submitted her application for assessed disclosure to the Office of the Premier, and she had not been issued a decision on the whole of her application. It was also accepted on the basis that the Premier's delegate had made a decision that the information required was not in the possession of the Minister.
- 5 On 13 October 2023, Ms Hutton issued a decision on part one of Ms White's application. Ms Hutton identified two documents as being responsive to this part of Ms White's application, those being an email chain and a question and answer information document attached to the email chain. Ms Hutton determined that some of the information contained in the email chain was exempt from release pursuant to ss35 and 36 of the Act, and that the question and answer document was exempt in full pursuant to s35 of the Act.
- 6 Ms White sought external review of the application of these exemptions, and this was accepted pursuant to s45(1)(ab) of the Act.

Issues for Determination

- 7 I must first determine whether information responsive to part one of Ms White's application that was not released is eligible for exemption under ss35 or 36 of the Act. I must also determine whether the Premier's delegate was entitled to find that information responsive to parts two and three of Ms White's application was not in the possession of the Premier.
- 8 As ss35 and 36 are contained in Division 2 of Part 3 of the Act, my assessments are subject to the public interest test contained in s33. This means that should I determine that information is *prima facie* exempt from disclosure under either ss35 or 36, I am then required to determine whether it would be contrary to the public interest to release it, having regard to at least, the matters contained in Schedule 1.

Relevant legislation

- 9 Copies of ss35, 36 and 45 are attached at Attachment 1.
- 10 Copies of s33 and Schedule 1 are also attached.

Submissions

Ms White

- 11 Ms White did not make substantive submissions regarding the validity of the exemptions applied by the Premier's delegate under ss35 or 36 of the Act.

However, Ms White did request that I use my powers to assess whether information requested is available.

The Premier's delegate

- 12 The Premier's delegate did not make submissions beyond the reasoning of her 13 October decision on part one of Ms White's application. This decision set out that:

... item 1 [the email chain] is exempt in part and item 2 [the question and answer document] is exempt in full under s35 of the Act as opinion, advice and recommendations prepared by officers in Ministerial officers in the course of internal consultations and deliberative 'conversations' in formulating policy advice relating to the official business of the Minister, and are not purely factual.

While it may be considered that some of the information contained in the Q&A is factual, the process by which the information is prepared and presented is consultative and deliberative. Material of a factual nature is not information of a purely factual nature if that material would reveal the consultation and deliberation that has taken place in the course of the deliberative process involved in the functions of a public authority. The factual and deliberative information is inextricably linked and it would not be practicable to differentiate purely 'factual' information from that which is 'deliberative'.

- 13 In applying the public interest test contained in s33 of the Act to information identified as *prima facie* exempt under s35 of the Act, Ms Hutton reasoned as follows:

I have carefully considered each of the matters in Schedule 1 as part of my assessment of the public interest test, including the following matters:

- (a) *the general public need for government information to be accessible;*
- (b) *whether the disclosure would contribute to or hinder debate on a matter of public interest;*
- (c) *whether the disclosure would inform a person about the reasons for a decision;*
- (d) *whether the disclosure would provide the contextual information to aid in the understanding of government decisions; and,*
- (e) *whether the disclosure would prejudice the ability to obtain similar information in the future.*

Factors in favour of release

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

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

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

I have also considered whether the following factors weigh in favour of release:

- (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;*
- (c) whether the disclosure would inform a person about the reasons for a decision; and*
- (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions.*

I consider that these factors are of neutral weight in this instance because disclosure of the exempted information in the Q & A would not contribute to the debate on a matter of public interest; inform a person about the reasons for a decision; or provide contextual information to aid in the understanding of government decisions.

Factors against release

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

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

In terms of the document listed in item 2 that I have determined is exempt from release under section 35 of the Act, I have determined that releasing this information would prohibit the frank exchange of views and consultative and deliberative processes between Ministerial staff when deliberating on official business. In my view, the overriding public interest consideration is that there is a need to ensure a frank exchange of views between officers when consulting and deliberating on official business. The disclosure of consultations or deliberations between officers would likely prevent such exchanges

from occurring, with a consequent detrimental impact on good decision-making. Such documents also provide the basis for corporate knowledge management and information sharing.

- 14 Ms Hutton also found the email chain to contain information which was exempt from disclosure pursuant to s36 of the Act:

I have redacted personal mobile numbers and personal email addresses in the items of information that I have released to you, on the grounds that the information is either irrelevant and/or out of scope of your request or exempt under section 36 (personal information) of the Act.

In making this decision, I have considered the matters relevant to assessment of the public interest provided under Schedule 1 of the Act. I have determined that there are no matters relevant to [sic] assessment of public interest that weigh positively in favour of release of the information, other than the general public need for government information to be accessible (Schedule 1 (I)(a)) and whether the disclosure would contribute to or hinder debate on a matter of public interest (Schedule 1 (I)(b)). On balance, I consider that disclosing the personal contact information of individuals who are third parties to your request would harm the interests of those individuals (Schedule 1 (I)(m)) and it is contrary to the public interest to release that information. I note that the redacted information is not material to your request.

- 15 On 30 October 2023 Ms Carmen Kelly, another delegate of the Premier under the Act, provided the following information to Ombudsman Tasmania detailing the searches undertaken in locating information responsive to Ms White's application:

Date	Search action-Content Manager	Outcome of action	Action Officer	Position title	Time taken (hrs)
19 July 2023	Search term in DPAC dataset: Danielle McKay	16 records all out of scope by date and subject	Gemma Smith	Senior Project Officer, MES	0.1
19 July 2023	Search term in DPAC dataset: 'Font PR'	71 records all out of scope by date and subject	Gemma Smith	Senior Project Officer, MES	0.5
17 August 2023	Search term in Premier's Office emails: 'Danielle McKay'	0 records	Carol Jones	Manager, Premier and Ministerial Services	

17 August 2023	Email sent to all Chiefs of Staff asking for any emails from Danielle McKay	0 records	Carol Jones	Manager, Premier and Ministerial Services	
5 September 2023	Search term in Ministerial dataset: ‘Danielle McKay’	0 records	Jane Norris	Manager Information Management Services	0.1
5 September 2023	Search term in Ministerial dataset: ‘Font PR’ ‘Font Public Relations’ ‘Font Publishing’	2 records both out of scope	Jane Norris	Manager Information Management Services	0.1
25 September 2023	Email sent to Danielle McKay asking for any emails within scope of request	1 record with attachment	Danielle McKay	Partner Font PR	

Analysis

Section 35 Internal Deliberative Information

16 For information to be exempt from disclosure under s35(1) of the Act, I must be satisfied that it consists of:

- (a) An opinion, advice, or recommendation prepared by an officer of a public authority;² or
- (b) A record of consultations or deliberations between officers of public authorities;³ or
- (c) A record of consultations or deliberations between officers of public authorities and Ministers.⁴

17 Once one of those subsections are met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the

² Section 35(1)(a).

³ Section 35(1)(b).

⁴ Section 35(1)(c).

dominant purpose of, the deliberative process related to the official business of the Minister.⁵

- 18 Purely factual information,⁶ final decisions, orders or rulings given in the exercise of an adjudicative function (or reasons explaining these),⁷ or information over 10 years old cannot be exempt under s35.⁸
- 19 I must then consider whether it would be contrary to the public interest to release the information, pursuant to the public interest test in s33.
- 20 The Premier's delegate determined, under s35(1) of the Act, that information contained in an email chain sent between staff of Ministerial and Parliamentary Support, and all information contained in a question and answer document attached to this email chain was exempt from disclosure.

The Email and the Question and Answer Document

- 21 The Premier's delegate has sought to exempt from disclosure two paragraphs of information contained in the body of an email sent from Ms Vanessa Field, the Premier's Chief of Staff, to Mr David Palmer, a Ministerial advisor, and Ms Danielle McKay of Font PR on 14 July 2023 at 9:03pm.
- 22 The redacted information in this email does not consist of *an opinion, advice, or recommendation* and so cannot be considered *prima facie* exempt pursuant to s35(1)(a). However, I am satisfied that this information is *prima facie* exempt from disclosure pursuant to s35(1)(c) on the basis that it is a record of consultations or deliberations communicated between officers of public authorities and Ministers.
- 23 I note that Ms McKay is neither an officer of a public authority nor a Minister or Ministerial officer. Nonetheless I find that this information does not lose its internal flavour in this instance merely because Ms McKay is a party to the email. This is because content of the email relates to the work that Ms McKay was contracted for, namely public communications. My position on this matter might have been different had Ms McKay not been contracted by the State Government, or if the information did not relate to public communications.
- 24 The Premier's delegate has also sought to exempt from disclosure, this time in full, a question and answer document pursuant to s35(1) of the Act. This question and answer document is attached to an email sent from Ms McKay to Ms Field and the Government's media advisor Mr Chris Medhurst.
- 25 While the author/s are not specified in the document, I am satisfied from the content and statements from the Premier's delegate that this was prepared by officers of a public authority. The question and answer documents clearly consists of *opinion, advice, or recommendation* and I am satisfied that it is *prima facie* exempt from disclosure under s35(1)(a) of the Act.

⁵ Section 35(1).

⁶ Section 35(2).

⁷ Section 35(3)(a-b).

⁸ Section 35(4).

Section 33 Public Interest Test

- 26 In her 13 October decision Ms Hutton held that Schedule I matter (n) - whether the disclosure would prejudice the ability to obtain similar information in the future – was relevant and weighed against disclosure. As described above, Ms Hutton held that:

. . . releasing this information would prohibit the frank exchange of views and consultative and deliberative processes between Ministerial staff when deliberating on official business.

- 27 Ms Hutton went on to set out that it was her view that the:

. . . overriding public interest consideration is that there is a need to ensure a frank exchange of views between officers when consulting and deliberating on official business. The disclosure of consultations or deliberations between officers would likely prevent such exchanges from occurring, with a consequent detrimental impact on good decision-making.

- 28 I reject the argument put forward by Ms Hutton. As I have stated previously:

It is intended that public information should be accessible to the public and the Act sets out that internal deliberative information should be released to an applicant unless this is contrary to the public interest. Public officers should be conscious that their communications could be disclosed under the Act and should continue to perform their duties appropriately and confidently regardless of this.⁹

- 29 In considering all other matters contained in Schedule I, I find that Schedule I matter (a) - the general public need for government information to be accessible – is relevant and weighs in favour of disclosure.
- 30 I disagree with the Premier's delegate and find that Schedule I matter (b) – whether disclosure would contribute to or hinder debate on a matter of public interest – is relevant and weighs slightly in favour of disclosure, at least insofar as the question and answer document is concerned.
- 31 This is clearly an unfinalised version of the document, as it still contains internal notes questioning whether this is the most recent data. Unless there are reasons to justify the release, it has been my practice to find that early working drafts of documents are usually exempt under s35. It would be inappropriate for numerous slightly different drafts of a document to be released as a standard practice, and this is in accordance with Parliament's creation of the s35 exemption for such internal 'thinking' documents. Accordingly, I am satisfied that the question and answer document is exempt from release under s35(1)(a).

⁹ *Todd Dudley and Department of Natural Resources and Environment Tasmania* (12 May 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

- 32 I am not so satisfied regarding the email from Ms Field. This is merely a request for updated data regarding dwelling approvals and it is not clear why it would be contrary to the public interest for it to be released. I do not consider it is exempt under s35 and it should be released to Ms White.

Section 36

- 33 For information to be exempt from disclosure under s36 of the Act, I must be satisfied that its release would reveal the identity of a person other than Ms White, or that the information would lead to that person's identity being reasonably ascertainable, and that the disclosure of the information concerned may be reasonably expected to be of concern to that person.¹⁰ The Premier's delegate has applied s36 of the Act to exempt from disclosure information contained in Ms McKay's, Ms Field's and Mr Palmer's work email addresses. As their names are the information redacted, it is clear that this is personal information from which their identity is reasonably ascertainable.
- 34 I will not address each individual application of s36 by the Premier's delegate, rather, I will assess the application of s36 of the Act in relation to the following categories of people:
- Ms Field and Mr Palmer as Ministerial officers; and
 - Ms McKay of Font PR.

Ms Field and Mr Palmer

- 35 As I explained in my recent decision of *Linda Poulton and Department of Natural Resources and Environment*:

the names of public officers performing their regular duties are not usually exempt under s36. It is standard Australian practice that the personal information of public servants which relate to the performance of their regular duties (i.e. name, position information, work contact details) is not exempt from release, unless there are specific and unusual circumstances which justify such an exemption.¹¹

- 36 I am not satisfied that there are unusual or exceptional circumstances in this case which would justify the exemptions claimed by the Premier's delegate in relation to information contained in Ms Field and Mr Palmer's work email addresses. Accordingly, this information should be made available to Ms White.
- 37 I note Ms Hutton's 13 October decision pre-dated my recent decision of *Linda Poulton and Department of Natural Resources Tasmania*. The Department has since indicated that it has changed its standard practice to release this type of information when requested to comply with this decision.

¹⁰ Section 37(2)(c).

¹¹ 24 November 2023, available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

Ms McKay of Font PR

- 38 Ms McKay is not an employed public servant or Ministerial officer, so slightly different considerations apply.
- 39 Ms McKay is already readily identifiable from information provided to Ms White and the disclosure of her full email address would not provide any further information of substance. The only Schedule 1 matter that would potentially weigh against disclosure is matter (m) - whether the disclosure would promote or harm the interests of an individual or group of individuals. Though the risk of harm is minimal, I recognise that in these circumstances, where it is suggested that Ms McKay has been employed by the State Government improperly, that the release of her contact details may expose Ms McKay to a risk of unsolicited contact or harassment were they released.
- 40 Accordingly, after balancing all relevant matters, I find that the release of this information would be contrary to the public interest, and as such, should not be made available to Ms White.

Section 45(1)(d) – information not in the possession of a Minister

- 41 Section 45(1)(d) of the Act provides:

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 Minister or public authority has decided that the information requested was not in the possession of the Minister or public authority

- 42 I note that the Ombudsman's *Guideline in Relation to Searching and Locating Information* (the Guideline) provides that public authorities should record the following details of the searches it undertakes for information responsive for applications for assessed disclosure that it receives:¹²
 - the date of the search action;
 - the nature of the action undertaken - for example, discussion with a named person or search in an identified location or on an identified database;
 - the outcome of the action; and
 - the identity and position of the person who performed the action.
- 43 The search record provided to Ombudsman Tasmania by the Premier's office includes the required level of detail as set out in the Guideline. It records the date of searches for relevant information, the parameters of the searches

¹²Guideline as at 24 January 2013, available at https://www.ombudsman.tas.gov.au/__data/assets/pdf_file/0007/234268/Guideline_in_Relation_to_Searching_and_Locating_Information_-_Revised_24_January_2013.pdf.

undertaken on electronic databases, the outcome of the searches, and the details of who undertook them. Accordingly, I am satisfied that the Premier's delegate conducted a sufficient search for information responsive to Ms White's application for assessed disclosure. It follows that the conclusion that there was no information in the Premier's possession, responsive to these parts of her request, was reasonable.

Preliminary Conclusion

44 For the reasons given above, I determine that:

- exemptions claimed pursuant to ss35 and 36 are varied; and
- the Premier's delegate was entitled to decide that information requested was not in the Premier's possession.

Conclusion

45 As the above preliminary decision was adverse to the Premier, it was made available to him on 5 March 2024 to seek his input before finalisation, pursuant to s48(1)(a) of the Act.

46 On 3 April 2024, Ms Hutton submitted a response containing comments regarding the correct titles of various parties and her acceptance of the findings of my preliminary decision. I have carefully considered these comments and incorporated them, as appropriate, in my decision. It is not necessary to set them out here, however, as they do not dispute the substance of the decision expressed above and my findings remain unchanged.

47 Accordingly, I determine that:

- exemptions claimed pursuant to ss35 and 36 are varied; and
- the Premier's delegate was entitled to decide that information requested was not in the Premier's possession.

Dated: 10 April 2024



Richard Connock
OMBUDSMAN

Attachment I

Relevant Legislation

Section 35 Internal deliberative information

- (1) Information is exempt information if it consists of –
- (a) an opinion, advice or recommendation prepared by an officer of a public authority; or
 - (b) a record of consultations or deliberations between officers of public authorities; or
 - (c) a record of consultations or deliberations between officers of public authorities and Ministers –
in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.
- (2) Subsection (1) does not include purely factual information.
- (3) Subsection (1) does not include –
- (a) a final decision, order or ruling given in the exercise of an adjudicative function; or
 - (b) a reason which explains such a decision, order or ruling.
- (4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 36 Personal information of person

- (1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13 .
- (2) If –
- (a) an application is made for information under this Act; and
 - (b) the information was provided to a public authority or Minister by a third party; and
 - (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party – the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –
 - (d) notify that person that the public authority or Minister has received an application for the information; and
 - (e) state the nature of the information that has been applied for; and
 - (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.
- (3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f) , decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.
- (4) A notice under subsection (3) is to –
- (a) state the nature of the information to be provided; and
 - (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
 - (c) inform the person to whom the notice is addressed of –

- (i) that person's right to apply for a review of the decision; and
- (ii) the authority to which the application for review can be made; and
- (iii) the time within which the application must be made.

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

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

45. Other applications for review

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

- (a) the decision which may otherwise be the subject of an application for an internal review under section 43 has been made by a Minister or principal officer of a public authority and as a consequence the applicant cannot make an application under section 43 ; or
- (ab) the decision relates to an application made to a Minister in accordance with section 13 and is a decision in relation to which a written notice must be given under section 22 ; or
- (b) a Minister or public authority has made a decision that the information requested was not in existence on the day the application was made; or
- (c) a Minister or public authority has made a decision to give access other than in the form requested by the applicant, except where to do so would breach copyright; or
- (d) a Minister or public authority has decided that the information requested is not in the possession of the Minister or public authority; or
- (e) following a decision being made by a Minister or public authority, the applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the Minister or public authority; or

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

(1A) A person who is an external party may apply to the Ombudsman for a review of –

(a) a decision if the decision, which may otherwise be the subject of an application for an internal review under section 43(2) or (3), has been made by a Minister or principal officer of a public authority and as a consequence the external party cannot make an application under section 43; or

(b) a decision to provide, in accordance with an application made to a Minister in accordance with section 13, information –

(i) relating to the personal affairs of the person; or

(ii) that is likely to expose the person to competitive disadvantage.

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

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

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

(3) If a notice of a decision has been given under this Act, an application referred to in subsection (1) must be made within 20 working days of the day on which the applicant received notice of the decision.

(4) If a notice of a decision to which subsection (1A) relates has been given under section 36(3) or section 37(3) to an external party, the external party may only make an application under subsection (1A) in relation to the decision within 20 working days of the day on which the external party received the notice.

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;
 - (l) whether the disclosure would promote or harm the environment and or ecology of the State;
 - (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
 - (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
 - (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
 - (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
 - (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
 - (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
 - (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
 - (t) whether the applicant is resident in Australia;
 - (u) whether the information is wrong or inaccurate;
 - (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;

- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

**Right to Information Act Review****Case Reference:** R2307-006**Names of Parties:** Rebecca White and the Premier of Tasmania**Reasons for decision:** s48(3)**Provisions considered:** s36 and s39

Background

- 1 In August 2022, Tasmanian Anti-Discrimination Commissioner, Ms Sarah Bolt, published her report *Motion for Respect: Report into Workplace Culture in the Tasmanian Ministerial and Parliamentary Services* (the Motion for Respect Report).¹ This report detailed findings and recommendations resulting from her investigation into workplace discrimination, sexual harassment and bullying within Ministerial and Parliamentary Services (MPS).
- 2 On 5 May 2023, Ms Bolt wrote to the Premier of Tasmania, Mr Jeremy Rockliff, to express her concerns about the impact Members of Parliament were having on the psychological health of public servants and their families when naming them in Parliament. Ms Bolt asked that the Premier, in the spirit of the Motion for Respect report, do what he could to *promote respectful behaviours and ensure compliance with relevant work health and safety legislation*.
- 3 On 9 May 2023, the Premier announced in Parliament that there were plans to review the rules that govern what Members can say in Parliament. This sparked public backlash and opposition from the Tasmanian branch of the Australian Labor Party and Tasmanian branch of the Greens Party, who opposed any limit to parliamentary privilege.²
- 4 On 9 May 2023, the Honourable Ms Rebecca White MP, the then leader of the State opposition, submitted an assessed disclosure application under the *Right to Information Act 2009* (the Act) to the Office of the Premier. She requested the following:

1. *From 1 January 2023, a copy of any correspondence (including letters, emails, text messages or encrypted messages), in which the Premier or any of his staff*

¹ Available at www.equalopportunity.tas.gov.au

² Beavis, L., *Tasmanian premier faces backlash over push to limit what MPs can say in parliament* (10 May 2023), ABC News, www.abc.net.au/news/2023-05-10/concerns-over-push-to-limit-free-speech-tas-parliament/102322018.

corresponded with the Tasmanian Anti-Discrimination Commissioner Sarah Bolt.

2. From 1 January 2023, a list of dates in which the Premier or any of his staff, contacted by phone the Tasmanian Anti-Discrimination Commissioner Sarah Bolt, If the details could also include the length of the phone call and topics of conversation as recorded.

- 5 On 7 June 2023, Ms Carmen Kelly, a delegate of the Premier under the Act, issued a decision to Ms White in which she refused her assessed disclosure application. Ms Kelly decided that the information requested by Ms White was excluded from the operation of the Act by virtue of s6(3) on the basis that the requested information was:

in the possession of the Independent Review or a person acting for, or on behalf of, the Independent Review; and was given to, or received or brought into existence by, the Independent Review, or a person acting for, or on behalf of, the Independent Review, for the purposes of the Independent Review.³
- 6 On 3 July 2023, Ms White wrote to the Premier's office to seek an internal review of Ms Kelly's decision. Ms White's application for internal review raised her concerns that the Premier's office had misapplied s6 of the Act in coming to the conclusion that information responsive to her request was excluded from the operation of the Act.
- 7 On 10 July 2023, Ms Celeste Miller of Ms White's office wrote to my office to provisionally lodge an application for external review of Ms Kelly's 7 June decision.
- 8 On 13 October 2023, Mr Elias Bowe of my office wrote to the then Secretary of the Department of Premier and Cabinet, Ms Jenny Gale, to raise concerns that Ms Kelly may have misapplied s6 of the Act. Mr Bowe set out that the Department and the Premier are not excluded by s6, so it is not apparent why s6(3) would operate to exclude information in its possession, even if that information was provided to the Independent Review.
- 9 On 6 November 2023, Ms Bridget Hutton, a delegated officer of the Premier, wrote to Mr Bowe to advise that a fresh decision would be issued to Ms White.
- 10 On 16 January 2024, Ms Hutton wrote to Ms White with her fresh decision on Ms White's assessed disclosure application. As part of this

³ The Independent Review is a defined term in s5 the Act and refers to the *Independent Review of Parliamentary Workplace practices and procedures to support workplace culture conducted by the Anti-Discrimination Commissioner*.

decision, Ms Hutton advised that she had identified six items of information responsive to Ms White's application:

- *Item one: Letter to Premier as Chair of Joint Standing Committee from Sarah Bolt about naming of public servants in parliamentary debate.*
- *Item two: Letter to Premier from Sarah Bolt about naming of public servants in parliamentary debate*
- *Item three: Screenshot - text messages between Sarah Bolt and Premier's Chief of Staff Vanessa Field - arranging telephone call with the Premier*
- *Item four: Telephone meeting between the Premier and Anti-Discrimination Commissioner*
- *Item five: Screenshots - text messages between Sarah Bolt and Chief of Staff Vanessa Field*
- *Item six: Email from Sarah Bolt to Vanessa Field Chief of Staff quoting from submissions made by MPS staff to Anti-Discrimination Commissioner in relation to Motion for Respect review*

- 11 Items two and four were not assessed for disclosure under the Act on the basis that this information was publicly available, and item three was provided to the applicant in full.
- 12 However, information referred to in items five and six was considered exempt from disclosure in full pursuant to s36 of the Act in full, while information referred to in items one, five, and six was considered exempt in full pursuant to s39 of the Act.
- 13 On 22 January 2024, Ms Miller wrote to Ombudsman Tasmania to advise that Ms White sought an external review of Ms Hutton's 16 January decision. This application was accepted.

Issues for Determination

- 14 I must first determine whether information responsive to Ms White's application that was not released is eligible for exemption under ss36 or 39 of the Act.
- 15 As ss36 and 39 are contained in Division 2 of Part 3 of the Act, my assessments are subject to the public interest test contained in s33. This means that should I determine that information is *prima facie* exempt from disclosure under either ss36 or 39, I am then required to determine whether it would be contrary to the public interest to release it, having regard to all relevant matters, but at least those contained in Schedule 1.

Relevant legislation

- 16 Copies of ss36 and 39 are attached at Attachment 1.
- 17 Copies of s33 and Schedule 1 are also attached.

Submissions

Ms White

- 18 Ms White did not make submissions as to why information responsive to her assessed disclosure application was not exempt from disclosure pursuant to either ss36 or 39 of the Act.

The Premier's Delegate

- 19 The Premier's delegate did not make submissions to my office as to why requested information is exempt from disclosure under ss36 or 39, however the delegate's internal review decision set out the following:

Personal information of person (section 36)

Section 36(l) of the Act provides that:

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

I have exempted items 5-6 in full under section 36 (personal information) of the Act. I consulted with the relevant persons about the information within scope of the request and have considered the views expressed by them. In making my decision, I have considered matters relevant to assessment of the public interest provided under Schedule 1 of the Act. I have determined that there are no matters relevant to assessment of public interest that weigh positively in favour of release of the information, other than the general public need for government information to be accessible (Schedule 1 (l)(a)) and whether the disclosure would inform a person about the reasons for a decision (Schedule 1 (l)(c)).

On balance, I consider that disclosing the personal information of individuals who are third parties to your request would harm the interests of those individuals (Schedule 1 (l)(m)) and prejudice the ability to obtain similar information in the future (Schedule 1 (n)) and it is contrary to the public interest to release that information.

Information obtained in confidence (section 39)

Section 39 of the Act provides that:

Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority 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.*

In relation to items 1-3 and items 5-6, I consulted with the relevant third parties and considered the views expressed by them before making my own decision.

I have determined that all of item 1 and items 5-6 are exempt under section 39 of the Act. Item 1 is a letter addressed to the Premier as the Chair of the Joint Standing Committee established following the release of the report: Motion for Respect Report into Workplace Culture in the Tasmanian Ministerial and Parliamentary Services (the Final Report). I am satisfied that this letter was brought into existence in relation to the Independent Review. In the letter, the Anti-Discrimination Commissioner refers to concerns about psychological harm to individuals named and criticised in Parliament. It was provided to the Premier in confidence and, in my view, was provided on the basis that the specifics of the content about staff members, who could potentially be identified, not be disclosed other than to the Joint Standing Committee Workplace Culture Oversight.

Item 6 is an email sent by the Anti-Discrimination Commissioner to the Premier's Chief of Staff about complaints made to her from Ministerial and Parliamentary Support (MPS) staff in her capacity as the Independent Reviewer and made subsequent to the completion of the Final Report. Further, item 5 refers to the same email that I have determined to exempt in full. In my opinion, the content of the email at item 6 relates to the Independent Review and consists of information provided to the Anti-Discrimination Commissioner in confidence on the understanding that it is not disclosed.

I have determined to release all of item 3 which is a series of text messages which could be considered to be information obtained in confidence. However, the text message exchange relates to arranging a telephone meeting between the Premier and the Anti-Discrimination Commissioner which is relevant to part 2 of your request for assessed disclosure. Further, subsequent to June 2023, the meeting itself was disclosed on the MPS Routine Disclosures website under Ministerial Diaries (refer to item 4 in the attached schedule). In my view it is in the public interest to release this information.

Public interest test

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

In making my decision to exempt the above information from release, I have carefully considered the matters relevant to assessment of the public interest provided under Schedule 1 of the Act. I have determined that there are no matters relevant to [the] assessment of [the] public interest that weigh positively in favour of release of the information, other than the general public need for government information to be accessible (Schedule 1 (l)(a)) and whether the disclosure would contribute to or hinder debate on a matter of public interest (Schedule 1 (l)(b)).

In my view, the information was obtained in confidence and the disclosure of the information would harm the interests of the individuals concerned (Schedule 1 (l)(m)) and would prejudice the ability to obtain similar information in the future (Schedule 1 (l)(n)). In forming this opinion, I am concerned that the individuals who provided information to the Anti-Discrimination Commissioner did so on the understanding that it was provided confidentially and that she would keep it confidential. In this instance it would not further the object of the Act and it is contrary to the public interest to release that information. Further, to release the information would not be in the spirit of the amendments made to the Act specifically for the purposes of providing

certainty of anonymity in raising their concerns within the scope of the Independent Review.

Analysis

Section 36 - personal information of a person other than the applicant

- 20 For information to be exempt under s36(1) of the Act, I must be satisfied that it is the personal information of a person other than the applicant. Personal information is defined in s5(1) of the Act as any information about an individual whose identity is apparent or reasonably ascertainable from that information, and who is alive or has not been dead for more than 25 years.
- 21 The Premier's delegate's decision asserts that information contained within documents one, five and six is exempt from disclosure in full pursuant to s36 of the Act.
- 22 Item one consists of a Letter to the Premier as Chair of the Joint Standing Committee from Ms Bolt outlining her concerns about the naming of public servants in Parliament. Item five consists of screenshots of a series of text messages sent between Ms Field and Ms Jones, which appear to have been sent from their respective work phones. Item six consists of an email from Ms Bolt to Ms Field, the body of which contains seven dot points of de-identified and anonymised quotations of submissions made to the Independent Review by MPS staff.
- 23 Having reviewed these documents, I am unclear how they could be considered exempt from disclosure *in full* pursuant to s36 of the Act. However, I do recognise that some information contained in these documents would identify the Premier, the Anti-Discrimination Commissioner, or the Premier's then Chief of Staff, or leave their identity reasonably ascertainable. It is also possible that the identity of those who made the de-identified comments, or the person or people to whom those comments relate, could be ascertainable when combined with other knowledge of those working at the Parliament.
- 24 As such, I find the following information contained in items one, five and six *prima facie* exempt from disclosure pursuant to s36 of the Act:
 - any reference to the Premier's name, Ms Bolt's name, or Ms Field's name, including in email addresses, contained in items one, five and six;
 - any reference to the Premier's position title, Ms Bolt's position title or Ms Field's position title contained in items one, five and six;
 - the reference to Ms Field's contact phone number in her email signature block contained in item six;

- the body of the email in item six; and
- Ms Bolt's signature and work email contained in item one.

Public interest test

- 25 Though I accept that this information is *prima facie* exempt from disclosure pursuant to s36, I am not satisfied that it would be contrary to the public interest for it to be released.
- 26 The Anti-Discrimination Commissioner and the Premier's then Chief of Staff were, at the time, both high ranking public servants, while the Premier is Tasmania's highest ranking publicly elected official. As I have said consistently in previous decisions, the names of public officers performing their regular duties are not usually exempt under s36.⁴ It is standard Australian practice that the personal information of public servants which relate to the performance of their regular duties (i.e. name, position information, work contact details) is not exempt from release, unless there are specific and unusual circumstances which justify such an exemption.⁵ I am not satisfied that specific or unusual circumstances apply in this instance so as to justify the non-disclosure of the above-mentioned information.
- 27 In relation to the body of the email in item six, this information has been de-identified and is very similar (or, at times, identical) to other de-identified comments which were included in the Motion for Respect Report. While I agree with the Premier's delegate that matters (m) and (n) in Schedule 1 of the Act are relevant, I do not consider that the impact on the interests of individuals or the prejudice to the ability to obtain similar information in future would be significant. The careful de-identification and the similarity of the content with other published material regarding the Independent Review mitigate against negative consequences flowing from the release of this material.
- 28 On balance, I consider that this information is not exempt under s36 and should be released to Ms White, subject to my consideration of s39.

Section 39- Information obtained in confidence

- 29 For information to be exempt from disclosure under s39(1) of the Act, I must be satisfied that it is information that has been communicated in confidence to the Premier and that:
- (a) The information would be exempt information if it were generated by a public authority or Minister; or

⁴ *Linda Poulton and Department of Natural Resources and Environment* (24 November 2023) at [96]; *Manuel Sessink and Meander Valley Council* (4 October 2023) at [23-26]; T and *Department of Health* (12 March 2024) at [26], all available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

⁵ *Linda Poulton and Department of Natural Resources and Environment* (24 November 2023) at [96], available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

- (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.
- 30 As part of her fresh decision, the Premier's delegate decided that documents one, five and six were exempt from disclosure in full pursuant to s39 of the Act. The Premier's delegate did not specify whether s39(1)(a) or (b) applied to exempt this information from disclosure. However, as this information does not appear to be of a type analogous to internal deliberative information so as to qualify for exemption under s39(1)(a), I will proceed to assess whether s39(1)(b) applies to any of this information.
- Item one: Letter to Premier as Chair of Joint Standing Committee from Sarah Bolt about naming of public servants in parliamentary debate.*
- 31 As previously discussed, document one is a letter expressing Ms Bolt's concerns about Members of Parliament naming public servants in the course of debate on the floor of Parliament.
- 32 Given the nature of the material contained in this letter, and the fact it is marked as 'private and confidential', I am satisfied that this letter was communicated in confidence. However, I do not consider that there is anything in this letter that is so sensitive that its release would result in the Premier not receiving similar correspondence in the future. It simply details Ms Bolt's concerns about Members of Parliament using parliamentary privilege to name public servants, concerns which are raised in her official capacity as Anti-Discrimination Commissioner. It also asks that the Premier discuss her concerns with the Joint Standing Committee on Integrity. Further to this, the substance of this letter closely mirrors the substance of Ms Bolt's letter that was tabled in Parliament prior to question time on 9 May 2024. This again speaks to low likelihood that the release of this correspondence would inhibit an Anti-Discrimination Commissioner from making similar representations in future.
- 33 In light of the above, I am not satisfied that any information contained within this letter is of a type which, if released, would result in the Premier not receiving similar information in the future. Accordingly, I find that this information is not exempt from disclosure pursuant to s39(1)(b) of the Act and should be released to Ms White.

Item five: Screenshots - text messages between Sarah Bolt and Chief of Staff Vanessa Field

- 34 As I have previously set out, item five consists of screenshots of a series of text messages sent between Ms Field and Ms Bolt. The information contained within these text messages is largely innocuous. The only text message of any substance was sent from Ms Field to Ms Bolt on 9 May 2023. This text message contains Ms Field's opinion regarding

Parliament's response to the Premier raising Ms Bolt's concerns about the impact of naming public servants in Parliament.

- 35 Given that these messages were sent between Ms Field and Ms Bolt on their personal work phones, I am satisfied that they were communicated in confidence. However, there does not appear to be any information contained in the messages, which if released, would impair the likelihood of a Minister or public authority receiving the same or similar information in the future. Accordingly, I find that no information contained within item five could be exempt from disclosure pursuant to s39(1)(b) of the Act.

Item six: Email from Sarah Bolt to Vanessa Field Chief of Staff quoting from submissions made by MPS staff to Anti-Discrimination Commissioner in relation to Motion for Respect review.

- 36 As discussed, item six is an email from Ms Bolt to Ms Field, the body of which contains seven dot points of de-identified and anonymised quotations of submissions made to the Independent Review. After reviewing these submissions, I can see that they are of a highly sensitive nature as they outline allegations that could amount to bullying.
- 37 Though these submissions have been de-identified and anonymised, I am satisfied that if they were made publicly available, Ms Bolt would be less likely to make the same or similar information available to the Premier in the future. Accordingly, I find the de-identified and anonymised quotes of verbal and written submissions made to the Independent Review contained within the seven dot points in Ms Bolt's email to Ms Field are *prima facie* exempt from disclosure pursuant to s39(1)(b) of the Act.
- 38 I find that the remaining information contained in item six, being the remainder of the information in the body of Ms Bolt's email - salutations, time stamps, subject lines and address lines are - not *prima facie* exempt pursuant to s39(1)(b) of the Act. This information should be made available to Ms White.

Public Interest Test

- 39 I now turn to assess whether it would be contrary to the public interest to release the seven dot points I found to be *prima facie* exempt. The Premier's delegate has identified Schedule 1 matters (a) and (b) as weighing in favour of disclosing this information, and Schedule 1 matters (m) and (n) as weighing against disclosure.
- 40 I agree that matter (a) – the general public need for government information to be accessible – is relevant and weighs in favour of disclosure.
- 41 I also agree with the Premier's delegate that matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant and weighs in favour of disclosure. The anonymised and de-identified quotations contained in Ms Bolt's email to Ms Field are

reflective of the types of submissions made to the Independent Review and contributed to the Motion for Respect Report which detailed findings and recommendations resulting from Ms Bolt's investigation into workplace discrimination, sexual harassment and bullying in Ministerial and Parliamentary Services. The publishing of this report was covered extensively by the media at the time,⁶ and the safety of the Tasmanian Parliament and Ministerial officers remains a matter of public debate today.

- 42 I also agree with the Premier's delegate that matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – is relevant and weighs against disclosure. The de-identified and anonymised quotes of submissions subject to this external review were submitted to the Independent Review for the purposes of its review. I do not anticipate that those who made those submissions to the Independent Review would expect these to be made publicly available if that was not required for Ms Bolt to conduct and complete the Independent Review. Accordingly, I am satisfied that the release of this information could harm the interests of those who made these submissions.
- 43 I also agree with the Premier's delegate that matter (n) - whether the disclosure would prejudice the ability to obtain similar information in the future – is relevant and weighs against disclosure. I give this much lower weight than the Premier's delegate, however, as the submissions have been anonymised and de-identified. I therefore find that it would be difficult to identify those who made these submissions to the Independent Review. As such, it is unlikely that these people or others would be deterred from participating in similar reviews in future.
- 44 Further, I note that, in her fresh decision, the Premier's delegate said that the release of this information would not be in the spirit of the amendments to the Act, which were implemented to provide *certainty of anonymity* for those making submissions to the Independent Review. I acknowledge that the amendments intended to provide confidence to those making submissions that their submissions would not be subject to release under the Act. But I again note that these submissions, as contained in Ms Bolt's email to Ms Field, have been de-identified so as to provide that anonymity. As noted previously, Ms Bolt herself released many similar anonymised comments in the Motion for Respect Report. As such, I find that matter (n) weighs only slightly against disclosure.

⁶ For example: Maloney, M., *One-third of sexual harassment reports from a Tasmanian Parliament workplace review involved a politician* (29 August 2022), The Examiner, www.examiner.com.au/story/7880256/women-in-tasmanian-political-offices-pressured-for-sex-workplace-review-finds/, accessed 9 September 2024; Killick, D., *Bullying, sexism rife in parliament as Premier responds* (30 August 2022), The Mercury <https://www.themercury.com.au/news/tasmania/bullying-sexism-rife-in-parliament-an-mps-offices-report-finds/news-story/b7bd51060774f4522d12add60174f553>, accessed 9 September 2024.

- 45 This is a difficult balance to strike, however, in light of the above, I find that it would not be contrary to the public interest to release the anonymised and de-identified submissions to the Independent Review contained within the seven dot points in Ms Bolt's email to Ms Field. This information should be made available to Ms White.

Preliminary Conclusion

- 46 Accordingly, for the reasons set out above, I determine that exemptions claimed pursuant to ss36 and 39 are not made out.

Submissions to the Preliminary Conclusion

- 47 As the above preliminary decision was adverse to the Premier, it was made available to his delegate on 30 October 2024 under s48(1)(a) of the Act to seek input prior to finalisation. On 18 November 2024 my office received submissions from Ms Gemma Smith, a delegated officer under the Act, regarding items one and six of the information subject to this external review.
- 48 In relation to item one, the Premier's delegate's submissions noted my reasoning that this letter could not be considered exempt under s39(1)(b), as it closely mirrored the substance of Ms Bolt's letter that was tabled in Parliament prior to question time on 9 May 2024.
- 49 In making submissions on my preliminary decision, the Premier's delegate emphasised that, unlike the letter tabled in Parliament, the letter in item one specifically named a government agency which employed public officers who had been named in Parliament. She indicated that, as a result, it may be possible to identify individual public officers who had raised with Ms Bolt that they had suffered psychological harm by being named in Parliament. The extension of this point being that if this letter was released, and that those who have discussed their mental health with Ms Bolt can be identified, that people would be less likely to come forward with similar information to Ms Bolt in the future.
- 50 Regarding the public interest test, the Premier's delegate provided the following submissions:

Regarding any subsequent application of the public interest test, as the information in Item 1 offers no more additional information than Item 2 other than the specific references to work areas, it is submitted that the factors that weight in favour of disclosure do not weigh heavily. The release of information will not satisfy the need for government information to be accessible, contribute to debate on a matter of public interest, or inform a person of a reason for decisions any more than what has already been released in Item 2. Conversely, due to the ability to identify which specific individuals have suffered

psychological harm as outlined above, there are matters that make the release of the information contrary to the public interest and these matters should weigh heavily. These matters are whether the disclosure would promote or harm the interests of an individual or group of individuals and whether the disclosure would prejudice the ability to obtain similar information in the future (Schedule 1 (m) and (n) of the Right to Information Act 2009).

- 51 After carefully considering the Premier's delegate's submissions on this point, I have decided to slightly alter my finding regarding item one. I am satisfied that it would be contrary to the public interest to release the words between the commas in the second substantive paragraph of this letter, which name the relevant government agency. This information is exempt under s39(1)(b) and is not to be released to Ms White.
- 52 However, as I discussed in my preliminary decision, I find that the rest of this letter very closely mirrors the substance of the letter that was tabled in Parliament, and so I cannot accept that it could be exempt. The rest of this letter should be released to Ms White.
- 53 In relation to item six, the Premier's delegate's submissions noted that there was some information contained within this letter, which if released, would leave the identity of a person, or people, reasonably ascertainable.
- 54 The Premier's delegate also made the following submissions, in relation to the public interest assessment:

In considering matters relevant to the assessment of the public interest, it is submitted that further consideration should be given to Schedule 1(h), (j), (m) and (n) of the Act when determining whether the disclosure of the information is in the public interest. It is submitted that consideration should be given to whether the release in full of Item 6 would harm the administration of justice by not affording procedural fairness, would hinder equity and fair treatment of persons in their dealings with government, would harm the interests of an individual or group of individuals, and/or would prejudice the ability to obtain similar information in the future.

- 55 Again, after careful consideration, I have altered my finding regarding this item. I am satisfied that it would be contrary to the public interest to release the last two words of the first sentence in the first substantive paragraph of this letter and the seven dot points.
- 56 On reflection and after consideration of the further submissions, I consider that the risk of identification of the person or persons to whom the comments relate, and this leading to identification or speculation

regarding the makers of the comments, is of higher likelihood than originally assessed. This would undermine the legislated intention of confidentiality regarding the Independent Review and risk harm to the interests of relevant individuals in relation to the bullying allegations. Consequently, I find that the specified information in item six is exempt pursuant to s36(1) and should not be released to Ms White.

Conclusion

- 57 Accordingly, for the reasons set out above, I determine that exemptions claimed pursuant to ss36 and 39 should be varied.
- 58 I apologise to the parties for the delay in finalising this decision.

Dated: 28 November 2024

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

Richard Connock
OMBUDSMAN

Attachment 1 - Relevant Legislation

Section 36 Personal information of person

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

(2) If –

- (a) an application is made for information under this Act; and
- (b) the information was provided to a public authority or Minister by a third party; and
- (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party –
the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –
- (d) notify that person that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information that has been applied for; and
- (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
- (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.

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

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

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

Section 39 Information obtained in confidence

- (1) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –
 - (a) the information would be exempt information if it were generated by a public authority or Minister; or
 - (b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.
- (2) Subsection (1) does not include information that –
 - (a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and
 - (b) relates to trade secrets or other matters of a business, commercial or financial nature; and
 - (c) was provided to a public authority or Minister pursuant to a requirement of any law.

Section 33 Public interest test

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

Schedule 1 Matters Relevant to Assessment of Public Interest

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

- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION



Right to Information Act Review Case Reference: R2210-004

Names of Parties: Robert Hogan and Department for Education, Children and Young People

Reasons for decision: s48(3)

Provisions considered: s36

Background

- 1 In 2019, the University of Tasmania (the University) announced a decision to relocate its campus in Sandy Bay to central Hobart. This decision sparked a high level of public interest and debate.
- 2 Mr Robert Hogan (the Applicant) has a strong interest in the debate and maintains a website and blog which are generally opposed to the move.
- 3 On 4 May 2022, Mr Hogan made an application for assessed disclosure to the Department of Premier and Cabinet under the *Right to Information Act 2009* (the Act) in the following terms:

I request the following records in relation to the period 1 January 2015 to 4 May 2022:

- *All briefs provided to senior officers (Executives) and the Premier/Ministers of the Departments of Premier and Cabinet, Education and Infrastructure (or such names as these Departments were known in the relevant period) in relation to the proposed move of UTAS [the University] into the Hobart CBD and/or redevelopment of the Sandy Bay campus;*
- *All analysis undertaken by the Departments of Premier and Cabinet, Education and Infrastructure in relation to the proposed move of UTAS into the Hobart CBD and/or redevelopment of the Sandy Bay campus;*
- *All records relating to the inclusion of UTAS in the Hobart City Deal; and*
- *All briefs and correspondence relating to the appointment of UTAS Councillors by the Minister for*

Education under ss.8(1)(d) and 8.(5) of the University of Tasmania Act 1992.

- 4 On 27 May 2022, Ms Bridget Hutton of the Department of Premier and Cabinet advised Mr Hogan that, pursuant to s14 of the Act, all of Part 4 of his application and relevant sections of Parts 1 and 2 had been transferred to the then Department of Education and Minister for Education.
- 5 On 4 July 2022, Ms Ingrid Brown, a delegate under the Act for the then Department of Education, now the Department for Education, Children and Young People, (the Department) released a decision to Mr Hogan. Ms Brown determined that no information relevant to the application was found.
- 6 On 31 July 2022, Mr Hogan requested an internal review, submitting that he expected the Department to hold *significant documentation*. On 9 September 2022, Ms Yolanda Prenc, another delegate under the Act for the Department, released the internal review decision, which was emailed to Mr Hogan on 13 September 2022. Ms Prenc released 39 pages of information in whole or in part and applied s36 of the Act to exempt some personal information.
- 7 On 11 October 2022, Mr Hogan sought external review, which was accepted pursuant to s44(1) of the Act. Mr Hogan also submitted that the *documents provided are clearly incomplete*.
- 8 On 25 October 2024, Ms Louise Brooks, a delegate under the Act for the Department, released a further 19 pages of information to Mr Hogan in whole or in part and relied upon s36 to exempt some personal information. On 5 November 2024, Mr Hogan informed my office that he accepted the redactions pursuant to s36 in these 19 pages and did not seek review of that decision.

Issues for Determination

- 9 I must determine whether the information not released by the Department is eligible for exemption under s36 or any other relevant section of the Act. As s36 is contained within Division 2 of Part 3 of the Act, my assessment is made subject to the public interest test in s33.
- 10 This means that, should I determine the requested information is *prima facie* exempt from disclosure under s36, or any other exemption provision contained within Division 2 of Part 3 of the Act, I must then determine whether it would be contrary to the public interest for it to be disclosed. In making this assessment I must have regard to, at least, the matters contained in Schedule 1 of the Act.
- 11 I must also determine whether the Department undertook sufficient searches, pursuant to s45(1)(e) of the Act, for information responsive to Mr Hogan's application.

Relevant legislation

- 12 I have included copies of s36, s33, s45(1)(e) and Schedule 1 of the Act with this decision at Attachment 1.

Submissions

Applicant

- 13 In his application to the Department for internal review on 31 July, Mr Hogan submitted:

I am extremely surprised by the response to my RTI application.

As you know, the Minister for Education has administrative responsibility for the University of Tasmania Act 1992...

Under section 8.(1)(d) ... the Minister has responsibility for appointing two members of the University of Tasmania (UTAS) council.

Under section 8.(5), the Minister must discharge several responsibilities before making an appointment to the UTAS Council, including consultation with the UTAS Council.

Under section 12, the Minister has responsibility for receiving and tabling the annual report of UTAS.

Given these responsibilities, I would expect the Department of Education to hold significant documentation in relation to UTAS.

...

The volume of information DPAC and the Department of State Growth hold relevant to my RTI application strongly suggests that the Department of Education and/or the Minister for Education also hold information relevant to my request...

- 14 On 29 April 2024, in relation to his application for external review, Mr Hogan submitted (emphasis Mr Hogan's):

...

While Ms Perec [sic] stated in her [internal review]... that a “further thorough search was conducted by the RTI office” she indicated some uncertainty about the search procedures across the Department, stating:

“As you can imagine, the Department is a large department and when requesting information, we trust that a thorough search has been conducted...”

...

Having regard to general context, and the specific documents that I have received ... I do not accept that a thorough (sufficient) search of its records (including emails) was conducted across the Department.

...
Under Administrative Arrangements for Tasmanian Enactments, responsibility for the UTAS Act [University of Tasmania Act 1992] was assigned to the Department of Education for the whole period covered by my initial RTI application (January 2015 to 4 May 2022) and it continues to be so assigned to the Department.

...
Given the Minister's and the Department's administrative responsibility for the UTAS Act and the specific and detailed roles set out for the Minister with respect to appointment of UTAS Council members and UTAS' annual report, I would expect the Department to have extensive and well-ordered files relating to UTAS.

...
Given developments, I only wish to pursue further records relating to dot point request [4] of my original RTI application...

- 15 Mr Hogan then considered recent Ministerial appointments to the University Council and submitted:

The Department should have been able to identify a full array of documentation in respect of each of these appointments ... covering, for example: requests for/canvassing of candidates for appointment; assessment of candidates for appointment; government appointment processes (including processes for ministerial and Cabinet approval of appointments); and full records of communications at various stages with UTAS. Instead, the Department provided a motley collection of six documents...

- 16 Mr Hogan then considered documents provided to a Legislative Council Inquiry and submitted:

... I note that the attachments provided ... include four documents ... relating to the period covered by my RTI application, none of which were identified in the Department's review decision on my RTI application, but which should have been.

- 17 Finally, Mr Hogan submitted, in relation to the Department's application of s36:

I note that the CVs of Rhys Edwards and Susan Chen, which were provided as part of the Cabinet Submission on their proposed appointment in 2015 ... have been entirely exempted (and redacted) under section 36(1) ...

I believe this is inappropriate. The fact of Mr Edwards and Ms Chen being appointed as UTAS Council members is a matter of public record and disclosed in other documents provided by the Department. Ms Chen and Mr Edwards' qualifications for appointments as UTAS Council members is [sic] also a matter of legitimate public interest.

...

This is the only instance in which I wish to question the Department's use of section 36(1) of the RTI Act as the basis for redactions in the documents that it provided to me.

I note in passing that the ministerial appointments of Ms Chen and Mr Edwards in 2015 are the only appointments for which the Department has provided Cabinet material and the only instance in which CVs have been identified as relevant to the terms of my request. However, it seems likely that the Department would hold Cabinet documents relating to later ministerial appointments that have not been identified. Even if Cabinet were not involved in later appointments, it is highly likely that CVs would be held by the Department relating to later ministerial appointments ... and, possibly, consideration of other candidates who were not chosen for appointment. This again underlines the insufficiency of the Department's search.

...

Given the role of the Minister and the Department with respect to UTAS, the Department should have large file holdings relating to UTAS. The provision of only eight documents therefore indicates the conduct of a totally insufficient search, a point confirmed by the fragmentary nature of the documents provided. I am particularly concerned at the gaps in documentation provide in respect of ministerial appointment of UTAS Council members and wish to pursue the issue.

I also seek reconsideration of the exemption of Ms Chen and Mr Edwards' CVs under section 36(1) of the RTI Act.

Department

- 18 The Department provided its reasoning in its internal review decision and made further submissions in response to communications from my office. As part of the internal review, the Department submitted:

Very small sections of the information have been exempted under section 36 of the Act... To disclose personal information of individuals to promote the interests of some individuals would not outweigh the harm to a larger group of individuals. For personal information of individuals to be disclosed would cause a loss of trust and potential harm to the individual.

Section 36 is subject to the public interest test. Schedule 1 of the Act lists the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest.

... The sections of Schedule 1 I find relevant are:

- (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with Government*
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;*
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future.*

I find that to release this information could harm the individuals and could impact on the ability of the Department to obtain similar information in the future if there is a loss of trust in the Department to be responsible in handling personal information. I find it contrary to the public interest to release this information.

- 19 On 29 October 2024, in a letter to my office, the Department addressed Mr Hogan's submissions, relevantly:

Regarding appointments, resignations or nominations to the University Council, the Department ... and formerly the Department of Education (DoE), has not had oversight of this process for approximately five years.

The Department understands that University Council and the Minister of the Day liaise and determine nominations and appointments.

A further search ... was conducted in the Department's record management system and can advise no additional information ... was located within scope of Mr Hogan's application.

...

The relevant business units are best placed and hold relevant knowledge to conduct a thorough search ... Upon receipt of the information, delegated officers trust that the business units have conducted thorough searches for all information within scope. Instructions to business units clearly defines [sic] the scope of the application to assist with search parameters.

- 20 In relation to letters provided to a Legislative Council inquiry, the Department submitted:

I have obtained a copy of the four documents referred to above from the Minister's office via the Department's Ministerial

Services Unit (MSU). I am advised by MSU that the Minister's office confirmed the LegCo response was sent direct from their office, with no input from the Department. This confirms the documents referred to above did not originate from the Department.

Moreover, I have had discussions with Department of Premier and Cabinet (DPAC) and affirmed that the process for appointments to the University Council are purely a matter between the Minister for Education and the University according to The University of Tasmania Act 1992.

...

Not every piece of correspondence the Minister receives is sent to the Department. It is common practice for the Minister's office to respond to correspondence with the knowledge they already have, with no need to consult the Department.

I am confident that thorough searches have been conducted and that the Department does not hold these letters.

Analysis

- 21 The Department has applied s36 of the Act to exempt some information. For information to be exempt under this section, I must be satisfied that its release would reveal the identity of a person other than the person seeking the information, or that the information would lead to that person's identity being reasonably ascertainable.
- 22 Section 5 of the Act defines personal information as:

...any information or opinion in any recorded format about an individual –

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

(b) who is alive, or who has not been dead for more than 25 years.
- 23 The Department has identified information of this kind, however in a submission to my office dated 29 April 2024, Mr Hogan indicated that he only wished to question the Department's application of s36 in relation to the curricula vitae of Ms Susan Chen and Mr Rhys Edwards, where the Department determined both documents were exempt in their entirety. Accordingly, I shall restrict my analysis to these two documents.
- 24 It is clear that the two curricula vitae contain information which falls within the definition of personal information in s5 of the Act. I consider the entirety of these documents are *prima facie* exempt under s36 of the Act.

Public interest test

- 25 Section 36 is subject to the public interest test contained in s33. This means that, as I have determined the information to be *prima facie* exempt, I am now required to determine whether it would be contrary to the public interest to release it. This requires me to consider all relevant matters and as a minimum those specified in Schedule 1 of the Act.
- 26 Schedule 1 matter (a) – the general need for government information to be accessible – was not considered by the Department, however it is always a relevant consideration and weighs in favour of disclosure.
- 27 Schedule 1 matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – was not considered by the Department but is also relevant and weighs in favour of disclosure. The performance of Tasmania's only university in general and the specific proposal to move the campus from Sandy Bay into the Hobart CBD is a matter of significant public interest and debate within the Tasmanian community. Awareness of the qualifications and experience of University Council members appointed by the relevant Minister can only contribute positively to this debate, though it is not a key point at issue. I consider this weighs slightly in favour of disclosure.
- 28 Schedule 1 matter (f) – whether the disclosure would enhance scrutiny of government decision-making processes – was also not considered by the Department but is relevant. I consider that it weighs in favour of disclosure in that the suitability of Ministerial appointees to the University Council would be better able to be scrutinised with awareness of their qualifications and experience.
- 29 Schedule 1 matter (h) – whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government – was considered relevant by the Department, but made no further submissions. If the Department is concerned about the fair treatment of Ms Chen and Mr Edwards, I consider this better dealt with in relation to matter (m). I do not consider matter (h) to be a particularly relevant consideration.
- 30 Schedule 1 matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – was considered by the Department to be relevant, but again with little said in support. I agree that this is a relevant matter in that some of the information contained in the documents is quite personal and unconnected with professional history, and as such weighs against disclosure.
- 31 Schedule 1 matter (n) – whether the disclosure would prejudice the ability to obtain similar information in the future – was identified by the Department as relevant and weighing against disclosure because of the possibility of a loss of public trust in the Department to maintain confidentiality. I broadly agree with this assessment. The relevant personal information is of a type routinely requested by and provided to a potential employer as part of a recruitment or appointment process and where the confidentiality of the information is

important, at least during the selection phase and/or for those applicants who are unsuccessful.

- 32 However, I also consider a relevant matter to be that in its further decision of 25 October 2024, the Department released with minimal exemptions a summary of the curriculum vitae of Ms Jennifer Gale containing information relevant to her appointment to the University Council.
- 33 I further consider the professional online presence of both appointees to be relevant in that much of Mr Edwards' professional experience is already in the public domain as a result of other appointments he holds.
- 34 After considering the submissions of Mr Hogan and the Department, as well as my own assessment of the public interest test, on balance I have determined that the release of those sections of the curricula vitae with a direct bearing on the experience and skills relevant to a position on the University Council would not be contrary to the public interest. However, I agree that the parts of the documents which provide details of the applicants lives, academic results and employment history which do not have the same relevance to their appointment to the University Council are exempt.
- 35 Accordingly, the following information in Ms Chen's curriculum vitae is exempt under s36 and is not required to be released to Mr Hogan:
 - on page 1 – the information between Family Name: Chen and the word Qualifications;
 - all of page 2; and
 - on page 3 – the information before the words Marist Regional College.

The remainder of the document is not exempt and is to be released to Mr Hogan.

- 36 The following information in Mr Edwards' one-page curriculum vitae is exempt under s36 and is not required to be released to Mr Hogan:
 - the photograph and Mr Edwards' middle names, along with his address, telephone and email contact details.

The remainder of the document is not exempt and is to be released to Mr Hogan.

Sufficiency of search

- 37 Mr Hogan made lengthy submissions regarding what he perceived to be the inadequacy of the searches carried out by the Department, and identified information which he believed the Department should possess yet which had not been provided in response to his application.
- 38 I am not satisfied that the initial searching undertaken by the Department was sufficient, as no information was located at that time and such information clearly did exist. However, further searching as part of the internal review and

after communication from my office did locate relevant information responsive to Mr Hogan's application.

- 39 My office has issued a guideline, No. 4/2010¹, under s49(1)(c) of the Act (Search Guideline), the purpose of which *is to assist public authorities and Ministers to conduct a search in response to an application for assessed disclosure in a thorough, documented and disciplined manner*.
- 40 The Department has provided my office with a record of all searches conducted in relation to this application, and noted that an earlier record was incomplete in that one business unit had not responded. I am satisfied that the record accords with the Search Guideline and, ultimately, the searches performed were sufficient to identify relevant information in the possession of the Department. I do not consider that there is utility in requiring any additional searching at this stage. I also note the Department's submissions regarding documents provided to the Legislative Council inquiry, which set out that:

the process for appointments to the University Council are purely a matter between the Minister for Education and the University according to The University of Tasmania Act 1992.

Preliminary Conclusion

- 41 For the reasons given above, I determine that:

- exemptions claimed pursuant to s36 are varied; and
- while the Department initially did not undertake a sufficient search for information, by the conclusion of the external review it had taken appropriate steps to rectify the situation.

Conclusion

- 42 As the above preliminary decision was adverse to the Department, it was made available to it on 20 November 2024 to seek its input prior to finalisation, in accordance with s48(1)(a) of the Act.

- 43 On 25 November 2024, Ms Roxana Jones of the Department advised that *the Department has no submissions to make in regards to this preliminary decision*.

- 44 Accordingly, for the reasons given above, I determine that:

- exemptions claimed pursuant to s36 are varied; and
- while the Department initially did not undertake a sufficient search for information, by the conclusion of the external review it had taken appropriate steps to rectify the situation.

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

¹ Revised 24 January 2013, available at www.ombudsman.tas.gov.au/right-to-information/rti-publications.

Dated: 25 November 2024

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

Richard Connock
OMBUDSMAN

Attachment 1

Relevant Legislation

Section 36 – Personal information of person

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

(2) If –

- (a) an application is made for information under this Act; and
- (b) the information was provided to a public authority or Minister by a third party; and
- (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party –

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

- (d) notify that person that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information that has been applied for; and
- (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
- (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.

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

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

Section 33 - Public interest test

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

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

1. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:
 - (a) the general public need for government information to be accessible;
 - (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
 - (c) whether the disclosure would inform a person about the reasons for a decision;
 - (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
 - (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;

- (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
- (g) whether the disclosure would enhance scrutiny of government administrative processes;
- (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
- (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
- (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
- (k) whether the disclosure would promote or harm the economic development of the State;
- (l) whether the disclosure would promote or harm the environment and or ecology of the State;
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;

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

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

45. Other applications for review

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

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

(ab) the decision relates to an application made to a Minister in accordance with section 13 and is a decision in relation to which a written notice must be given under section 22 ; or

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

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

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

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

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

(1A) A person who is an external party may apply to the Ombudsman for a review of –

(a) a decision if the decision, which may otherwise be the subject of an application for an internal review under section 43(2) or (3) , has been made by a Minister or principal officer of a public authority and as a consequence the external party cannot make an application under section 43 ; or

(b) a decision to provide, in accordance with an application made to a Minister in accordance with section 13 , information –

(i) relating to the personal affairs of the person; or

(ii) that is likely to expose the person to competitive disadvantage.

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

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

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

(3) If a notice of a decision has been given under this Act, an application referred to in subsection (1) must be made within 20 working days of the day on which the applicant received notice of the decision.

(4) If a notice of a decision to which subsection (1A) relates has been given under section 36(3) or section 37(3) to an external party, the external party may only make an application under subsection (1A) in relation to the decision within 20 working days of the day on which the external party received the notice.



Right to Information Act Review

Case Reference: R2208-030

Names of Parties: Robert Hogan and the University of Tasmania

Reasons for decision: s48(3)

Provisions considered: s45(1)(e)

Background

- 1 In 2019 the University of Tasmania (the University) announced a decision to relocate its longstanding campus in Sandy Bay to the Hobart central business district. This decision sparked a high level of community interest and debate. Mr Robert Hogan, the applicant, is an active member of the Save UTAS Campus community group which opposes the University's relocation proposal. He also runs a website regarding this called *The UTAS Papers*.
- 2 Mr Hogan relevantly made three prior assessed disclosure applications under the *Right to Information Act 2009* (the Act) to the University which sought information about the relocation proposal. Each application was refused by the University in reliance on s12(3)(c)(ii) of the Act.
- 3 The basis of the refusals under s12(3)(c)(ii) was that the requested information *will become available, in accordance with a decision that was made before receipt of the application, as routine disclosure or required disclosure* within a specified period of time not exceeding 12 months of the application date.
- 4 Mr Hogan disputed that the information was actually otherwise available and that a decision had genuinely been made prior to (and independently of) his applications to release the same information. He raised concerns that the University had misapplied s12(3)(c)(ii) to delay the release of information he was seeking.
- 5 On 5 May 2022, Mr Hogan lodged an assessed disclosure application with the University for the following:

I request information relating to UTAS' refusal of three previous Right to Information applications that I made.

...

I have searched UTAS' website for evidence that the information I requested in the three applications will be released through routine disclosure, without success.

- 6 Mr Hogan particularised the request in an attachment to his assessed disclosure application, setting out (verbatim):

On 3 May 2022, Juanita O'Keefe wrote to me by email in relation to four Right to Information Applications that I had lodged.

Ms O'Keefe's email included the following:

Section 12(3)(c)(ii) permits the University to refuse an application made for assessed disclosure in accordance with section 13 if the information that is the subject of the application 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 but not exceeding 12 months from the date of the application.

I confirm that the University made a decision prior to the receipt of your 3 applications to make a routine disclosure of information related to the University's move from Sandy Bay into the Hobart CBD within the foreseeable future, and before the expiration of 12 months from the date of receipt.

Accordingly, the University refuses to accept the following 3 applications on the basis of section 12(3)(c)(ii) of the RTI Act:

1. *"Consultation with the community and UTAS staff and students, in the period 1 July 2018 to 5 April 2019 relating to UTAS' decision to develop a city-centric campus in the Hobart CBD": - Received 12 April 2022. Twelve months from date of receipt 12 April 2023.*
2. *"Records relating to overseas visits/tours by UTAS officers, mayors and aldermen to the UniverCities conference and overseas universities, as reported in UTAS' annual reports for 2016 and 2017": - Received 21 March 2022. Twelve months from date of receipt 21 March 2023.*
3. *"Copy of the Urbis research referred to at, for example, <https://utas.edu.au/about/campuses/southern-transformation#faqs>, and related records". Application received 20 April 2022. 12 months from date of receipt 19 April 2023.*

I request "information", as defined in the Right to Information Act 2009, in relation to prior decisions to make routine disclosure of

the information sought in the three applications (numbered above 1-3). This should include evidence that the decisions were made prior to lodgment of the three applications.

- *I note that Ms O'Keefe used the one sentence summary of the information that I was seeking in the three applications. Details of the information that I sought was provided in the three applications. The evidence I have requested should therefore reasonably include evidence that routine disclosure will include the substance of all the information that I sought.*

I request details of how and when routine disclosure of all the information that I sought in the three applications will be made by UTAS.

- 7 On 16 May 2022, Mr Simon Perraton, a delegate under the Act for the University, released a decision to Mr Hogan. The decision addressed Mr Hogan's five applications for assessed disclosure, related to the Save UTAS Campus community group, that had been lodged the University between 21 March 2022 and 5 May 2022.
- 8 Central to this external review is Mr Perraton's response to *Application 5 – Received 5 May 2022* but also relevant is the response to the three related assessed disclosure applications that were refused. Extracted from Mr Perraton's statement of reasons:

Applications 1, 2, 3

By email dated 3 May 2022, Juanita O'Keefe, delegated RTI Officer, advised you that she had made a decision to refuse to accept applications 1, 2 and 3. That email stated that the University had made a decision prior to the receipt of your three applications to make a routine disclosure of information related to the University's move from Sandy Bay into the Hobart CBD within the foreseeable future, and before the expiration of 12 months from the date of receipt.

On 3 May 2022 and 5 May 2022 you emailed Juanita

O'Keefe and requested details of (in summary):

1. *the information the University intends to release through routine disclosure; and*
2. *the timing of such release; and*
3. *a copy of UTAS' assessment procedure for applications for assessed disclosures of information.*

In answer to these questions:

1. *a list of the information you have sought is marked Annexure A;*

2. the University is presently working towards making information available to the public within the next month and due to the volume of information you have sought a more precise response is not possible at this stage; and

3. in processing applications for assessed disclosure under the RTI Act the University relies on the provisions of the Act and associated regulations, the Right to Information Manual and guidelines published by the Tasmania Right to Information Ombudsman, and on the considerations of the Ombudsman contained in relevant past decisions of the Right to Information Ombudsman. These are available via the Ombudsman's website:

<https://www.ombudsman.tas.gov.au/right-to-information/rti-publications>

...

Application 5 – Received 5 May 2022.

On 5 May 2022 you submitted a fifth application for assessed disclosure under the RTI Act.

The information sought was as follows:

"I request information relating to UTAS' refusal of three previous Right to Information applications that I made"

As described above, Tuesday 3 May 2022 and on Thursday 5 May 2022 you emailed Juanita O'Keefe requesting further information in relation to the processing of your requests for assessed disclosure of information. That same information is also the subject of your fifth application for assessed disclosure of information and that information has been provided to you in this letter. That information has therefore been provided to you apart from the RTI Act as contemplated by section 12 of the RTI Act.

If you are seeking information beyond what has now been provided, I note the following factors:

- Your application for assessed disclosure of information was submitted within two business days of your email request for this information;
- You were sent Juanita O'Keefe's automatic reply which indicated she was out of the office and therefore it was reasonable to expect it to take longer than usual for another officer of the University to receive your request and then respond to it;
- The volume of requests for assessed disclosure of information you have now submitted is five applications in the period between 21 March 2022 and 5 May 2022;
- You are requesting assessed disclosure on a decision in which you were advised by email sent by Juanita O'Keefe on 3 May 2022 that the reason for the refusal to accept your applications

was that the University had made a decision prior to the receipt of your 3 applications to make a routine disclosure of information related to the University's move from Sandy Bay into the Hobart CBD within the foreseeable future, and before the expiration of 12 months from the date of receipt. Your application for assessed disclosure of information relates to the reasoning for a decision to make information available to the public, noting you were seeking to have the same information provided to you by means of Right to Information; and

- *Following from point 4 above, given you have been advised that the University is presently endeavouring to make information on the transformation of the Southern Campus available to interested parties and the community, there is therefore minimal public interest in information relating to a decision to make a routine disclosure of information that you are interested in, and to do so is likely to be an unreasonable diversion of resources.*
- 9 On 14 June 2022, Mr Hogan applied to the University for internal review. That request to the University was headed *Evidence of Prior Decisions RTI Application* and included a summary that, *my application sought evidence of prior decisions cited as the basis for UTAS' refusal of three previous RTI applications that I had made*. It then went on to detail the applicant's issues with the original decision, relevantly:

I also lodged the Evidence RTI on 5 May. The principal thrust of this application was to seek evidence both that UTAS' decision to release information under routine disclosure applied to the information that was actually the subject of Applications 1-3 and that the decision (or decisions) was made before the applications were lodged.

As a secondary matter, I also sought information on how and when routine disclosure of the information that I sought in the three applications would be made by UTAS. Despite the wording of section 12(3)(c)(ii) of the Act, and advice provided in the Ombudsman's Manual on the Act (p27), Ms O'Keefe's emailed decision had failed to specify a "period of time" within which the information sought would be provided, only noting the date on which 12 months would elapse from the lodgement of each of the Applications 1-3.

...

On the kindest interpretation, Mr Perraton appears to have totally misunderstood what was actually being sought in the Evidence RTI. Thus he states:

*"Your application for assessed disclosure of information relates to the **reasoning** for a decision to make information available to the public, noting you were seeking to have the **same information** provided to you by means of Right to Information." [my bolding]*

This is quite simply incorrect. As I have indicated above, the Evidence RTI is primarily focused on obtaining evidence that a decision was made to release the material sought in Applications 1-3 prior to lodgment of those applications. Seeking evidence that decisions had been made to release material prior to the lodgment of applications is entirely different from seeking the material itself. The refusal of Applications 1-3 provided by Ms O'Keefe of 3 May could not have been made in good faith, in conformity with section 12(3)(ii) of the Act, unless evidence of prior decisions to release the information that was sought was readily available at that time of her email.

...

In sum, I believe that Mr Perraton's decision on my Evidence RTI fails to respond to the primary focus of the application, which should have been easily addressed if Ms O'Keefe's email of 3 May was soundly based. I therefore continue to seek evidence that a decision (or decisions) to release the information sought in Applications 1-3 was made prior to the lodgement of those applications. I look forward to your response.

(emphasis original)

- 10 On 27 June 2022, the internal review decision was released by Ms Jane Beaumont, a delegate under the Act for the University. Ms Beaumont's decision references two internal reviews that had been requested by Mr Hogan, but relevantly to Application 5 Ms Beaumont wrote:

I confirm that the University made a decision prior to the receipt of Applications 1, [2 and 3] to make a routine disclosure of information related to the University's move from Sandy Bay into the Hobart CBD within the foreseeable future, and before the expiration of 12 months from the date of receipt.

In early 2022 the communications strategy was to be as transparent as possible around the move to Hobart city and in doing so this would involve moving to an active disclosure scheme.

- 11 On 21 July 2022, by email Mr Hogan sought external review of the University's decision on what he called the Evidence RTI (previously called Application 5 by the University) being the request for information in the possession of the University that demonstrates the position taken to refuse the three prior assessed disclosure applications in reliance on s12(3)(c)(ii).
- 12 On 28 July 2022, Mr Hogan supplemented the email application by lodging an external review application with supporting information. He then lodged further submissions with my office on 3 August 2022 and on

8 August 2022 he provided a copy of a *short paper* he had written for the Save UTAS Campus group.

- 13 On 23 September 2022 my office wrote to the University to raise a number of issues in relation to this application and the original and internal review decisions released by the University. In that letter the University was directed to provide *better reasons* and issue a schedule of information, consistent with s47(1)(n) of the Act.¹
- 14 On 6 October 2022, Ms Beaumont, General Counsel for the University provided the better reasons. Relevantly, she advised that:

2. Ms O'Keefe's decision to refuse the three RTI applications on 3 May 2022 was based on a decision made prior to the receipt of the requests, specifically a decision made on 9 March 2022 by the Deputy Chief Operating Officer.

3. The decision was recorded in a file note regarding the approach for requests for information relating to the UTAS city move as follows:

Southern Campus move

Purpose is to record decision regarding approach for requests for information relating to the UTAS city move:

- 1. Following verbal discussions at Council regarding the need to be more transparent around the move into the city, where possible, UTAS will rely on routine and/or active disclosure for any requests for information related to the move from Sandy Bay into city.*
 - 2. Assessed disclosure is last resort - ie where possible UTAS will rely on routine or active disclosure for any information that relates to the move to the city.*
 - 3. UTAS will release relevant information on justification on the move into the CBD and anything else we want to make public within the next 12 months.*
 - 4. Southern Transformation will manage the review of requests and post information to the public website, and all requests for information are to be channelled via Southern Transformation in the first instance.*
- 15 Given a number of issues arising between the parties in relation to this request for information and some of Mr Hogan's other right to information requests with the University, on 13 October 2022 my Principal Officer – Right to Information, Ms Leah Dorgelo, and Ms O'Keefe met to discuss resolution of these matters. Such an approach is

¹ Section 47(1)(n) of the Act permits the Ombudsman to direct a public authority to provide better reasons for a decision, within a period of 10 working days, including if necessary a schedule of information relevant to the application.

consistent with my functions under s47. The University agreed to provide a fresh decision to Mr Hogan on his *Evidence RTI* matter.

- 16 On 8 December 2022, a fresh decision was released to Mr Hogan by Ms O'Keefe. Along with the fresh decision, Ms O'Keefe released the file note dated 9 March 2022 that had previously been issued with the better reasons.
- 17 After receiving the fresh decision, Mr Hogan maintained his application for external review. My office accepted the application under s45(1)(e) of the Act to review whether the University had conducted a sufficient search for information responsive to Mr Hogan's application for assessed disclosure.
- 18 On 5 May 2023, Mr Hogan provided further, consolidated submissions in support of his application. This was an 18 page document titled *UTAS, the Three Refusals and the Evidence RTI*, dated 4 May 2023 (extracted in Submissions below.) He expressed his view, at the end of his covering email, that:

...the File Note dated 9 March 2022 - even if it was available to Ms O'Keefe at the time - would not of itself have provided a sufficient basis for her refusal decision of 3 May 2022. It describes a process for RTI decision making. Evidence of a prior decision to release the material sought through routine disclosure would still have needed to be separately available.

- 19 On 13 July 2023, my office wrote to the University to invite a response to the concerns raised by the applicant about the sufficiency of searching undertaken.
- 20 Ms O'Keefe of the University responded on 3 August 2023, advising:

I confirm that we have conducted a further search and there are no further documents in existence referencing the decision of the Deputy Chief Operating Officer on 9 March 2022 regarding the approach for requests for information relating to the city move.

- 21 The University also provided a further Powerpoint presentation to the applicant regarding the University's *Transparency Project* for his information, though this was not within scope of his application.
- 22 I agreed to expedite Mr Hogan's application in accordance with my Priority Policy, as I was satisfied that it was a matter of broader public interest.

Issues for Determination

- 23 The issue for determination is whether there was an insufficiency in the searching for information responsive to the request pursuant to s45(1)(e) of the Act.

Relevant legislation

24 Relevant to this review is s45(1)(e) of the Act, a copy of which is attached in Attachment I.

Submissions

Applicant

25 Mr Hogan provided significant supporting information in relation to this application. I have had regard to the following for the applicant:

- a. assessed disclosure application, dated 5 May 2022;
- b. internal review application, dated 14 June 2022;
- c. external review application, dated 21 July 2022;
- d. external review submissions dated 28 July 2022, 3 August 2022 and 5 May 2023 *consolidating previous material*, with attachments; and
- e. various correspondence exchanged with my office.

26 In relation to the grounds for external review, the applicant submitted:

The Evidence RTI Application, I lodged on 5 May [2022], sought:

1. “*evidence that the decisions [to release the material sought in the three refused applications] were made prior to lodgment of the three applications*”, and related to the “*substance of all the information*” sought in those applications; and
2. “*details of how and when routine disclosure of all the information that I sought in the three applications will be made by UTAS.*”

Both in the initial decision by Mr Perraton, and the review decision by Ms Beaumont, UTAS failed to respond to the request for evidence of prior decisions. Mr Perraton seems to have confused the request for evidence of prior decision making with the detailed requests for information contained in the three applications that were refused (evidence of prior decision to release material could reasonably be expected to comprise no more than a couple of paragraphs).

Ms Beaumont stated that:

“I confirm that the University made a decision prior to the receipt of [the three refused applications] to make a routine disclosure of information related to the University’s move from Sandy Bay into the Hobart CBD within the foreseeable future, and before the expiration of 12 months from the date of receipt.

In early 2022 the communications strategy was to be as transparent as possible around the move to Hobart city and in doing so this would involve moving to an active disclosure scheme.”

A statement of decision to release “information”, so described, does not equate to evidence of a prior decisions to release specific material and does not meet the requirement of 12(3)(c) of the Act:

“(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 – [Mr Hogan’s emphasis]

(i)....

(ii) will become available, [Mr Hogan’s emphasis] 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.” [my bolding]

Moreover, Ms Beaumont did not provide evidence even of a general decision “to make a routine disclosure of information”.

As to how and when disclosure was to be made, in her refusal of the three applications on 5 May, Ms O’Keefe stated “I confirm that the University made a decision prior to the receipt of your 3 applications to make a routine disclosure of information related to the University’s move from Sandy Bay into the Hobart CBD within the foreseeable future, and before the expiration of 12 months from the date of receipt.”

In his letter of 16 May, Mr Perraton went further as to timing, stating:

“the University is presently working towards making information available to the public within the next month and due to the volume of information you have sought a more precise response is not possible at this stage”.

In her letter of 27 June, Ms Beaumont advised that information had been made public on UTAS’ website on 27 May that “provides information in relation to” the Council Minutes, Consultation and Urbis RTI Applications (but not the Overseas Visits RTI Application). Ms Beaumont also provided a list of “information relating to your RTI applications released to date” (with a downloadable copy of the listed documents provided in annexure to the covering email to her letter). She also referred

me to the Frequently Asked Questions on UTAS' website. However, this material is problematic in relation to the three refused RTI Applications. ...

- 27 Mr Hogan concluded by saying:

Neither Mr Perraton nor Ms Beaumont provided evidence of prior decisions to release the information that was the subject of the three refused applications. Ms Beaumont referred to a previous decision by UTAS to release information, but without specifying the information that UTAS had decided to release. Ms Beaumont did not provide evidence even of this decision.

...

There is some helpful material in Ms Beaumont's response to my internal review request. Overall, however, I believe that the response fell significantly short of the standards that might be expected of a senior decision maker in a major Tasmanian public institution, which should be modelling best practice behaviour.

As UTAS erred in refusing the three Applications under section 12(3)(c), I believe the appropriate course would be for it to promptly consider release of the material requested in these Applications.

- 28 In the consolidated information submitted on 5 May 2023, Mr Hogan made the following relevant submissions in response to the fresh decision (verbatim with original emphasis):

Ms O'Keefe's 'fresh decision' and the File Note raise a number of major issues:

1. It is clear that Ms O'Keefe has in effect been placed in the position of reviewing her own three refusals decision – this is entirely inappropriate.

2. Ms O'Keefe initially mentions "routine disclosure" in her decision but then proceeds to state:

*"The three applications were refused on the basis that their subject matter was captured by this decision on 9 March 2022 and that the **information would be released by routine or active disclosure.**"*

Ms O'Keefe did not mention active disclosure in her three refusals decision. Active disclosure is not covered by the refusal mechanism in section 12(3)(c)(ii) of the RTI Act and it would have been incorrect for Ms O'Keefe to refuse my application if active disclosure was considered to be part of the way to respond my three refused RTI applications. I

also note that neither Mr Perraton nor Ms Beaumont mentions active disclosure in any of their correspondence on the Evidence RTI.

3. The File Note sets out a process for dealing with RTI applications and it would not, in itself, have provided a basis for Ms O'Keefe to claim on 3 May 2022 that UTAS had already decided to make a routine disclosure of the information that I was seeking in my three applications. In other words, for Ms O'Keefe's decision to refuse the three applications to be soundly based, there would have needed to be evidence, in the form a second document or second set of documents, showing that UTAS' had planned routine disclosure of "**the information that is the subject of the application[s]**" within 12 months of the date of those applications.

4. Without evidence that "**the information that is the subject of the application[s]**", was to be provided by routine disclosure, Ms O'Keefe should have been led by the File Note to consider whether active disclosure would be warranted. Further, as I have already indicated, given that my detailed requests encompassed draft documents, and documents requiring third party consultation, and would also have involved consideration of the need for exemption, **Ms O'Keefe should ultimately have been led to conclude that there would be a need for assessed disclosure.**

5. If Ms O'Keefe (erroneously) relied on the File Note for the three refusals decision, why did it take UTAS seven months from when I submitted the Evidence RTI to provide the File Note to me?

6. I note that Mr Perraton showed no awareness of the File Note in his Evidence RTI decision and failed to engage with the request to provide the evidence for Ms O'Keefe's three refusals decision. Why?

7. Ms Beaumont, on the other hand stated:

*"I confirm that the University made a decision prior to the receipt of Applications 1, 3 and 4 [the three refused applications] to make a **routine disclosure** of information related to the University's move from Sandy Bay into the Hobart CBD within the foreseeable future, and before the expiration of 12 months from the date of receipt."*

As I have previously indicated, if Ms Beaumont was able to "confirm" that decision, she must have had evidence for doing so. Why did she not provide a copy of that evidence – the very thing I had requested - to me?

8. I believe that, given her senior position, Ms Beaumont should have realised that neither the File Note (if she had it to hand), nor any previous decision(s) on routine disclosure, could have justified Ms O'Keefe's three refusals decision given the terms of my requests and reinstated processes of assessed disclosure. Given that Ms Beaumont stated in the same letter as her Evidence RTI review decision that the Urbis report had not been commissioned by UTAS and therefore could not be made available (see Section 4), her decision on the Evidence RTI seems disingenuous at best. How could there be a prior decision to release a report that was not UTAS' to release?

*9. The terms of the File Note have not been met and more than twelve months after the third of my three refused applications, almost none of "**the information that is the subject of the application[s]**" has been publicly released by UTAS, or even provided to me, as I will show in Section 4.*

10. While the File Note seems to me to raise more questions than it answers for UTAS, I believe that the document itself also warrants serious scrutiny, given its late (re-)discovery.

11. The File Note Refers to UTAS Council discussion. I have reviewed the UTAS Council Minutes for the six months prior to 9 March 2022. There was only one discussion to which the File Note might have been referring. As I stated in an email to Ms Joanna Wiese of the Ombudsman's office on 17 February 2023:

"In the UTAS Council minutes of February 2022, there are points where an approach to handling of RTIs could logically have been discussed.

Given the thoroughness of the Minutes around these points and the fact that there is no mention of handling of RTIs, which would have been a major issue, I'm certain that handling of RTIs was not discussed at this meeting.

Now having read quite a lot of the 513 page set of UTAS Council Minutes, I also believe that if a new, radically different approach to RTIs was going to be discussed at the UTAS Council it would have been put on the agenda."

I attach a copy of the February 2022 Minutes, with the most relevant sections of the discussion highlighted (Attachment A, Items 2 and 3.6).

12. In my 30 years as a Commonwealth public servant, I never failed to put my name on any of the many file notes I wrote. I also cannot recall ever seeing a file note written by another officer that did not identify that officer. To write a file note, without a name on it, is contrary to its purpose, to provide a record, including for transparency and accountability purposes.

UTAS' [Deputy Chief Operating Officer] – the sole identifier of the author of the File Note at its date...

13. The format of the File Note is unclear. Was it an email? The File Note seems to be a pdf or jpeg type document. Why did UTAS simply not provide a photocopy of the original?

14. How was the File Note transmitted to RTI decision makers in UTAS and why has transmission data not been included with Ms O'Keefe's fresh decision?

15. How widely was the File Note transmitted to UTAS staff?

16. What information (such as meta data) is there to confirm the File Note (dated 9 March 2022) was not post-dated?

29 Mr Hogan ended those submissions with the following Summary/Conclusion:

On 5 May 2022, Ms O'Keefe refused three of my RTI applications on the basis that a decision had already been made by UTAS to release the material requested within 12 months of the date of the applications through routine disclosure.

As I did not have any right of review on that decision, I questioned the decision through submitting the Evidence RTI, as I did not believe it credible that UTAS could have made a decision to release information that met the terms of my applications through routine disclosure, given the detailed content and nature of my requests for information, before those applications had been received.

More than 7 months after the last of the three refused applications, in a fresh decision on the Evidence RTI, dated 8 December 2022, Ms O'Keefe purported to have found evidence justifying the three refusals – a File Note dated 9 March 2022.

While the credibility of this document warrants scrutiny it does not provide any evidence to support refusal of the three applications.

It describes a process to be adopted in relation to "requests for information" rather than providing evidence of a prior decision to release the specific material that I requested – a second document or set of documents would have been required to justify the three refusals decision.

UTAS seems to have missed the point that, if anything, the File Note highlights the fact that UTAS should have completed/proceeded to assessed disclosure of the three refused applications.

The claimed existence of the File Note also raises major questions regarding both the initial decision and internal review decision made on my Evidence RTI. For example, if Ms Beaumont believed that the File Note, or other evidence available to her, provided an adequate basis for the three refusals decision, why did she not provide it with her internal review decision.

'The proof is in the pudding'. More than 12 months after I submitted the last of the three refused applications, UTAS has still not released the information I requested in those applications, apart from some minor and flawed exceptions.

Ms O'Keefe's three refusals decision (incorrectly) denied me the information that I sought and also denied me any opportunity to exercise review rights in seeking that information. Mr Perraton and Ms Beaumont then conspicuously failed to address the terms of my Evidence RTI in their initial and internal review decisions respectively.

Ms O'Keefe's three refusals decision, and Mr Perraton's, Ms Beaumont's and Ms O'Keefe's handing of the Evidence RTI, raise major questions about UTAS' conduct under the Right to Information Act 2009 and, indeed the Ombudsman Act 1978. I would appreciate the Ombudsman's office using all powers available to it to consider this matter.

I would also appreciate the Ombudsman's office using all powers available to it to ensure that UTAS responds to the three refused applications as fully as possible, as soon as possible, given that they were incorrectly refused and that my information requests remain almost entirely unmet.

The University

- 30 The University did not provide submissions beyond the reasoning in its decisions. I have set out the reasoning of the original, internal review and better reasons in the Background above, so I will not repeat that here.
- 31 In Ms O'Keefe's fresh decision she set out:

The Evidence RTI resulted from a decision by UTAS to refuse three applications for assessed disclosure under section 12(3)(c) i) [sic] on the basis that a decision had been made before receipt of the application, that the information would become available as a routine disclosure within a period of time specified by the public authority but not exceeding 12 months from the date of the application.

...

I have conducted a search of all relevant material that could fall within the scope of the request and taken the following material into account in making my decision:

- All relevant information provided by our Southern Transformation team, Vice-Chancellor's office, and any other parts of the office of the Chief Operating Officer;
- The content of the documents that fall within the scope of your request;
- Decision - *Forestry Tasmania v Ombudsman [2010] TASSC 39*;
- The RTI Act (specifically sections 7, 22, 33, 35-39, Schedule 1); and
- The guidelines and manual issued by the Tasmanian Ombudsman under section 49 of the RTI Act.

...

The decision to refuse the three RTI requests (applications 1, [2 and 3]) was based on a decision made on 9 March 2022 to make a routine disclosure of information related to the University's move from Sandy Bay into the Hobart CBD within the foreseeable future, and before the expiration of 12 months from the date of receipt. This decision was recorded in a file note dated 9 March 2022.

In early 2022 the communications strategy was to be as transparent as possible around the move to Hobart city and in doing so this would involve moving to a routine and/or active disclosure scheme.

The three applications were refused on the basis that their subject matter was captured by this decision on 9 March 2022 and that the information would be released by routine or active disclosure.

Schedule 2 of this letter contains information that can be released in relation to your application.

It is my view that disclosure of the information provided in Schedule 2, is in the public interest.

Analysis

Sufficiency of search

32 Mr Hogan has raised very legitimate issues in relation to the approach taken by the University and these have been subject to a complaint under the *Ombudsman Act 1978*, which is a separate process. The University acknowledged that it fell into error in its approach to the use of

s12(3)(c)(ii) and that this is not permitted to be used in response to an active disclosure request.

- 33 Section 12(3)(c)(ii) is not, however, the matter which is under review here though it is clearly closely related. The extent of my jurisdiction in relation to this application is limited to an examination of whether the University conducted a sufficient search for information responsive to the assessed disclosure request for *evidence of prior decisions cited as the basis for UTAS' refusal of three previous RTI applications that I had made*.
- 34 The University has responded by saying it does not have any further information responsive to Mr Hogan's request. Despite being requested, it did not provide any written search record to detail the searches undertaken.
- 35 It is disappointing that the University did not keep adequate search records in accordance with my *Guideline in Relation to Searching and Locating Information* (the Guideline).² Particularly relevant here, is the requirement from the Guideline that *a written record should be retained of all searches carried out in relation to the application for assessed disclosure*.
- 36 The onus is upon the public authority to ensure compliance with the requirements of the Act and the Guideline to undertake and document searches for information. This is especially important when the public authority claims there is nothing or nothing further responsive to a request for information, to show that this a reasonable conclusion following effective searching.
- 37 Having regard to the full background, I am not satisfied that the University's initial searching for information was sufficient. However, following additional efforts and the fresh decision, I am satisfied that the University ultimately conducted an adequate search. It has cooperated with this review and there is no utility in requiring any additional searching at this stage.

Other matters

Decision making and statement of reasons

- 38 Having regard to each of the decisions made by the University in response to Mr Hogan's assessed disclosure request, I consider that there was a failure to properly consider the substance of the request. It was apparent that he was not seeking a review of the refusal decisions but was seeking information that would evidence and support the University's reliance on s12(3)(c)(ii). It is unfortunate that this occurred at

² Guideline 4/2010, available at www.ombudsman.tas.gov.au/right-to-information/rti-publications.

the original decision making stage, but it was aggravated by the approach taken at the internal review stage.

- 39 More could have been done early in the progress of this application to address the legitimate issues being raised. Mr Hogan did not receive a statement of reasons fully addressing the relevant matters until a fresh decision was provided following the intervention of my office.

Approach to multiple requests for information

- 40 I accept that the University was managing several concurrent active assessed disclosure applications from Mr Hogan and some confusion may have occurred due to this. However, the Act does not permit for the modification of the approach taken due to multiple applications being received. Each assessed disclosure application must be assessed on its own merit.
- 41 The University should have been expected that there would be an increased interest in information held by it in relation to the relocation proposal. The fact that multiple requests were lodged by a nominated representative for a community group, rather than many individuals from that group lodging information requests, should not have changed the University's process regarding the processing of those applications. Provided they do not constitute an unreasonable diversion of a public authority's resources, there is no limit in the Act to the number of applications a person may make.

Internal procedures for relocation proposal information

- 42 I note that in the course of the proceedings my office was advised by the University about changes being implemented:

Change in University policy

As recently discussed with you, the University has implemented a change in process to deal with requests for information in relation to the move into the Hobart CBD. In early 2022 there were discussions at Council level which have led to a change in process, whereby requests for information related to the move were to be dealt with, where possible by routine, required or active disclosure and requests for assessed disclosure were to be utilised as a last resort. The need for more transparency in decision making was recognised and this has been actively implemented into operations. This is a significant change in process, as our previous process had managed RTI requests by assessed disclosure.

As I also explained when we met, the University is in the process of implementing a Transparency project across the organisation which will see increased transparency of decision making as a key output.

- 43 I was also provided with a copy of the Transparency project powerpoint presentation prepared by the University.
- 44 Any measures to release information consistent with the objectives of the Act are to be encouraged, however, such approaches cannot be seen to modify or remove a person's legally enforceable right under the Act (s7). Caution and diligence are necessary to ensure that there is no departure from the Act as a consequence of internal practices or decision making.
- 45 Mr Hogan raised justified concerns regarding the incorrect use of s12(3)(c)(ii) to refuse his applications and I note again that the University has acknowledged that it used an incorrect approach. While s12 is not the subject of this external review, I take this opportunity to urge the University to ensure that its policies regarding transparency match its actions and it is genuinely attempting to release the maximum amount of official information in accordance with the object of the Act.

Preliminary Conclusion

- 46 For the reasons given above, I determine that the University did not initially undertake a sufficient search for information responsive to this request, but had taken appropriate steps to rectify this by the conclusion of the external review.

Further Considerations

- 47 On 19 June 2024, consistent with s48(1)(b) of the Act, Deputy Ombudsman, Ms Clare Hopkins, made the above preliminary decision available to both parties with the opportunity for them to provide further input, if any, prior to finalisation of the decision.
- 48 On 3 July 2024, Ms Danielle Stokes, Legal Assistant from the University, advised that no further input would be provided.

Applicant submissions

- 49 On 4 July 2024, Mr Hogan provided further submissions which in part address the preliminary decision and in part address the separate complaint process under the Ombudsman Act and his ongoing concerns about the approach taken by the University to the release of information. Given the limited scope of this external review application I have not replicated those submissions in full.
- 50 Relevantly extracted, Mr Hogan wrote (footnotes omitted):

However, the proposed relocation of the University of Tasmania's (UTAS) southern campus from Sandy Bay to the Hobart CBD is, as you have affirmed in your three adverse decisions against UTAS in respect of external review applications by me, a matter of high public interest and importance. In regard to the matters on which I am

commenting in this letter, I am concerned that UTAS is in effect being rewarded for seriously bad behaviour (and/or incompetence) with regards to Right to Information (RTI), and continued denial of important information to the public, with only a relatively light ‘slap on the wrist’.

- 51 The submissions continue, setting out the *background and current situation*. This largely restates the background (as set out above) under the parallel matters under the Act and the Ombudsman Act. Mr Hogan emphasises his dissatisfaction with the options for progressing those related matters and his view about the outcomes (emphasis original):

*As you can imagine, coming over two years after I lodged the three refused applications with UTAS, **this is an extremely disappointing response**, especially as the documents I requested remain of vital public interest and importance.*

- 52 The submissions then set out ongoing concerns that Mr Hogan holds in relation to the prior adverse external review decisions that I have made against the University. Indicating that in his opinion, collectively taken, *there is pattern of UTAS systematically obstructing and delaying RTI requests....I also request that criticism of UTAS in the Preliminary Decision on the Evidence RTI be more clearly articulated and strengthened in the final decision.*
- 53 Under the heading *Section 5: The Preliminary Decision on the Evidence RTI* Mr Hogan acknowledges the limited scope of this decisions and that it has *to be limited (as set out in paragraph 33), and that the decision is in my favour.*
- 54 Throughout the submissions matters are addressed that are outside the scope of this external review. Where that has occurred, those submissions will be considered as may arise in the course of parallel applications or complaints. I cannot properly have regard to those matters in this decision.
- 55 I note, summarily, that Mr Hogan’s position is that the University:
- a. *...fell far short of providing the necessary evidence to support the refusal decisions and that at least a second document, or set of documents, would have been required to (even superficially) legitimise that decision, even assuming there were no issues warranting assessed disclosure in the three refused applications; and*
 - b. *should be further challenged on the approach and position taken.*

- 56 Mr Hogan concluded his submissions as follows:

I appreciate that each and every request for external review of RTI applications, and complaint under the Ombudsman Act 1978, should be considered on its individual merits. However, from UTAS' pattern of behaviour – apparent in your four external review decisions to date against UTAS, the Preliminary Decision on the Evidence RTI and in UTAS' dealings with me - I believe it is clear that UTAS willfully engages in obstruction and delay of RTI applications, in a manner that should be totally unacceptable for a public institution.

Accordingly, I believe that – in the matters I have raised above - what UTAS says has been taken too readily at face value by the Ombudsman's Office and I am concerned that the Preliminary Decision on the Evidence RTI provides only a relatively light slap on UTAS' wrist for an "error" of legislative interpretation and deficient search procedures, where - at best - UTAS was seriously incompetent and uncooperative.

- 57 On 10 July 2024 Mr Hogan provided a further email of corrections and comments in response to the preliminary decision.
- 58 I equally considered the matters raised by him in that email but aside from some minor drafting corrections, there were no matters requiring further discussion here.

Further analysis

- 59 I carefully considered all of the matters raised by the applicant in his responses to the preliminary decision. Much of the emphasis in the submissions replicates matters already raised in the course of the external review, which I have already addressed in the previous Analysis.
- 60 Section 12(3)(c)(ii) is not reviewable under the Act and Mr Hogan has a related complaint about the University's administrative action under the Ombudsman Act which is before me but is not appropriate to respond to in this decision.
- 61 I am satisfied that Mr Hogan has now received the evidence relied upon by the University to refuse his previous information requests under s12(3)(c)(ii), the adequacy of this evidence is not a matter I can deal with in this external review. I am further satisfied that there are no other findings I could make in respect of this external review application.
- 62 Accordingly, my decision remains unchanged.
- 63 As disappointed as Mr Hogan may be with the outcome and the conduct of the University in its handling of his assessed disclosure applications,

there is nothing further that it is reasonable to require of the University in relation to this request for information.

- 64 I do acknowledge that the consequence of the University's original approach has resulted in delay to Mr Hogan. Accordingly, the University is reminded of the enforceable right to information that exists under the Act (s7) and the statutory objectives pursuant to s3. It is a matter of primacy that those provisions, supporting a push model of access to information, are advanced.

Conclusion

- 65 For the reasons given above, I determine that initially the University did not undertake a sufficient search for information responsive to the assessed disclosure request. By the conclusion of the external review the University had taken appropriate steps to rectify the situation.
- 66 I apologise to the parties for the delay in finalising this matter.

Dated: 16 July 2024

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

Richard Connock
OMBUDSMAN

Attachment 1**Relevant legislation****Section 45 Other applications for review**

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

- (a) the decision which may otherwise be the subject of an application for an internal review under section 43 has been made by a Minister or principal officer of a public authority and as a consequence the applicant cannot make an application under section 43 ; or
- (ab) the decision relates to an application made to a Minister in accordance with section 13 and is a decision in relation to which a written notice must be given under section 22 ; or
- (b) a Minister or public authority has made a decision that the information requested was not in existence on the day the application was made; or
- (c) a Minister or public authority has made a decision to give access other than in the form requested by the applicant, except where to do so would breach copyright; or
- (d) a Minister or public authority has decided that the information requested is not in the possession of the Minister or public authority; or
- (e) following a decision being made by a Minister or public authority, the applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the Minister or public authority; or
- (f) notice of a decision on an application under section 13 has not been received by the applicant and the period specified in, or calculated under, section 15 has elapsed.

(1A) A person who is an external party may apply to the Ombudsman for a review of –

- (a) a decision if the decision, which may otherwise be the subject of an application for an internal review under section 43(2) or (3) , has been made by a Minister or principal officer of a public authority and as a consequence the external party cannot make an application under section 43 ; or
- (b) a decision to provide, in accordance with an application made to a Minister in accordance with section 13 , information –
 - (i) relating to the personal affairs of the person; or
 - (ii) that is likely to expose the person to competitive disadvantage.

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

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

- (b) a decision has been made on a review under section 43 and a person, other than the person who applied for the review, is adversely affected by the decision.
- (3) If a notice of a decision has been given under this Act, an application referred to in subsection (1) must be made within 20 working days of the day on which the applicant received notice of the decision.
- (4) If a notice of a decision to which subsection (1A) relates has been given under section 36(3) or section 37(3) to an external party, the external party may only make an application under subsection (1A) in relation to the decision within 20 working days of the day on which the external party received the notice.



Right to Information Act Review Case Reference: R2309-003

Names of Parties: Roland Browne and Department of Health

Reasons for decision: s48(3)

Provisions considered: s27, s35, s36

Background

- 1 In May 2020, a new helipad at the Royal Hobart Hospital (RHH) began operation.
- 2 Mr Roland Browne (the Applicant) is a legal practitioner with an interest in the community of Glebe, Tasmania, which is an inner suburb of Hobart.
- 3 On 15 March 2023, Mr Browne made an application for assessed disclosure to the Department of Health (the Department) under the *Right to Information Act 2009* (the Act) seeking information regarding helicopter operations at the RHH between 1 January 2021 and 1 April 2023. Specifically, Mr Browne sought:
 - (1) ... *Communications about helicopter use of the RHH helipad between the Department of Health (including the Ambulance Service) and the operators of the 2 helicopters using the helipad, relating to:*
 - (a) *flight paths and changes to flight paths;*
 - (b) *noise and control of noise generated by helicopters;*
 - (c) *complaints about helicopter noise.*
 - (2) *Communications between the Department of Health (including the Ambulance Service) and the office of the Minister for Health relating to (a), (b) and (c) above.*
- 4 On 7 June 2023, after a negotiated extension of time, a Senior Legal Advisor – Right to Information, a delegate under the Act for the Department, released a decision. The delegate released 149 pages of information to the Applicant in whole or in part and relied upon the following sections of the Act to exempt some information within these pages:
 - Section 27 – Internal briefing information of a Minister;
 - Section 35 – Internal deliberative information; and
 - Section 36 – Personal information of person.

- 5 On 17 June 2023, Mr Browne emailed the Department and sought internal review of the decision.
- 6 On 31 August 2023, a Senior Legal Officer within the Department, another delegate under the Act, released the internal review decision. The delegate determined to *generally accept and adopt the reasoning* of the original decision maker in relation to s35 and s36 of the Act. However, they assessed a further four pages of information and released some information contained in the 149 pages originally assessed, no longer relying on s27 and s36 exemptions in some instances.
- 7 On 4 September 2023, Mr Browne sought external review, and his application was accepted pursuant to s44 of the Act.

Issues for Determination

- 8 I must determine whether the information not released by the Department is eligible for exemption under ss 27, 35 and 36, or any other relevant section of the Act.
- 9 As ss35 and 36 are contained in Division 2 of part 3 of the Act, part of my assessment is subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under these sections, I am then required to determine whether it would be contrary to the public interest to release it, having regard to, at least, the matters contained in Schedule 1 of the Act.

Relevant legislation

- 10 Copies of ss27, 35 and 36 are at Attachment A
- 11 Copies of s33 and Schedule 1 are also attached.

Submissions

Applicant

- 12 In his request for internal review, Mr Browne submitted:

I seek a review of the decision in so far as it applies the public interest test. [The Department's original decision maker] has applied the test in favour of the agency in circumstances where a correct application of the test ought find in favour of release. I also seek review of the conclusions as to the internal briefing information and deliberative information. Obviously, I cannot address the errors of approach by reference to the documents as I have not seen them. But the conclusions in [the original decision] are each too favorable [sic] to the Agency in circumstances where there is an enforceable right to the information.

- 13 Mr Browne sought external review *primarily on the grounds upon which I sought an internal review.*

Department

- 14 The Department was not required to provide specific submissions in response to this external review, as it had provided its reasoning in its decisions. Extracts of these decisions are set out below.

- 15 In relation to s27, in the original decision the delegate noted:

I am satisfied the briefings provide an opinion, advice and recommendations prepared by an officer of a public authority, being the public authority. ...

I am also satisfied that this information has been prepared in the course of, or for the purpose of, providing the Minister for Health with a briefing in connection with the official business of the public authority and the Minister, and is also in connection with the Minister's parliamentary duty. ...

...

In terms of s27(4) I note the briefings contain factual information, but I consider it is inextricably linked to the other information, such that its disclosure would reveal the nature or content of the opinion, advice or recommendations. It is for these reasons I find the information to be exempt.

- 16 In the internal review decision, the delegate amended this determination:

Upon reviewing the briefing for the Minister, I consider the information in the ten dot points provide background and supplementary information relating to the subject. There is advice and an opinion partially in dot point four, but this is not, in my view, inextricably linked to the other information.

My decision is to disclose in full nine of the ten dot points and part of dot point four. I adopt the reasoning of the delegate at first instance in regard to s36 for the names of the officers that prepared the briefing.

- 17 In relation to s35, the original decision maker noted (footnotes omitted):

The expression deliberative processes in s35 refers to pre-decisional thinking processes within a public authority as it moves towards the making of a decision or towards embarking on a course of action. This thinking generally refers to the process of weighing up or evaluating competing arguments or considerations – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

The deliberative process must relate to the functions of a public authority or minister. The functions of a public authority include both policy making and the processes undertaken in administering or implementing a policy. The functions also extend to the development of policies in respect of matters that arise in the course of administering a program. The non-policy decision making processes required when carrying out agency, ministerial or governmental functions, may also be deliberative processes.

...

To be satisfied that this information is exempt under s35(1) specifically, consideration must be given that it consists of opinion, advice or recommendation prepared by a public officer in the course of, or for the purposes of the deliberative processes of a public authority and, amongst other things, that it does not contain purely factual information.

...

The information consists of a series of email exchange [sic] between officers of a public authority and third parties discussing the amendment to the helicopters flight plan. I am satisfied the information has been generated by officers of public authorities for the purpose of providing advice and as a record of consultations. The email exchanges forms [sic] part of the deliberative process comprising exchange of views about a draft while moving towards a determined outcome. The information is for the deliberative process comprising advice and as a record of consultation is sufficient to meet the requirement of s35(1).

... While I am satisfied the emails written by a public officer do contain some factual information, I am not satisfied that it is sufficiently separate from the deliberative material to be considered purely factual information for the purposes of s35.

- 18 In the internal review decision, the delegate accepted and adopted this reasoning.
- 19 In relation to s36, the original decision maker reasoned (footnotes omitted):

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

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

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

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

... In addition to the statements in 'BA', the disclosure of the identity of officers now has much greater privacy impacts than in the past. Before the broad community use of social media, the disclosure of an officer's name on a document might have permitted an applicant to determine an individual's telephone number or address. Today, an individual's identity may be connected effortlessly with a vast range of personal information available through social networks, such as: photographs; friends' and family members' identities and photographs; employment histories; social activities and interests; personal opinions, including political opinions, and so on.

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

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

- 20 In the internal review decision, the delegate accepted and adopted this reasoning. However, noting that Mr Browne had been included in some email correspondence and is involved with the Glebe Residents' Association, they did not rely upon s36 to exempt this correspondence.

Analysis

- 21 The Department's internal review assessed 153 pages of information, which were all released in whole or in part. It provided this information in a single collated document to aid this review. For ease of reference, in my analysis I will

use the Department's page numbering in this collated document to refer to the information.

Section 27 – Internal briefing information of a Minister

22 Section 27 of the Act relevantly provides that:

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

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

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

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

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

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

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

...

- 23 The Department has applied s27 to exempt part of a briefing note entitled *Dot points for Minister - Subject: Royal Hobart Hospital Helipad*. The briefing note comprises 10 dot points on page 152 – 153 with the only redaction being the second sentence of the fourth dot point. There is no dispute that the document in question was prepared by an officer of a public authority in the course of, or for the purpose of, providing the Minister with a briefing in connection with the Minister's parliamentary duty.
- 24 When considering whether the redacted information is purely factual, I refer to *Re John Edward O'Brien Waterford and the Treasurer of the Commonwealth of Australia* where the Administrative Appeals Tribunal (AAT) observed that the word *purely* in this context has the sense of simply or merely and that the material must be factual in quite unambiguous terms¹.

¹ [1984] AATA 518 at [14].

- 25 When considering whether the redacted information is opinion, I note the word *opinion* is not defined in the Act, so I turn to the ordinary meaning of the word. The Macquarie Dictionary² defines opinion as:
1. *judgement or belief resting on grounds insufficient to produce certainty.*
 2. *a personal view, attitude or estimation ...*
 3. *the expression of a personal view, estimation, or judgement...*
- 26 On page 152, the fourth dot point concerns the contents of a letter sent by Mr Kerry Burns to Minister Rockliff on 21 June 2021, in particular regarding noise logging data. Mr Burns in his letter describes the data as being compiled by professional noise engineers.
- 27 The second sentence of the dot point has been claimed to be exempt by the Department. While the sentence in question may be described as a conclusion drawn from the letter, I am satisfied that the conclusion is speculative and so remains within the definition of opinion. The sentence is therefore exempt under s27 and is not required to be released to Mr Browne.
- 28 Section 27 is not subject to the public interest test.

Section 35 – Internal deliberative information

- 29 For information to be exempt under this section, I must be relevantly satisfied that it consists of:
- an opinion, advice or recommendation prepared by an officer of a public authority; or
 - a record of consultations or deliberations between officers of public authorities.
- 30 When one of those limbs is met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative process relating to the official business of the Department.
- 31 The information is not exempt if it is:
- purely factual information;
 - a final decision, order or ruling given the exercise of an adjudicative function, or a reason which explains such a decision, order or ruling; or
 - information that is older than 10 years.
- 32 The meaning of the phrase in the course of, or for the purpose of, the deliberative process was considered in *Re JE Waterford and Department of Treasury (No 2)*³. The AAT adopted the view that this was an agency's

² www.macquariedictionary.com.au accessed on 1 October 2024.

³ [1984] AATA 67 at [58].

thinking process – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

- 33 If I am then satisfied that the information is for a deliberative purpose related to official business, I must have regard to the public interest test in s33 of the Act.
- 34 The Department considered the operation of s35 in detail in the context of a series of email exchanges between *officers of a public authority and third parties discussing the amendment to the helicopters [sic] flight plan*. However, in the schedule of documents released after internal review, it only relied upon s35 to exempt one sentence, on page 26, in an email between two members of Ambulance Tasmania.
- 35 The sentence in question appears to be a light-hearted aside which bears no relation to the official business of the Department. As such, there is no need to consider the public interest test as the information is not exempt under s35 and the sentence should be released to Mr Browne.

Section 36 – Personal information of a person

- 36 The Department relied upon s36 to exempt certain information on 28 separate pages as personal information. I note that the pages identified on the supplied schedule of documents do not correlate with the actual page numbers in all cases where s36 has been applied. For avoidance of doubt, I will refer to the actual page numbers.
- 37 Section 5 of the Act defines personal information as:

any information or opinion in any recorded format about an individual—

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

- 38 The Department has identified information of this kind, such as names, position titles, email addresses and phone numbers of public officers and staff from third party organisations. It is clear that the information falls within the definition of personal information in s5 of the Act and the persons concerned clearly have not been dead for more than 25 years. I consider the information to be *prima facie* exempt under s36 of the Act.

Public interest test

- 39 That the information may be considered personal information does not preclude it from release if doing so would not be contrary to the public interest.

Public officers

- 40 On numerous occasions, the Department found the names and contact details of public authority staff exempt under s36 of the Act. As I have explained in previous decisions, the names of public officers performing their regular duties are not usually exempt under s36. It is standard Australian practice that the

personal information of public servants which relate to the performance of their regular duties (such as their name, signature, position information and work contact details) is not exempt from release unless there are specific and unusual circumstances which justify such an exemption. Whether a public service employee is a current or former employee is irrelevant to the assessment under s36 of the Act.

- 41 The exception to this practice is direct and mobile phone numbers and direct emails of Department employees, which I have consistently found eligible to be exempt under s36 where these details are not routinely provided to the public. I am satisfied that there is potential for harm with the release of this information as it is valid for public authorities to limit the release of direct contact numbers and emails of staff to ensure public enquiries are able to be directed through appropriate channels.
- 42 It is vital for accountability and proper scrutiny that public servants at all levels should not be shielded from identification when they are undertaking their regular duties, unless specific justification for this is present. No arguments were advanced by the Department as to why the information of the specific officers should be exempt. The relevant documents appear to be routine and it is not apparent why the release of the authors' names would expose staff to any particular risk.
- 43 The Department considered and quoted from the Australian Information Commissioner's 2014 decision in '*BA*' and Merit Protection Commissioner⁴, which considered an application for the release of an application for promotion within the Commonwealth Public Service in the context of the *Freedom of Information Act 1982* (Cth). The Department is of the view that disclosure of information to an applicant is, in effect, disclosure to the world at large because no limitations can be placed upon the use of the information, and it is concerned about the misuse of released information.
- 44 I consider the Department's position on this matter lacks some nuance, as it must be cautious to ensure that the primacy of the s7 right to information in the Act is respected in its assessments. This is consistent with other jurisdictions, such as in the 2024 decision of *Alcoa of Australia Ltd and Commissioner of Taxation (Freedom of Information)*⁵, in which the AAT acknowledged that there are no limits on what an applicant may do with released documents, but also drew attention to guideline 3.36 issued by the Office of the Australian Information Commissioner (OAIC), which relevantly provides:

... it would be incorrect for an agency to proceed on the premise that disclosure under the FOI Act is always the same as 'disclosure to the world at large.' ... Agencies should ensure that each case is examined on its own merits when deciding whether disclosure of the information would be unreasonable...

⁴ [2014] AICmr 9 (30 January 2014).

⁵ [2024] AATA 423 (9 February 2024) at [110].

45 Further, the OAIC:

... remains of the view that generally it will not be unreasonable to disclose the names and contact details of public servants because this information only reveals that they were performing their public duties. The Information Commissioner considers there are public interest factors, including transparency and accountability of public servants, which favour disclosure of this kind of information.⁶

- 46 The Department identified Schedule 1, matter (p) – *whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff* – as weighing against disclosure because if officers become aware that their communication and comments are attributed to them, they may not be as open and frank in their communications as they otherwise would.
- 47 I do not agree. The proposition that professional public officers would not properly perform their duties if their comments were to be publicly attributed to them is not one I can accept.
- 48 I acknowledge the Department's concern regarding the potential for misuse of personal information, particularly in relation to social media. However, the clear intent of Parliament is set out in s7 of the Act, which provides that *a person has a legally enforceable right to be provided, in accordance with this Act, with information in the possession of a public authority or a Minister unless the information is exempt information.*
- 49 Accordingly, in the absence of specific and unusual circumstances and with the exception of contact details not routinely provided to the public, I am not satisfied that any personal information of public officers is exempt under s36 and it is to be released to Mr Browne.

Personal information of others

Rotor-Lift Aviation

- 50 The Department has claimed the names of three staff at Rotor-Lift Aviation, as well as all their contact details, are exempt under s36. The Department has considered the public interest test and identified, in relation to third parties, that Schedule 1 (m) – *whether the disclosure would promote or harm the interests of an individual or group of individuals* - to be relevant and weigh against disclosure. The Department reasoned that *the mere fact that disclosure of the information could create apprehension in the mind of the person concerned is enough to render disclosure unreasonable.*

⁶ Position paper entitled *Disclosure of public servant details in response to a freedom of information request*, available at <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/guidance-on-handling-a-freedom-of-information-request/handling-personal-or-business-information/disclosure-of-public-servant-details-in-response-to-a-freedom-of-information-request> accessed 1 October 2024.

- 51 Again, I do not agree. Rotor-Lift Aviation was established in 1991 and has become a significant operator in the Tasmanian aviation sector, with company information available on a website,⁷ as well as having a social media presence confirming the company's role in emergency and medical services.
- 52 The Department has redacted the names and all contact details of three senior staff of Rotor-Lift. These staff not only have a professional online presence, but the information in question was created in their professional capacities. It is not apparent how release of their names and position titles, along with the business contact details of Rotor-Lift, could create any apprehension or adversely impact their interests. I also note that under s33 of the Act, the relevant test is not whether disclosure would be unreasonable, but whether disclosure would be contrary to the public interest. Accordingly, with the exception of direct contact details, the information of Rotor-Lift staff on pages 1, 13, 14, 15, 16, 17, 20, 21, 25, 31 and 50 is to be released to Mr Browne.

Vos Group

- 53 The Department released the contents of a series of emails discussing the issue of a crane on a building site which impacted the operations of helicopters approaching the RHH, but redacted the name, position title and contact details of a staff member of Vos, except on page 31 where his name and email address has been released. As this information has already been released and the individual has a professional online presence confirming his role at Vos Group, there is no utility in exempting the information on pages 14, 15, 16, 17, 18, 31 and 32 and it is to be released to Mr Browne.

Other redactions

- 54 The Department has claimed two email addresses are exempt under s36 on pages 17 and 18, but released these on page 31. As the information has already been released, the relevant redacted on pages 17 and 18 is not exempt under s36 and should be released to Mr Browne.
- 55 The Department has redacted a single word on page 100 and again on page 140. There is no apparent reason for this, and pursuant to s47(4), the onus is on the Department to show that the information should not be disclosed. As the Department has provided no explanation, I determine that the onus has not been discharged and the word is to be released to Mr Browne on both pages.

Preliminary Conclusion

- 56 For the reasons set out above, I determine that:

- the exemption claimed pursuant to s27 is affirmed;
- the exemption claimed pursuant to s35 is set aside; and
- exemptions claimed pursuant to s36 are varied.

⁷ About Us, www.rotorlift.com.au, accessed on 2 October 2024.

Response to the Preliminary Conclusion

- 57 As the above Preliminary Decision was adverse to the Department, it was made available to it on 7 November 2024 to seek its input prior to finalisation, in accordance with s48(1)(a) of the Act
- 58 On 4 December 2024, Mr Dale Webster, Secretary of the Department, provided a response. Mr Webster accepted the proposed findings in my decision but made a submission regarding the release of the name of one employee of the Department.
- 59 I have considered Mr Webster's submission and incorporated it in my decision. As it does not affect the substance of the decision, my findings remain unchanged.

Conclusion

60 Accordingly, for the reasons given above I determine that:

- the exemption claimed pursuant to s27 is affirmed;
- the exemption claimed pursuant to s35 is set aside; and
- exemptions claimed pursuant to s36 are varied.

Dated: 4 December 2024

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

Richard Connock
OMBUDSMAN

Attachment A

Relevant legislation

Section 27 - Internal briefing information of a Minister

- (1) Information is exempt information if it consists of –
 - (a) an opinion, advice or a recommendation prepared by an officer of a public authority or a Minister; or
 - (b) a record of consultations or deliberations between officers of public authorities and Ministers –
in the course of, or for the purpose of, providing a Minister with a briefing in connection with the official business of a public authority, a Minister or the Government and in connection with the Minister's parliamentary duty.
- (2) Subsection (1) ceases to apply after the end of the period of 10 years commencing on the date of the creation of the information referred to in that subsection.
- (3) Subsection (1) does not include information solely because it –
 - (a) was submitted to a Minister for the purposes of a briefing; or
 - (b) is proposed to be submitted to a Minister for the purposes of a briefing –
if the information was not brought into existence for submission to a Minister for the purposes of a briefing.
- (4) Subsection (1) does not include purely factual information unless its disclosure would reveal the nature or content of the opinion, advice, recommendation, consultation or deliberations of the briefing.
- (5) Nothing in this section prevents a Minister from voluntarily disclosing information that is otherwise exempt information.

Section 35 - Internal deliberative information

- (1) Information is exempt information if it consists of –
 - (a) an opinion, advice or recommendation prepared by an officer of a public authority; or
 - (b) a record of consultations or deliberations between officers of public authorities; or
 - (c) a record of consultations or deliberations between officers of public authorities and Ministers –
in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.
- (2) Subsection (1) does not include purely factual information.
- (3) Subsection (1) does not include –
 - (a) a final decision, order or ruling given in the exercise of an adjudicative function; or
 - (b) a reason which explains such a decision, order or ruling.
- (4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 36 - Personal information of person

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

(2) If –

- (a) an application is made for information under this Act; and
- (b) the information was provided to a public authority or Minister by a third party; and
- (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party –
the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –
- (d) notify that person that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information that has been applied for; and
- (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

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

(4) A notice under [subsection \(3\)](#) is to –

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
- (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.

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

- (a) until 10 working days have elapsed after the date of notification of that person; or
- (b) if during those 10 working days the person applies under [section 43](#) for a review of the decision, until that review determines that the information should be provided; or
- (c) until 20 working days after notification of an adverse decision under [section 43](#); or
- (d) if during those 20 worksdays the person applies for a review of the decision under [section 44](#), until that review determines that the information should be provided; or
- (e) if the information is information to which a decision referred to in [section 45\(1A\)](#) relates –
 - (i) during 20 working days after the notification of the decision; or

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

Section 33 - Public interest test

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

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

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

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

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

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

- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

**Right to Information Act Review****Case Reference:** R2202-098**Names of Parties:** Ruth Forrest and Waratah-Wynyard Council**Reasons for decision:** s48(3)**Provisions considered:** s35, s39

Background

- 1 On 29 September 2020, the Honourable Member for Murchison Ruth Forrest MLC made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the Department of Justice (the Department). She requested information relating to two development applications received by the Waratah-Wynyard Council (Council) concerning a proposed development at 30B Old Bass Hwy, Wynyard. This is the current site of Beach Retreat Tourist Park.
- 2 Specifically, Ms Forrest requested the following information:
 1. *Draft and/or initial application, DA 45/2019, submitted to Council as a discretionary application including plans;*
 2. *Details of the new application DA 29/2020 including plans and conditions of approval;*
 3. *Copies of advice and/or communications related to the consideration by planning officials of both above noted Das;*
 4. *Details of who undertook the independent planning assessment and copies of any communication relevant to the assessment between the WWC, planning officers at WWC and the independent planning assessor;*
 5. *In the approved DA, details of the applicable standards of the Waratah-Wynyard Interim Planning Scheme 2013 were required to be met and the Acceptable Solution and how the applicable standards will be met.*
 6. *Any other documents relevant to the assessment and approval of the above.*
- 3 On 30 September 2020, Mr Tom Saltmarsh of the Department transferred Ms Forrest's application to Council, as he considered that the information requested related more closely to its functions.

- 4 On 19 October 2020, Council advised that it required an extension until 19 November 2020 to process Ms Forrest's application, so it could consult with third parties in accordance with s37 of the Act.
- 5 On 18 November 2020, Ms Roseanne Titcombe, Executive Officer Governance & Performance at Council and a delegate under the Act, issued a decision on Ms Forrest's application. Ms Titcombe found *all the requested information was exempt from disclosure under s35 of the Act on the basis that all documents that have been requested are covered by what is described as a deliberative process within the Council and is therefore exempt from release*.
- 6 Despite this, Ms Titcombe went on to decide that the exemption under s35 *does not extend to the development applications and the documents that were lodged with them, including the plans. These documents are however subject to copyright and therefore Council is not in a position to release copies of these documents*.
- 7 Ms Forrest then raised concerns with my office regarding irregularities concerning this decision. Her concerns included that Council had failed to consider the public interest test contained in s33 of the Act as required, and that the decision nominated my office for external review, rather than Council's principal officer for internal review as required by the Act.
- 8 On 4 December 2020, one of my officers emailed Ms Titcombe to draw her attention to these irregularities. Council agreed to issue a fresh decision correcting the concerns. On 13 January 2021, Mr Shane Crawford, Council's General Manager and its principal officer under the Act, issued this fresh decision to Ms Forrest.
- 9 In making his decision, Mr Crawford noted that information found responsive to request items one and two of Ms Forrest's application was made available for inspection in accordance with s18(1)(a) of the Act. Regarding items three, four and five, Mr Crawford applied s35(1) to exempt the relevant information from disclosure in full.
- 10 On 19 January 2021, Ms Forrest applied to my office seeking external review of Council's decision. This application was accepted on the basis that the application was made within 20 working days of the applicant receiving Mr Crawford's decision. The application fee had been waived on the basis that the applicant is a Member of Parliament acting in connection with her official duty.

Issues for Determination

- 11 I must determine whether the information is eligible for exemption under ss35 or 39, or any other relevant section of the Act.
- 12 As ss35 and 39 are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33, including consideration of the matters in Schedule 1. This means that, should I determine that the

information is *prima facie* exempt under either of these sections, I must then determine whether it is contrary to the public interest to disclose it.

Relevant legislation

13 I attach copies of ss35 and 39 to this decision at Attachment I.

14 Copies of s33 and Schedule 1 of the Act are also attached.

Submissions

Ms Forrest

15 Ms Forrest did not make submissions in relation to this external review.

Council

16 On 23 March 2022, Council provided information identified as responsive to Ms Forrest's application for assessed disclosure to my office. Attached to the information was an explanatory letter which set out Council's reasons for not releasing the requested information to Ms Forrest.

17 Regarding information responsive to items one and two of Ms Forrest's application for assessed disclosure, Council set out that this information was subject to copyright and that Ms Forrest had previously been afforded the opportunity to view the material rather than have it released to her in accordance with s18 of the Act:

The development application DA 45/2019 was withdrawn by the applicant prior to full assessment and as a result was not presented to Council for consideration.

Upon receipt of the RTI request the architect who drew the plans that were submitted with the application objected to the release of the plans on the basis of implied copyright. The applicants have also objected to the release of any documentation concerning the development applications.

Council Officers concluded that copyright exists in the plans that were lodged with the development applications and the development applications themselves and declined to provide a copy of the documents. The documents enclosed in response to items 1 and 2 were however made available for inspection in accordance with s18(l)(a) of the RTI Act. The inspection of those documents took place on 30 November 2020.

18 Regarding information responsive to items three, four and five of Ms Forrest's application for assessed disclosure, Council asserted that some of this information deemed exempt from disclosure under s35 of the Act was subject to copyright:

Copyright considerations are applicable to some the documentation requested in items 3 - 5 given some of those

documents also include copies of plans, however these documents were considered exempt from disclosure as they consist of opinion, advice or recommendations prepared by an Officer of the Council in the course of, or for the purpose of the deliberative process of the Council as a planning authority. The information was therefore considered exempt from disclosure in accordance with the provisions of s35(l) of the Right to Information Act.

Analysis

Council's failure to apply the public interest test

- 19 As set out above, Council applied s35 of the Act to exempt from disclosure information identified as responsive to items three, four, and five of Ms Forrest's application for assessed disclosure. However, I note that Council failed to consider the public interest test contained in s33 of the Act.
- 20 A public authority's determination that requested information is prima facie exempt from disclosure is subject to the public interest test contained in s33 of the Act, where the exemption provision applied is contained within Part 3 Division 2 of the Act.
- 21 As s35 is contained within Part 2 of Division 3 of the Act, Council was required to consider whether it was contrary to the public interest to disclose the information it deemed prima facie exempt under this section. This required Council to consider, at a minimum, all matters specified in Schedule 1 of the Act, and any other matters relevant to this assessment.
- 22 Council's failure to apply the public interest test when finding information prima facie exempt under s35 is not satisfactory. This is particularly so given Council was advised by my office of this requirement on 4 December 2020 after issuing the defective decision on 18 November, and had the opportunity to rectify this error when issuing its fresh decision of 13 January 2021 but still did not do so.
- 23 I urge Council to ensure it complies with the Act and applies the public interest test when required in the future. This is necessary to ensure the proper operation of the Act.

Copyright considerations relevant to Ms Forrest's request

- 24 As mentioned above, Council did not find information responsive to items one and two of Ms Forrest's request exempt from disclosure but permitted her to view the information only due to copyright concerns. In his explanatory letter dated 23 March 2022, Mr Crawford also explains that *Copyright considerations are applicable to some of the documentation requested in items 3-5 given some of those documents include copies of plans, however those documents were considered exempt from disclosure as they consist of opinion, advice and recommendations prepared by an officer of the Council in the course of, or for the purpose of the Council as a planning Authority.*

- 25 Council has not specifically identified which documents responsive to items three, four and five of Ms Forrest's request were permitted to be inspected only due to copyright considerations. Having reviewed the documents, it appears as though copyright considerations apply to architectural drawings of the proposed development, and I will proceed with my decision on that basis.
- 26 Decisions regarding provisions of information under s18 of the Act are not eligible for my external review under the Act, as the information is not claimed to be exempt or refused to be produced. Accordingly, this decision will be confined to Council's decision to exempt information responsive to items three, four and five of Ms Forrest's request.

Section 35 – Internal Deliberative Information

- 27 Council relied on a single exemption for the information it did not provide to Ms Forrest, being s35 – internal deliberative information.
- 28 For information to be exempt from disclosure under s35 of the Act, I must be satisfied that it consists of:
 - an opinion, advice, or recommendation prepared by an officer of a public authority;¹ or
 - a record of consultations or deliberations between officers of public authorities;² or
 - a record of consultations or deliberations between officers of public authorities and Ministers.³
- 29 Once one of those subsections are met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative processes related to the official business of the Department.
- 30 The outlined exemption above does not apply to the following:
 - purely factual information;⁴ or
 - a final decision, order or ruling given in the exercise of an adjudicative function, a reason explaining such a ruling;⁵ or
 - information that is older than 10 years.⁶
- 31 As to the meaning of 'purely factual information' in s35(2), I refer to *Re Waterford and Treasurer of the Commonwealth of Australia (No 1)* where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the

¹ Section 35(1)(a).

² Section 35(1)(b).

³ Section 35(1)(c).

⁴ Section 35(2).

⁵ Section 35(3)(a-b).

⁶ Section 35(4).

word ‘purely’ in this context has the sense of ‘simply’ or ‘merely’ and that the material must be ‘factual’ in quite unambiguous terms.⁷

- 32 The meaning of the phrase ‘in the course of, or for the purpose of, the deliberative processes’ has also been considered by the AAT. In *Re Waterford and Department of Treasury (No 2)* it adopted the view that these are an agency’s ‘thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action’.⁸
- 33 As I have mentioned, s35 is subject to the public interest test in s33.
- 34 Council has applied s35 of the Act to exempt from disclosure all information identified as responsive to items three, four, and five of Ms Forrest’s application for assessed disclosure.
- 35 Council’s explanatory letter of 23 March 2022 helpfully identifies the documents responsive to each request item as follows:

Item 3 - Copies of advice and/or communications related to the consideration by planning officials of both development applications.

- Doc ID 1069220 - DA 29/2020 Planning Application Checklist
- Doc ID 1079647 - Planning Application - response to additional info request
- Doc ID 1079648 - Planning Application - Unsatisfactory additional info letter
- Doc ID 1080872 - Response to unsatisfactory further info request

Item 4 - Details of who undertook the Independent planning assessment and copies of any communication relevant to the assessment between the WWC, planning officers at WWC and Independent planning assessor.

- Doc ID 1084251 - Request for Independent Planning Assessment & Report
- Doc ID 1082617 - Email response re DA29/2020 Preliminary Planning Assessment
- Doc ID 1082613 - DA29/2020 Preliminary Planning Assessment from 6ty

Item 5 - In the approved DA, details of the applicable standards of the Waratah-Wynyard Interim Planning

⁷ *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at 14.

⁸ *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.

Scheme 2013 were required to be met and the Acceptable Solution on how the applicable standards will be met.

- Doc ID 1081224 - DA 29/2020 Council Planning Report

Item three

Doc ID 1069220 - DA 29/2020 Planning Application Checklist

- 36 This document is a five page form filled out by Council staff, recording particular details relating to the development application.
- 37 Having reviewed the document, it appears to consist of purely factual information and such information cannot be exempt from disclosure under s35 of the Act. Council has not discharged its onus under s47(4) of the Act to show why this information should be exempt and it should be released to Ms Forrest.

Doc ID 1079647 - Planning Application - response to additional info request

- 38 This information consists of a traffic impact assessment and covering email correspondence that was provided to Council after it requested further information relating to the development application. It also includes a drawing set of the proposed development which is attached to a 7 August 2020 letter from IDW Architecture and Interiors (IDW) to Council.
- 39 For s35 to apply, the requested information must relate to internal deliberative processes. It cannot apply when the parties to the communication are not within public authorities or Ministers' offices. As this information was communicated between Council and IDW, it cannot be considered to be internal deliberative information and cannot be exempt from disclosure under s35 of the Act.
- 40 Council has not made any argument regarding an alternative exemption, such as under ss37 or 39, and it is not otherwise apparent that any other provision would be applicable. This information should be released to Ms Forrest, though it is open to Council to provide access by inspection pursuant to s18(1)(a) if it considers material to be subject to copyright.

Doc ID 1079648 - Planning Application - Unsatisfactory additional info letter

- 41 This information consists of email correspondence between Ms Jasmine Briggs, a Town Planner at Council, and Ms Abby Hiberd of IDW. Attached to Ms Briggs' email to Ms Hibberd is a letter from Mr Ashley Thornton, Manager Development and Regulatory Services at Council, which requests further information from IDW in relation to its development application. Also attached is a copy of s10 of the relevant planning scheme.
- 42 Again, this information has been communicated externally and cannot be considered to be internal and deliberative or eligible for exemption under s35 of the Act. Council has not proposed any other exemption or discharged its

onus under s47(4) to show why this information should be exempt. It should be released to Ms Forrest.

Doc ID 1080872 - Response to unsatisfactory further info request

- 43 This information consists of email correspondence between Ms Hibbard and Ms Briggs and updated drawings of the proposed development attached to Ms Hibbard's email dated 14 August 2020.
- 44 Again, this is not internal deliberative information and cannot be exempt under s35. I should be released to Ms Forrest.

Item Four

Doc ID 1084251 - Request for Independent Planning Assessment & Report

- 45 This information consists of email correspondence between Mr Thornton and Mr George Walker of 6ty, an architecture, surveying and engineering firm, and the planning application lodged by IDW to Council which is attached to Mr Thornton's email dated 26 August 2020.
- 46 As with other information considered so far in my decision, this information cannot be considered exempt under s35 as it was not communicated internally. Council has not discharged its onus under s47(4) to show why this information should be exempt and it should be released to Ms Forrest.

Doc ID 1082617 - Email response re DA29/2020 Preliminary Planning Assessment

- 47 This information consists of email correspondence between Mr Thornton and Mr Walker on 26 August 2020 concerning the independent planning report prepared by 6ty. Again, this information is not exempt under s35 of the Act because these emails were not sent internally between public officers and Council has not discharged its onus to show why it would be otherwise exempt. It is to be released to Ms Forrest.

Doc ID 1082613 - DA29/2020 Preliminary Planning Assessment from 6ty

- 48 This independent report assessed IDW's development application for its proposed development at 30B Old Bass Hwy, Wynyard for compliance against relevant planning schemes. It was produced by 6ty for Council, and was attached to an email from Mr Thornton to Mr Walker dated 26 August 2020.
- 49 Again, this is not internal deliberative information and cannot be exempt under s35. However, as I have previously considered in relation to consultants undertaking tasks which would be covered by s35 if they were done in-house by a public authority, s39 may be applicable. I will consider this information further in relation to potential exemption s39 of the Act later in my Analysis.

Item Five

Doc ID 1081224 - DA 29/2020 Council Planning Report

- 50 Council has applied s35 of the Act to exempt its final assessment of IDW's development application for the proposed development at 30B Old Bass Hwy, Wynyard (the Report).

Purely factual information

- 51 Section 35(2) of the Act provides that purely factual information is not exempt from disclosure under s35. Some of the Report clearly consists of purely factual information, which does not qualify for exemption under s35. Namely, all of the information on pages one and two of the Report, the information in the A1-5 and P1-5 cells of tables which restate the planning scheme requirements and reviewer dates and details at the conclusion of the Report. This information is not exempt under s35 and should be released to Ms Forrest.

The remainder of the Report

- 52 The remainder of the Report consists of the Council's assessment of IDW's proposal for compliance against the relevant planning scheme and sets out the reasons for the recommendation that IDW's application be approved.
- 53 As such, I am satisfied that this information consists of a recommendation prepared by officers of a public authority, made for the purpose of a deliberative process related to the official business of a public authority. Accordingly, I am satisfied the remainder of the Report is *prima facie* exempt under s35(1)(a) of the Act.

Public interest test

- 54 Section 35 of the Act is subject to the public interest test in s33, so I now turn to assess whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt. In making this assessment I am to have regard to, at least, the matters in Schedule 1 of the Act.
- 55 I find that matter (a) – the general public need for government information to be accessible – is relevant and weighs in favour of disclosure.
- 56 Matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant and weighs in favour of disclosure. IDW's applications were controversial amongst the local Wynyard community, where many residents opposed the proposed development. As a consequence, this development was subject to ongoing coverage by the local media. The release of Council held information relating to the development applications would inform debate on a matter of public interest.
- 57 I find that matters (c) – whether disclosure would inform a person about the reasons for a decision – and (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions –

are relevant and weigh in favour of disclosure. The report includes detailed analysis of IDW's development application for compliance against the relevant planning scheme. The disclosure of this report would help to inform the local community as to why it was recommended that this development application be approved.

- 58 I find that matters (f) – whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation – and (g) – whether the disclosure would enhance scrutiny of government administrative processes – are relevant and weigh in favour of disclosure. The release of Council's planning report would inform the local community of the due diligence processes employed by Council in relation to the approval processes of development applications.
- 59 Overall, I find that Schedule 1 matters (a), (c), (d), (f), and (g), are relevant to this public interest assessment and weigh in favour of disclosure. I do not find any public interest matters weighing against disclosure.
- 60 I am satisfied that this Report sets out Council's considered position on the application, and is not reflective of an early part of its thinking process. Council has not made any argument to explain why the release of this information would be contrary to the public interest and I do not consider that it has discharged its onus under s47(4) to show why the Report should be exempt under s35.
- 61 Accordingly, I am not satisfied that this information is exempt from disclosure and it should be made available to Ms Forrest.

Section 39 – Information Obtained in Confidence

- 62 For information to be exempt from disclosure under s39 of the Act, I must be satisfied that it is information that has been communicated in confidence to the public authority and that-
 - a.) the information would be exempt information if it were generated by a public authority or Minister;⁹ 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.¹⁰
- 63 Council did not seek to exempt any information pursuant to s39 as it seemed to mistakenly rely on s35 for information which was not internal deliberative information. I consider that s39 is a more appropriate provision in relation to the potential exemption of the document considered below.

⁹ Section 39(1)(a).

¹⁰ Section 39(1)(b).

Item 4

Doc ID 1082613 - DA29/2020 Preliminary Planning Assessment from 6ty

- 64 This independent report by 6ty assessed IDW's development application for compliance against relevant planning schemes, as part of contracted services 6ty was providing to Council.
- 65 For this to be eligible for exemption under s39, it needs to have been communicated in confidence to Council. I am satisfied that Council's engagement of 6ty would have been on a confidential basis, requiring its work product to be provided in confidence to Council. I am also satisfied that this information, a review of Council's planning assessment of the development application against the relevant planning scheme, would have been *prima facie* exempt under s35(1)(a) had it been generated by Council.
- 66 Accordingly, I am satisfied that this information is *prima facie* exempt pursuant to s39(1)(a).

Public interest test

- 67 As I have found this information to be *prima facie* exempt on the basis that it would have been *prima facie* exempt under s35 had it been generated by Council, I consider the same public interest test matters are applicable as in my previous assessment above.
- 68 The only differing consideration here is the more draft nature of this document. Section 35 was intended to provide scope for the exemption of information relating to the thinking processes of public authorities, and I have previously accepted that documents showing early thinking processes are often contrary to the public interest to release.
- 69 In this case, however, the information shows a consultant providing an expert opinion and I am not satisfied that it is in such draft form that it would be contrary to the public interest to release. The conclusions accord with the Report, which I have found not to be exempt. I am not satisfied that the balance of Schedule 1 matters and consideration of the purpose of s35 regarding deliberative information favours the exemption of this information.
- 70 Accordingly, I find that it is not exempt and should be released in full to Ms Forrest.

Preliminary Conclusion

- 71 For the reasons given above, I determine that:

- Exemptions claimed pursuant to s35 are not made out; and
- Information is not exempt pursuant to s39.

Conclusion

- 72 As the above preliminary decision was adverse to Council, it was made available to it on 27 March 2024 to seek its input prior to finalisation in accordance with s48(1)(a) of the Act.
- 73 Council advised on 29 April 2024 that it did not wish make submissions in response to my preliminary decision. As such, my findings remain unchanged.
- 74 Accordingly, for the reasons given above, I determine that:
- Exemptions claimed pursuant to s35 are not made out; and
 - Information is not exempt pursuant to s39.

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

Dated: 30 April 2024



Richard Connock
OMBUDSMAN

ATTACHMENT I

Relevant Legislation

Section 35 – Internal Deliberative Information

- (1) Information is exempt information if it consists of –
 - (a) an opinion, advice or recommendation prepared by an officer of a public authority; or
 - (b) a record of consultations or deliberations between officers of public authorities; or
 - (c) a record of consultations or deliberations between officers of public authorities and Ministers –
 - in the course of, or for the purpose of, the deliberative processes related to the official business of a public authority, of a Minister or of the Government.
- (2) Subsection (1) does not include purely factual information
- (3) Subsection (1) does not include –
 - (a) a final decision, order or ruling given in the exercise of an adjudicative function; or
 - (b) a reason which explains such a decision, order or ruling.
- (4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

Section 39 – Information Obtained in Confidence

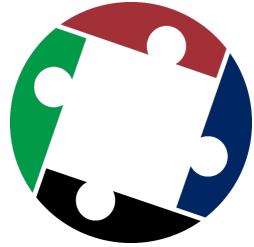
- (1) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –
 - (a) the information would be exempt information if it were generated by a public authority or Minister; or
 - (b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.
- (2) Subsection (1) does not include information that –
 - (a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and
 - (b) relates to trade secrets or other matters of a business, commercial or financial nature; and
 - (c) was provided to a public authority or Minister pursuant to a requirement of any law.

Schedule 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;
- (l) whether the disclosure would promote or harm the environment and or ecology of the State;
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA
DECISION



Right to Information Act Review Case Reference: R2203-003

Names of Parties: Anthony Scott Bell and Department of State Growth

Reasons for decision: s48(3)

Provisions considered: s35, s36, s37, s42

Background

- 1 Kassem Holdings Pty Ltd (the Licensee) submitted an application to Mineral Resources Tasmania at the Department of State Growth (the Department) for an exploration licence in an area near Bridport, Tasmania.
- 2 On 5 July 2016, this licence application, EL7/2016, was approved by the Department, insofar as it related to exploration work to seek construction minerals. The licence was subsequently issued on 27 February 2017.
- 3 On 23 September 2021, Dr Anthony Scott Bell lodged an application for assessed disclosure under the *Right to Information Act 2009* (the Act) with the Department.
- 4 The information request sought:
 1. *The exploration program or programs required to be completed under clause 6(d) and required to be submitted to the Director under clause 6(e) of Exploration Licence EL7/2016 dated 27 February 2017 (the Licence).*
 2. *The sufficient details of the proposed exploration activities to enable assessment of potential environmental effects given to the director under clause 6(b) of the Licence.*
 3. *The written approval or approvals received from MRT [Mineral Resources Tasmania] as required under clause 6(c) of the Licence.*
 4. *The report or reports submitted under clause 6(l) of the licence.*
 5. *The relinquishment or final report, if any, required to be submitted under clause 6(m) of the Licence.*
 6. *Any and all documents relating to the licensee waiving or being asked to waive the confidentiality referred to in clause 10.3 of the Licence.*

7. Any and all notices given or served under clause 12 of the Licence.

8. Any and all documents, whether in hard or soft copy, relating to the Licence including the application for it, MRT's consideration or assessment of the application, MRT's grant of the Licence and that have come into the possession, custody or power of MRT other than those referred to above.

- 5 On 7 December 2021, the Department's delegate under the Act, Ms Michelle Legg, provided a decision to the applicant. 160 pages of information in 35 documents was found to be responsive to the applicant's request. Ms Legg found 32 documents to be partially exempt from release, two documents were exempted in full and one document was released in full.
- 6 The undisclosed information was assessed as exempt under the following sections of the Act:
 - Section 35 – Internal deliberative information;
 - Section 36 – Personal information of a person;
 - Section 37 – Information relating to the business affairs of a third party; and
 - Section 42 – Information likely to affect cultural, heritage and natural resources of the State.
- 7 On 10 January 2022, the applicant wrote to the Department seeking an internal review of the decision and made a number of submissions relating to the exemption of information under s37 and also expressed concern that the Department had *not produced all information relevant to the request*.
- 8 On 31 January 2022, Ms Alison Lander, a delegated officer of the Department, issued the internal review decision. Ms Lander reached the same conclusions as in the original decision. The internal review decision also set out that some of the information sought by the applicant was considered confidential information pursuant to s190 of the *Mineral Resources Development Act 1995* (Tas) and was therefore excluded from assessment under the Act.
- 9 On 1 March 2022, the applicant applied for external review. This was accepted under s44 of the Act on the basis that the applicant had received an internal review decision and had submitted an external review application to the Ombudsman within 20 working days of receiving that decision.

Issues for Determination

- 10 I must determine whether the information not released by the Department is eligible for exemption under ss 35, 36, 37 and 42 or any other relevant section of the Act.
- 11 As ss35, 36, 37 and 42 are contained within Division 2 of Part 3 of the Act, part of my assessment is subject to the public interest test in s33. This means that,

should I determine that the information is *prima facie* exempt under these sections, I am then required to determine whether it would be contrary to the public interest to release it, having regard to, at least, the matters contained in Schedule 1. I must not have regard to the matters set out as irrelevant to the assessment of the public interest in Schedule 2 of the Act.

Relevant legislation

- 12 Copies of ss35, 36, 37 and 42 are at Attachment A
- 13 Copies of s33, Schedule 1 and Schedule 2 are also attached.

Submissions

Applicant

- 14 In support of his request for internal review, the applicant made submissions requesting that the original decision be overturned and the information be released, specifically in relation to the application of the public interest test to information exempted under s37 of the Act.
- 15 The applicant submitted, *[t]he subject matter of the documents is a matter of great public interest...*, including by reason of a Mining Exploration Licence being granted in a conservation area. The applicant also made reference to the original decision-maker taking into account *[t]he current level of interest, by some members of the public and the media, into mining and exploration activities being undertaken in Tasmania and their environmental impact on Tasmania's natural resources.*
- 16 The applicant further submitted that the public interest considerations which the original decision-maker had weighed in favour of exempting information under s37 of the Act should have been weighed to the contrary. This was because of the already poor public record of the Licensee, its breach of obligations under the Licence and that the Licensee no longer holds the Licence. The applicant submitted these factors meant the Licensee would not suffer further harm to its business or financial interests nor suffer harm to its competitive position by the release of the information – considering matters (s) and (w) in Schedule 1 of the Act.

Department

- 17 The Department was not required to provide specific submissions in response to this external review, as it had provided its reasoning in its decisions. Extracts of these decisions are set out below.
- 18 In the original decision dated 7 December 2021 Ms Legg noted:

Some of the information you requested is confidential information pursuant to s190 of the Mineral Resources Development Act 1995. This provision has the effect of excluding such information from the scope of the RTI Act and it has been omitted from my assessment and decision accordingly.

...

Some of the relevant information identified third-party information. I formed the view that release of this information could reasonably be expected to be of concern to the third parties involved and so I conducted the consultation required by the RTI Act prior to finalising my decision. I have taken third party views into account when making my decision.

19 Regarding s35 - Internal deliberative information, Ms Legg noted:

in my view, the Act recognises the need to protect the deliberative and consultative processes that allow government staff to undertake the requisite deliberations and assessments required to ensure that applications for, and ongoing work under an exploration licence properly complies with the MDRA [Mineral Resources Development Act 1995]. These assessments and deliberations need to be robust, candid and thorough. Release of this type of information may inhibit the flow of similar constructive and thorough information in the future, thereby impacting the capacity of the Minister, or the relevant Delegate, to effectively make decisions on matters of a similar nature in future.

20 In the internal review decision, Ms Lander set out:

I note that the original-decision maker released information explaining the basis for the Minister's decision to grant the licence, although she withheld the internal assessment opinion and advice. I agree with her view that disclosure could have the effect of inhibiting the provision of fulsome opinion and advice in the future, which would compromise the effectiveness of the decision-making process. I further agree that the harm arising from such effects would be contrary to the public interest.

21 Regarding s36 - personal information, Ms Legg noted:

35. Some of the information belongs to employees of the Department. In my view, the Act's objective to 'increase the accountability of the executive' may reasonably extend to identifying individuals in contexts where they have exercised statutory or other decision-making authority, or have the capacity to make, or influence the making of government policy. On this basis, I have decided to withhold personal information of Departmental staff, where that information appears in connection with routine duties or tasks.

36. I consider that non-executive Departmental officers are entitled to be concerned about being identified, as doing so leaves them open to being held personally accountable by the

public ... where there is no reasonable basis for doing so. In this case, there is no suggestion of impropriety or misconduct in connection with any of the officers' work.

37. By the same reasoning, in relation to personal information belonging to employees of third party businesses, I consider that it would be contrary to the public interest to release that information where the names and personal information of those employees appear in connection with routine tasks and duties.

...

39. In my view, the release of this personal information has the potential to harm the interests of the affected individuals. Specifically, releasing an individual's name, together with other identifying details (for example, phone numbers or email addresses) has the likely consequence of exposing those individuals to harm, or problematic attention. I do not consider that disclosing personal information could reasonably be expected to provide further contextual information of benefit to the public.

The internal review decision agreed with this approach.

- 22 Regarding s37 - Information relating to the business affairs of a third party, Ms Legg noted:

15. The information in question includes correspondence and associated documentation which contains commercially sensitive financial, technical and operational (project specific) information that belongs to Kassem Holdings Pty Ltd ('Kassem Holdings'), provided in connection with the application for Exploration Licence EL7/2016.

...

17. I am satisfied that the information in question has a realistic and un-remote chance of exposing Kassem Holdings to competitive disadvantage by revealing financial, technical, and operational information that would not normally be available to their competitors. I am therefore satisfied that the information falls within section 37(1)(b) of the Act and should not be released.

- 23 After considering the public interest test, Ms Legg set out:

29. I consider that the information would reveal competitive aspects of Kassem Holdings' business that is not generally available to competitors, which could not be disclosed without causing substantial damage to its competitive position. Such disadvantage would include permitting competitors to use

technical, operational, and financial information which it employs in its business. I consider that disclosure of the information would be likely to unreasonably disadvantage Kassem Holdings in the marketplace.

The internal review agreed with this position.

- 24 Regarding information likely to affect the cultural, heritage and natural resources of the State, Ms Legg noted:

41. Some of the information relates to sites of heritage significance. In my view, this information is not information that is provided to the public by Aboriginal Heritage Tasmania. It is sensitive information, that in this case, has been used to inform advice to Mineral Resources Tasmania on the specific mitigation steps to be taken in relation to exploration activities occurring around those areas. The information was provided in confidence and was expressly requested to not be used for public dissemination.

42. The ongoing integrity and effective custodianship of Aboriginal heritage sites in significant part depends on keeping the location of these sites confidential. Such culturally significant sites are irreplaceable and their degradation or loss, via inappropriate public identification, would be manifestly contrary to the public interest.

The internal review agreed with this position.

Analysis

- 25 The Department seeks to exempt information in 134 documents it found to be responsive to Dr Bell's application. It provided an *RTI Summary of Documents* table as part of its original decision, which allocates reference numbers to each document. The information was provided in a bundle of documents of 160 pages in length. For ease of reference, I will use the Department's document and page numbering system to refer to the information in my Analysis.

Section 35 – Internal deliberative information

- 26 For information to be exempt under this section I must be satisfied that it consists of:
- an opinion, advice or recommendation prepared by an officer of a public authority;¹ or
 - a record of consultations or deliberations between officers of public authorities.²

¹ Section 35(1)(a)

² Section 35(1)(b)

- 27 When one of those subsections is met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative process relating to the official business of the Department.
- 28 The information is not exempt if it is:
- purely factual information;³
 - a final decision, order or ruling given in the exercise of an adjudicative function, or a reason which explains such a decision, order or ruling;⁴ or
 - information that is older than 10 years.⁵
- 29 As to the meaning of purely factual information, I refer to *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*⁶ where the Administrative Appeals Tribunal (AAT) observed that the word *purely* in this context has the sense of simply or merely and that the material must be factual in quite unambiguous terms.
- 30 The meaning of the phrase in the course of, or for the purpose of, the deliberative process has also been considered by the AAT. In *Re Waterford and the Department of Treasury (No 2)*⁷ it adopted the view that these are an agency's thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.
- 31 Then, if I am satisfied that it is for a deliberative purpose related to official business, I must have regard to the public interest test in s33 of the Act.

Document 2

- 32 The Department has sought to apply s35 to exempt information in two parts of Document 2, which is entitled *Assessment of New Licence Application*, on pages 13 and 14. The information in question is clearly an opinion, advice or recommendation prepared by an officer of a public authority prepared in the course of the deliberative process relating to the official business of the Department. It is also clear that the information in question is not purely factual, not a final decision and not more than 10 years old. The information is therefore *prima facie* exempt under s35.

Document 30

- 33 The information the Department sought to exempt under s35 on pages 13 and 14 is duplicated on pages 30 and 31, so I do not need to assess Document 30 separately.

Public interest test

³ Section 35(2)

⁴ Section 35(3)

⁵ Section 35(4)

⁶ (1984) AATA 518 at [14]

⁷ (1985) 5 ALD 588

- 34 The parts of the assessment which are claimed to be exempt set out the officer's opinion in relation to the Licensee's intention to do the work, comply with relevant legislation, whether they have an appropriate program of work and whether they have provided sufficient information relating to the likely impact on the environment. The opinions are brief, from a maximum of a seventeen word sentence to a minimum of a one word sentence.
- 35 The original decision referred to the need for internal deliberations to be robust, candid and thorough and the internal review decided that release of the information would inhibit the provision of fulsome opinion and advice in the future, apparently giving much weight to matter (n).
- 36 I disagree with this assessment. The information redacted is very brief and aligns with other parts of the assessment which have been released to the applicant. It does not contain robust, candid and thorough discussion of the merits of the application, the release of which might impact on the efficacy of assessment of licence applications in future. As I have expressed in previous decisions, I do not consider that matter (n) is often relevant in relation to s35. The suggestion that disclosure under the Act of these succinct recommendations would result in public servants being reluctant to do their regular, paid duties, or that they would not do these properly in the future, is not one I will readily accept.
- 37 I consider that factors:
- (a) – *the general public need for government information to be accessible;*
 - (b) – *whether the disclosure would contribute or hinder debate on a matter of public interest, and;*
 - (f) – *whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation*
- are particularly relevant and weigh in favour of disclosure. I do not consider that there are any matters which weigh against disclosure, given this is a finalised assessment of a very brief nature and reflects other information already disclosed.
- 38 Accordingly, this information is not exempt under s35 and is to be released in full to Dr Bell.
- Section 36 – Personal information of a person**
- 39 The Department relied on s36 of the Act to exempt certain information on 28 separate pages as personal information. For the information to be exempt under this section of the Act I must be satisfied that its release would reveal the identity of a person other than the person seeking the information, or that the information would lead to that person's identity being reasonably ascertainable.
- 40 Section 5 of the Act defines personal information as:

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

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

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

- 41 The Department has identified information of this kind, such as names, position titles, email addresses and phone numbers of staff from various third party organisations and non-executive officers of public authorities. It is clear that the information falls within the definition of personal information in s5 of the Act and there is no suggestion that the persons concerned have been dead for more than 25 years. I consider the information is *prima facie* exempt under s36 of the Act.

Public interest test

- 42 That the information may be considered personal information does not preclude it from release if doing so would not be contrary to the public interest.

Public officers and employees

- 43 On numerous occasions, the Department found the names, signatures and contact details of public authority staff exempt under s36 of the Act. As I have explained in previous decisions, the names of public officers performing their regular duties are not usually exempt under s36. It is standard Australian practice that the personal information of public servants which relate to the performance of their regular duties (such as their name, signature, position information, and work contact details) is not exempt from release unless there are specific and unusual circumstances which justify such an exemption. Whether a public service employee is a current or former employee is irrelevant to the assessment under s36 of the Act.

- 44 I do not accept the Department's argument that its non-executive staff members' personal information should be routinely redacted or that they are likely to have their interests harmed by the release of this information in usual circumstances. It is vital for accountability and proper scrutiny that public servants at all levels should not be shielded from identification when they are undertaking their regular duties, unless specific justification for this is present.

- 45 The exception to this practice is direct and mobile phone numbers of Department employees, which I have consistently found to be exempt under s36 where these are not routinely provided to the public. I am satisfied that there is potential for harm with the release of this information and it is valid for public authorities to limit the release of direct contact numbers and emails for staff to ensure public enquiries are able to be directed through appropriate channels.

- 46 Accordingly, except for telephone numbers not routinely provided to the public, I am not satisfied that any personal information of employees of the Department is exempt under s36 and it is to be released to Dr Bell.

Personal information of others

Kassem Holdings

- 47 The Department has claimed that the names of two people are exempt under s36, being the authorised contact person for Kassem Holdings, and another person who sent one email (page 39) on behalf of the contact person. The contact person *is fully authorised to act on behalf of Kassem Holdings Pty Ltd in any capacity* and is their position is listed as *Director and GM [General Manager]*.
- 48 The contact person for Kassem Holdings is also listed on the licence application (page 5) as a person who will provide resource material properties assessment and reserves estimation, and is also listed on an application for transfer of the lease (page 145) as a *Construction sand expert*. The Department has also exempted their name at both these locations.
- 49 The Department's position is that *releasing an individual's name, together with other identifying details (for example, phone numbers or email addresses) has the likely consequence of exposing those individuals to harm or problematic attention and could not reasonably be expected to provide further contextual information of benefit to the public*.
- 50 Whilst the information is *prima facie* exempt under s36, I do not agree with the Department's position. The exploration lease was issued for a conservation area and even the Department concedes that *public interest in the licence is likely to be heightened*. A company director is not a junior employee likely to be disadvantaged by the release of their name, the details of such officeholders are required to be lodged with company regulators and can be obtained by any person on request.
- 51 Exemptions under s36 are subject to the public interest test in s33, where all relevant matters and the Schedule 1 factors must be considered. I consider the following factors to be relevant in favour of disclosure:
- (a) – *the general public need for government information to be accessible;*
 - (b) – *whether the disclosure would contribute to or hinder debate on a matter of public interest;*
 - (f) – *whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;*
 - (l) – *whether the disclosure would promote or harm the environment and or ecology of the State.*

- 52 In my view these factors should receive greater weight than (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals. Accordingly, and consistent with the approach used for public officers, the name of the contact person for Kassem Holdings is not exempt and should be disclosed wherever it appears, including on the authority on page 3. The company telephone number is publicly available and should be released too. However, their direct email and mobile number are exempt under s36 and should not be released to Dr Bell.
- 53 I am satisfied that the name of the person on page 39 previously referred is exempt under s36, as there is no information to determine this person's position (if any) within Kassem Holdings and the release of their name may cause harm to their interests.

Integrated Land Management & Planning

- 54 The Department has claimed that the name and contact details of a consultant at Integrated Land Management & Planning are exempt under s36.
- 55 This is the business information of a contracted professional which is otherwise available online due to his work in this area. It is unclear what harm to his interests might occur from the publication of his work contact details and name in this context. I have previously made similar determinations about the personal information of external professionals acting in their professional capacity⁸, and again find that this information is not exempt under s36.
- 56 Accordingly, the information should be released.

Austrak Quarries

- 57 The Department has claimed exempt under s36 the names and contact details of persons associated with Austrak Quarries No. 6 Pty Ltd (Austrak Quarries) during and after the exploration licence was transferred to that company from Kassem Holdings. The Department maintains the position that releasing the personal information of employees of third party businesses would be contrary to the public interest where that information appears in connection with routine tasks and duties.
- 58 I do not agree. As noted above, there is a heightened public interest in a situation where a mining exploration lease is granted within a conservation area and the public interest factors noted with regard to Kassem Holdings also apply to Austrak Quarries, at least as far as to those persons holding key management roles in Austrak Quarries.
- 59 As with Kassem Holdings, I find that the names, signatures and positions of the CEO of Austrak Quarries and the contact person for the Transferee are not exempt and may be released to Dr Bell. The names of witnesses, the two other persons carbon copied to the Austrak Quarries email of 31 July 2020 and direct

⁸ See, for example, *Clive Stott and TT-Line Company Pty Ltd* (June 2022) at [44].

and mobile phone numbers remain exempt under s36 and are not required to be disclosed.

Section 37 – Information relating to business affairs of a third party.

60 For information to be exempt under this section, I must be satisfied that its disclosure would disclose information related to business affairs acquired by the Department from a third party and that:

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

This section is subject to the public interest test at s33.

61 In relation to likely competitive disadvantage, when considering the equivalent provision under the now repealed *Freedom of Information Act 1991*, the Supreme Court of Tasmania in *Forestry Tasmania v Ombudsman*⁹ held that:

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

62 The court further held that:

55. In my view, what the provisions refer to as a competitive disadvantage is something which affects one entity to the extent that it may not be able to generate as high a level of profit relative to its competitive rivals as would be expected, if all else being equal, the particular entity did not face the reason or circumstance. A competitive disadvantage will not necessarily be something which, in strict terms, impacts on an actual ability to compete, and the level of competition.

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

64 The Department has sought to exempt information on 13 separate pages of the documents responsive to Dr Bell's request, and I will address them individually. While the Department did not specifically indicate that it relied upon s37(1)(b), there is no indication that trade secrets are in question here and I have only considered issues of competitive disadvantage.

⁹ [2010] TASSC 39

- 65 The Department indicated on its *RTI Summary of Documents* that it claimed information was exempt under s37 in Document 29, but no information was redacted for this reason in that document.

Document 1

- 66 On page 2 of Document 1, the Department has sought to exempt in its entirety a certificate of currency for public liability insurance. I am satisfied that this relates to the business affairs of Kassem Holdings and that the release of details regarding its insurance could cause competitive disadvantage. I find this information *prima facie* exempt under s37(1)(b) of the Act.
- 67 On page 7 of Document 1, the Department has sought to exempt financial information relating to the estimated expenditure by Kassem Holdings for the first two years of the proposed exploration program. I consider this information is likely to expose Kassem Holdings to likely competitive disadvantage as defined above. It is *prima facie* exempt from disclosure. This type of financial information is claimed to be exempt on pages 16 (Document 4), 17 (Document 5), 27 (Document 12), 29 (Document 13) and 32 (Document 14) of the information responsive to Dr Bell's request and I find it similarly *prima facie* exempt in these instances.
- 68 On page 11 of Document 1, the Department has sought to exempt details of a bank account held by Kassem Holdings, including the bank name, account type, BSB and account number. I am satisfied that this is *prima facie* exempt from disclosure under s37(1)(b), as its release could cause competitive disadvantage.

Document 2

- 69 On page 13 in Document 2, the Department has sought to exempt information concerning the financial position of Kassem Holdings because the information is *capable of conveying information about the company's financial position and technical approach to mining exploration that could expose it to disadvantage with respect to mining competitors and suppliers of good and services on other projects (either current or future)*.
- 70 I partially agree with this assessment. I consider the dollar figures in the table and in lines 4, and all of lines 5-7 in the fourth dot point are *prima facie* exempt under s37(1)(b). However, I am not persuaded that the remainder of the redacted information is exempt under s37, as it relates to the Department's assessment process and information already provided in other parts of the information. It should be released to Dr Bell.

Document 3

- 71 The Department has exempted Document 3 at page 15 in its entirety. This document is an extract from a bank statement of Kassem Holdings. I am satisfied that it is *prima facie* exempt under s37(1)(b).

Document 23

- 72 The information on pages 114-116 in Document 23 consists of three maps prepared by Integrated Land Management & Planning which detail the exact areas where exploration was planned to occur, as well as the methods of operation in each area. This is information which would be of great interest to any competitors of Kassem Holdings, either now or in the future, and would, I believe, expose Kassem Holdings to likely competitive disadvantage were they to be released. I am satisfied the three maps are *prima facie* exempt under s37(1)(b).

Document 24/25

- 73 On page 117 (repeated at page 125), the Department has sought to exempt 10 lines of information detailing, in general terms, how exploratory activities will be conducted.
- 74 Line 10 of the redacted information refers to the collection of samples by helicopter, information which has already been released on pages 124 and 133. Line 9 of the redacted information refers to samples being taken by hand auger, information which has already been released on page 131. Given that the information has already been released, I am not satisfied that it could cause any competitive disadvantage to Kassem Holdings. Accordingly, this information is not exempt and should be released to Dr Bell.
- 75 The remaining eight lines do give more detailed information about the proposed work plan and I am satisfied that this information has a reasonable likelihood of exposing Kassem Holdings to competitive disadvantage if it were released. It is *prima facie* exempt under s37(1)(b).

Public interest test

- 76 As mentioned, exemptions under s37 are subject to the public interest test set out in s33 of the Act. It is therefore now necessary to assess whether, after taking into account all relevant matters, it would be contrary to the public interest to disclose the information I have found to be *prima facie* exempt. In making this assessment I am required to have regard to, at least, the matters in Schedule 1 of the Act.
- 77 Schedule 1 matter (a) – the general need for government information to be accessible – is always relevant and weighs in favour of disclosure.
- 78 Schedule 1 matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – is relevant and weighs in favour of disclosure. There is no doubt the grant of mining leases in sensitive environmental areas is a matter of public interest and debate in Tasmania, especially where those areas are likely to have sites of Aboriginal heritage significance. The disclosure of details regarding the resources available to companies exploring these areas and the assessment process would contribute to this public debate.

- 79 Schedule 1 matter (f) – whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation – is relevant and weighs in favour of disclosure. Release of the business information supplied by a holder of a mining lease which was used to justify approval of that lease application enables greater scrutiny of the relevant government decision-making process.
- 80 Schedule 1 matter (s) – whether the disclosure would harm the business interests of a public authority or any other person or organisation is relevant and weighs strongly against disclosure. Entities seeking a mining lease are required to provide information regarding finances and business practices particular to the proposed activity. This information may be of great value to competitor organisations and so has genuine potential to harm the applicant organisation.
- 81 Overall, there are factors which weigh both in favour of and against release. After taking them all into consideration, I am satisfied that, subject to the following exception, the information identified as *prima facie* exempt should remain exempt under s37(1)(b).
- 82 The exception to this finding relates to the information I found to be *prima facie* exempt under s37 on page 13 within Document 2. The only information which should remain exempt is the dollar figures in the table and in the fourth dot point. The remaining information should be released to Dr Bell.

Section 42 – Information likely to affect cultural, heritage and natural resources of the State

- 83 The Department relied upon s42 of the Act to exempt information on three pages of the information responsive to Dr Bell's request. For the information to be exempt under this section of the Act, I must be satisfied that its disclosure would be likely to:
- (a) *Threaten the survival of a rare or endangered species of flora or fauna; or*
 - (b) *Prejudice any measures being taken, or proposed to be taken, for the management or protection of a rare or endangered species of flora or fauna; or*
 - (c) *Have an adverse effect on a site or area of scientific, cultural or historical significance; or*
 - (d) *Prejudice any measures being taken, or proposed to be taken, for the management or protection of a site or area of scientific, cultural or historical significance provided such measures would not themselves have any of the effects referred to in paragraph (a), (b) or (c).*
- 84 In information already released in this matter, an email from Aboriginal Heritage Tasmania (AHT) on 4 September 2019 (Document 22) advised:

Aboriginal Heritage Tasmania (AHT) has completed a search of the Aboriginal Heritage Register (AHR) regarding the proposed field sampling in the Waterhouse Conservation Area and can advise that there are no Aboriginal heritage sites recorded within the proposed sampling locations, however please be aware that there are several Aboriginal sites recorded in the surrounding area. Furthermore, the landscape between the Great Forrester River and Waterhouse Point is a known culturally rich area and is conducive to further Aboriginal heritage. According to our records the area ... has never been fully assessed, therefore the absence of Aboriginal heritage sites on the AHR cannot be taken as an indication that there are no sites present.

...

Attached is an A3 map and excel spreadsheet showing the location and details of recorded Aboriginal heritage within and surrounding your study area.

Please note that the map provided is intended for your planning purposes only and cannot be used for any other purpose without written permission from AHT. All Aboriginal heritage site information is confidential and not for public dissemination.

- 85 Descriptions, coordinates and a map of sites of Aboriginal heritage significance have been redacted on pages 110-112 of the information in Document 22.
- 86 I am satisfied that this information identified by AHT is *prima facie* exempt under s42, as the public dissemination of locations and details of significant Aboriginal heritage sites could make protection of such sites more difficult.
- 87 I now turn to assess the public interest test, including the factors in Schedule 1.
- 88 I consider that matter (a) – the general need for government information to be accessible – is relevant and will always weigh in favour of disclosure.
- 89 I also consider (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals is relevant in that it is in the interest of the Tasmanian Aboriginal community for sites of cultural significance to be protected and so this factor weighs heavily against disclosure
- 90 I note that in this case AHT supplied the heritage information for a narrow purpose of planning only, and specifically mentioned that it was *confidential and not for public dissemination*. I consider this a relevant matter, coupled with the cultural importance of the sites to the Aboriginal community. I consider that the public interest is best served by taking appropriate measures to protect and preserve heritage sites.
- 91 Accordingly, I find that it would be contrary to the public interest to release this information and it is exempt under s42.

Preliminary Conclusion

92 For the reasons given above, I determine that:

- Exemptions claimed pursuant to s35 are set aside;
- Exemptions claimed pursuant to ss36 and 37 are varied; and
- Exemptions claimed pursuant to s42 are upheld.

Submissions to Preliminary Conclusion

93 As the above preliminary decision was adverse to the Department, it was made available to it on 13 June 2024 under s48(1)(a) of the Act to seek its input prior to finalising the decision.

94 On 3 July 2024, submissions were received from Mr Craig Limkin, Secretary of the Department. Mr Limkin partially agreed with my findings and confirmed that the Department would release additional information. He also provided lengthy submissions raising concerns regarding my decision on two specific and other general grounds. Extracts of these submissions are set out below.

95 With regard to the release of signatures, Mr Limkin submitted:

The ... preliminary decision determines that all signatures are to be released. I strongly object to that determination. Signatures are used as a means of verifying identity and of confirming the acceptance of obligations, such as signing a contract. For all parties there is significant personal risk in having signatures released electronically into the public domain and thereby becoming liable to being stolen and misused. Where such information relates to members of the public service there is an additional risk to the Crown.

In respect of staff, there is no further contextual information to be gleaned from a signature or added accountability to be gained from releasing this information, and for private individuals there is no obligation for accountability to weigh against the risk of harm.

96 With regard to Integrated Land Management & Planning, Mr Limkin submitted:

The ... preliminary decision finds that the personal information of a consultant at integrated Land Management and Planning is not exempt from release as they are details of a contracted professional and the information is 'otherwise available online'. The...[decision] does not identify where online that information is otherwise available. I have not been able to find that information in my own online searches.

The individual in question has not been contracted by the department. There is, therefore, no suggestion that this person has any obligation of accountability to the general public. It is

not clear to me why this individual should be exposed to...harms...simply by virtue of a private professional contract with the applicant of a mineral tenement.

I further note that the person in question was consulted as part of the original decision-making process and strongly objected to having their personal information released. I consider it to be contrary to the public interest to release the personal information of external third parties against their express objections.

- 97 With regard to the release of personal information of public officers, Mr Limkin relevantly submitted:

The Macquarie Dictionary defines ‘accountability’ as ‘the expectation that public servants answer for their performance to ministers who are themselves responsible to parliament, so that ultimately all answer to the people’ (my emphasis). In addition, it is reasonable to expect that public servants will be accountable to the individuals with whom they interact, where their actions or decisions directly affect those persons. I consider it also reasonable to expect that myself as Secretary, and my senior management team, will be generally accountable, because we are responsible for advising Ministers and managing the implementation of the Government’s policy agenda.

However, in my view, unless staff exercise decision-making authority or perform a statutory role, there is little public interest value in making staff below senior management directly accountable to the general public for the routine performance of the duties they are directed by their managers to perform. ... If the performance is not satisfactory, the individual officer is accountable to their manager... A member of the general public not directly affected by the officer’s actions or conduct is poorly placed to determine whether or not an officer’s conduct is satisfactory, or what an appropriate performance management response should be. The commentary often prevalent in the public domain militates against effective management action, as it tends to be exaggerated and unrealistic, and causes distress that tends to lead to deterioration in performance or even periods of stress leave.

In my view, the officers identified may hold reasonable concerns about their personal information being disclosed. Mining is a topic that tends to generate strong and polarised opinions and attracts motivated groups and individuals who in the past have chosen to target identified individuals and may do so again in the future.

More generally, in a world of increasing cyber fraud, identity theft and other online crime, the release of personal information has significant potential to be harmful to the individuals concerned. ... Privacy regulators regularly exhort public authorities to protect the personal information in their possession because of the risks that arise to individuals from being identified.

I consider harm to the private interests of staff is also contrary to the public interest if that harm is unwarranted and disproportionate. I do not consider the release of information in this instance to provide further contextual information of benefit to the public. The officers identified were not the final decision-makers, and so the requirement for them to be ‘accountable’ is only one of general principal [sic].

As such, the risk of harm to these individuals outweighs the benefit to the public interest in having their information disclosed, given that release of the personal details in question adds very little value to the overall information being released.

I also consider that there is likely harm to the Department that flows from releasing staff information. All employees have a right to be safe at work and to be safe from harm because of their work. As Secretary, I have responsibilities under Work Health and Safety (WHS) legislation to provide a safe workplace and to avoid or mitigate the risk of harm to the Department’s employees. From 2022, this includes a positive obligation to manage psychosocial risks in the workplace.

... A policy of wholesale disclosure of staff information, particularly in the absence of a compelling need for accountability, leads to generalised anxiety amongst staff that can lead to injuries.

In my view, the real risk of personal and organisational harm that can arise from releasing personal information into the public domain can only be outweighed by a specific and compelling need for individual accountability. In this instance, I am of the view that there is no such compelling need for the relevant staff to be identifiable, only a general need for public service accountability. I therefore submit that the personal information of non-executive officers should continue to be withheld on the basis that release of this information would be contrary to the public interest.

- 98 Regarding publication of details of the Department’s delegates, Mr Limkin submitted:

... I submit that publishing decisions that identify individual decision-makers tends to act against the public interest.

... I query the necessity for these individuals to be exposed to more general public scrutiny, particularly when the practice of ‘naming and shaming’ RTI officers has had a tendency to deter officers from taking up roles with RTI duties, thereby hampering the ability of public authorities to ensure there are sufficient skilled resources available to deal with applications.

- 99 Mr Limkin concluded:

Finally, I advise that, in future, the Department will adopt the practice suggested by the OAIC [Office of the Australian Information Commissioner] ... and advise applicants that staff personal information will be treated as falling outside the scope of an application unless it is information relating to a senior manager, decision-maker, or person performing a statutory function, or has been specifically sought by the applicant, and that all signatures will be treated as out of scope.

Further analysis

- 100 I have carefully considered Mr Limkin’s extensive submissions and acknowledge his concerns, particularly in relation to his responsibility for the welfare of his staff. I also acknowledge his concerns surrounding the potential for misuse of information after release. However, it must be remembered that s7 of the Act sets out that a person *has a legally enforceable right to be provided, in accordance with this Act, with information in the possession of a public authority or a Minister unless the information is exempt information.*

Names of Departmental staff

- 101 Given the express terms of the Act set by Parliament in s7, I do not accept that the imposition of a policy of blanket exemption of any category of personal information relating to officers of the Department, without consideration of the public interest test, is an appropriate way to manage any potential for misuse of this information. While harassment, trolling or phishing scams are genuine issues, the risk of this occurring must be balanced with the express intentions of accountability and transparency regarding government operations in the Act.
- 102 I also cannot agree with Mr Limkin’s views regarding the position of the OAIC regarding personal information of public servants, as this does not accord with my understanding of the quoted guidance provided by that body to public sector agencies.¹⁰ It should also be noted that the relevant legislation which the OAIC was providing guidance about, the *Freedom of Information Act 1982*

¹⁰ Position paper entitled *Disclosure of public servant details in response to a freedom of information request*, available at www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/guidance-on-handling-a-freedom-of-information-request/handling-personal-or-business-information/disclosure-of-public-servant-details-in-response-to-a-freedom-of-information-request, accessed 30 July 2024.

(Cth), differs from the Act and the guidance would not be binding in Tasmania in any event. In this guidance, the OAIC sets out an analogous position to mine, that it:

...remains of the view that generally it will not be unreasonable to disclose the names and contact details of public servants because this information only reveals that they were performing their public duties. The Information Commissioner considers there are public interest factors, including transparency and accountability of public servants, which favour disclosure of this kind of information.

- 103 I note Mr Limkin's view that the officers identified *may hold reasonable concerns about their personal information being disclosed*, as *mining is a topic that tends to general strong and polarised opinions*. However, he does not indicate that any consultation with relevant public officers has occurred or that specific concerns have been identified in this particular instance. Should any public authority have concerns regarding the release of specific information identified as *prima facie* exempt, I encourage it to refer to the public interest test to determine whether, considering all the relevant circumstances, release of that specific information in the situation in question would be contrary to the public interest. A generalised policy to always consider details of more junior public officers performing their paid duties as exempt frustrates the object of the Act as set out in s3, which also provides *that discretions conferred by this Act be exercised so as to facilitate and promote, promptly and at the lowest reasonable cost, the provision of the maximum amount of official information*. The clear intention of Parliament must override an opinion that public officers *may* hold a concern.
- 104 No specific arguments are advanced by Mr Limkin in relation to why the names and positions held by the relevant public officers should be exempt or that any agreement has been reached with the applicant that this information is not sought by him. I have previously accepted that names of public officers should be exempt from release in appropriate circumstances but am unpersuaded that that is the case here, as the relevant information appears to be routine and it is not apparent why its release would expose staff to any particular risk.
- 105 In relation to the differentiation between junior and senior staff, it is explicitly provided in Schedule 2 of the Act that *the seniority of the person who is involved in preparing the document or who is the subject of the document* is irrelevant. Again, I consider that Mr Limkin's approach appears to be contrary to the express terms of the Act and I cannot agree that it is correct. I maintain my view that the names and position details of Department staff are not exempt under s36 and are to be released to Dr Bell.
- 106 I further note Mr Limkin's indication that he intends to adopt a process, which he believes is advocated by the OAIC, to treat staff personal information as being out of scope of the application. I strongly caution against this path, as there is no provision in the Tasmanian legislation to allow a public authority to

unilaterally remove certain parts of an application for assessed disclosure without the agreement of the applicant. The Department is welcome to ask applicants if this information is sought, and remove it from its assessment if it is not, but it is not permitted to deem information as out of scope due to a policy position rather than a specific assessment of the terms of a request for information.

Signatures

- 107 Similar considerations also apply to signatures on documents. I acknowledge, and share to some extent, the Department's concern regarding the potential for misuse but also note that the potential is always present, in every document signed in every circumstance. I agree that a signature is used to confirm the acceptance of obligations, such as signing a contract, and as such it is an important component of any document. The use of a signature demonstrates, in a manner that a name alone cannot, that a document has been properly executed by those with authority to do so, which is a significant matter of public interest.
- 108 I have considered the Department's submission in conjunction with Schedule 1 of the Act and consider the following matters to be most pertinent:
- matter (a) – the general need for government information to be accessible – weighs in favour of disclosure;
 - matter (g) – whether the disclosure would enhance the scrutiny of government administrative processes – weighs in favour of disclosure, to determine for example if documents are signed by the named person or a proxy;
 - matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – weighs against disclosure for the reasons advanced by the Department.

- 109 On balance, I am not satisfied that the relevant signatures are exempt under s36 or that their release would be contrary to the public interest.

Delegate names

- 110 Mr Limkin submitted that the release of the names of Right to Information delegates amounts to 'naming and shaming' those officers and is 'punitive' rather than 'educative'. I do not agree with this characterisation. There is no intention to shame or punish these individuals, I am merely undertaking my statutory function to review delegate decisions under the Act and to publish my findings. I further note Mr Limkin's acknowledgement that names of decision-makers at the Department should be released. Given that Right to Information delegates perform an important decision-making function, it is unclear why he objects to my use of the names of these delegates in my decisions when he agrees this is not exempt information. I do not propose to change my standard practice here.

Integrated Land Management & Planning

- 111 The Department has, on page 131, released the postal address of Integrated Land Management & Planning. On page 10, it has also released the email address of the consultant which contains his first and last name. An online search using that information reveals that this information has been previously published online through work he has done for other public authorities.
- 112 While I understand Mr Limkin's concerns about this information being released over the consultant's objections, their view is not the final determinant when considering the public interest test. I remain of the view that it is not contrary to the public interest to release this information, as it relates to professional work being undertaken and is effectively already in the public domain through previous publication. I maintain my finding that it should be released to Dr Bell.

Overall

- 113 While I have carefully considered the entirety of Mr Limkin's submissions, I have not altered the findings set out in the preliminary decision.
- 114 Mr Limkin's submissions seem to place less weight on the clear intentions of Parliament regarding government transparency and the release of the maximum amount of official information than on generalised and, at times, overstated concerns regarding risks to public servants. I do not seek to downplay risks to public officers undertaking vital work but it is crucial that these risks are appropriately balanced with the explicit provisions of the Act.
- 115 The Department may wish to change internal processes or seek amendments to legislation to address concerns around psychosocial hazards to its staff or cybersecurity risks, but I do not agree that its proposed method to reduce these risks through blanket exemption is compatible with the spirit and intention of the Act. I encourage the Department to reflect on its position, with this explicit intention of parliament regarding accountability and information access given its proper weight.

Conclusion

- 116 For the reasons set out above, I determine that:
- Exemptions claimed pursuant to s35 are set aside;
 - Exemptions claimed pursuant to ss36 and 37 are varied; and
 - Exemptions claimed pursuant to s42 are upheld.
- 117 I apologise to the parties for the delay in finalising this decision.

Dated: 16 August 2024

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

Richard Connock
OMBUDSMAN

Attachment A

Relevant Legislation

Section 35 – Internal Deliberative Information

- (1) Information is exempt information if it consists of –
- (a) an opinion, advice or recommendation prepared by an officer of a public authority; or
 - (b) a record of consultations or deliberations between officers of public authorities; or
 - (c) a record of consultations or deliberations between officers of public authorities and Ministers –

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

- (2) Subsection (1) does not include purely factual information.

- (3) Subsection (1) does not include –

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

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

Section 36 – Personal information of a person

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

- (2) If –

- (a) an application is made for information under this Act; and
- (b) the information was provided to a public authority or Minister by a third party; and
- (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party –
the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –
- (d) notify that person that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information that has been applied for; and
- (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
- (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.

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

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

Section 37 – information relating to business affairs of third party

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

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

(2) If–

- (a) an application is made for information under this Act; and
- (b) the information was provided to a public authority or Minister by a third party; and
- (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of substantial concern to the third party –
the principal officer or Minister must, before deciding whether the disclosure of the information under this Act would be likely to expose the third party that provided the information to substantial harm to the third party's competitive position, by notice in writing given to the third party –
- (d) notify the third party that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information applied for; and

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

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority, state the name and designation of the person who made the decision; and
- (c) inform the third party of –
 - (i) its right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made;
 - and
 - (iii) the time within which the application must be made.

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

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

Section 42 – Information likely to affect cultural, heritage and natural resources of the State

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

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

Section 33 – Public interest test

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

Schedule 1 – Matters relevant to Assessment of Public Interest

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

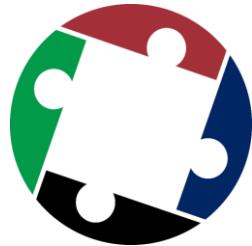
- (a) the general public need for government information to be accessible;
- (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
- (c) whether the disclosure would inform a person about the reasons for a decision;
- (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
- (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
- (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
- (g) whether the disclosure would enhance scrutiny of government administrative processes;
- (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
- (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
- (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
- (k) whether the disclosure would promote or harm the economic development of the State;
- (l) whether the disclosure would promote or harm the environment and or ecology of the State;
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;

- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

Schedule 2 – Matters Irrelevant to Assessment of Public Interest

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

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



Right to Information Act Review

Case Reference: R2202-147

Names of Parties: Stephen Crothers and Department of Health

Reasons for decision: s48(3)

Provisions considered: s20(b)

Background

- 1 Mr Stephen Crothers identifies as a scientist, occupational hygienist and forensic investigator. On 11 October 2021, he applied to the Department of Health (the Department) under the *Right to Information Act 2009* (the Act) for assessed disclosure of information related to the COVID-19 pandemic (the Application). He paid the relevant fee.
- 2 Specifically, he sought:
 1. *The Department of Health (DoH) has alleged that there have been thirteen deaths in Tasmania attributed to the alleged COVID-19. Of this total, six were female and seven male ranging in age from 72 to 91. One death was at the Royal Hobart Hospital, five at the North West Regional Hospital and seven at the Mersey Community Hospital. In anonymity, for each of the thirteen deceased, appropriately designated, please provide:*
 - (i) *The co-morbidities of the person when tested positive for the alleged COVID-19.*
 - (ii) *The number of RT-PCR cycles for the test positive of the person with documentary evidence of recording of the cycles against the person's record. If no record was made a simple statement to that effect will suffice.*
 - (iii) *The means by which the number of RT-PCR cycles relative to detection of the alleged SARS-CoV-2 for COVID-19 was determined by the DoH.*
 - (iv) *The clinical symptoms presented by the person for the alleged COVID-19.*
 2. *The DoH has alleged that two people in Tasmania, who had tested positive to COVID-19 and died, are not included in the total of thirteen*

in § 1 above: a woman and a man, both aged in their 60s, died at the North West Regional Hospital, and that the pair had pre-existing serious health conditions; the cause of death in each case to be determined by the Tasmanian Coroner. In anonymity, for each of the two deceased, appropriately designated, please provide:

- (i) *The co-morbidities of the person when tested positive for the alleged COVID-19.*
 - (ii) *The number of RT-PCR cycles for the test positive of the person with documentary evidence of recording of the cycles against the person's record. If no record was made a simple statement to that effect will suffice.*
 - (iii) *The clinical symptoms presented by the person for the alleged COVID-19.*
 - (iv) *The cause of death determined by the Tasmanian Coroner.*
3. *The DoH has reported that on Friday 1 October 2021, a 15 year old boy arrived at Launceston airport on a Virgin flight from Melbourne, that he tested positive for COVID-19 and exhibited mild symptoms of the alleged infection; the only confirmed COVID-19 'case' in more than a year. In anonymity, appropriately designated, please provide:*
- (i) *The number of RT-PCR cycles for the test positive of the person with documentary evidence of recording of the cycles against the person's record. If no record was made a simple statement to that effect will suffice.*
 - (ii) *The clinical symptoms presented by the person for the alleged COVID-19.*
4. *The DoH has reported that in August 2020 a visitor from Sydney tested positive for the alleged COVID-19 but left the state. In anonymity, appropriately designated, please provide:*
- (i) *The age and gender of the person.*
 - (ii) *The number of RT-PCR cycles for the test positive of the person with documentary evidence of recording of the cycles against the person's record. If no record was made a simple statement to that effect will suffice.*
 - (iii) *The clinical symptoms presented by the person for the alleged COVID-19.*
5. *Full citations for all peer-reviewed published scientific papers upon which the DoH has relied for report of achieving a purified isolate of the alleged SARS-CoV-2 pathogen or unique elements thereof.*
6. *The Material/Product Data Sheets for each and every swab kit used by the DoH for sampling people for subsequent RT-PCR analysis.*

7. *The life cycles of a swab and the related specimen, including but not limited to:*

 - (i) *How long the swabs are held secure by the DoH after specimens have been obtained.*
 - (ii) *The identities of all, if any, other parties to which the swabs are delivered and for what purposes.*
 - (iii) *The identities of all, if any, other parties to which the biological specimens are delivered and for what purpose.*
 - (iv) *How long after RT-PCR processing are the swabs disposed of, by what means and by whom.*
 - (v) *If the DoH, or its servant or agents or other parties, process the biological specimens for anything other than the alleged SARS-CoV-2 and if so for what and what purposes.*
8. *In anonymity, appropriately designated, please provide the findings on post-mortem of any and all such examinations performed on people who have allegedly died from COVID-19 in Tasmania.*
- 3 On 22 December 2021, Dr Mark Veitch, Director of Public Health and a delegate under the Act, issued a decision to Mr Crothers. The decision refused to provide the information sought pursuant to s20(b) of the Act, on the basis that the Application was vexatious. Dr Veitch's reasoning for this decision is summarised as follows:

 - a) The topic of the Application was the subject of a previous application where the Department had issued a decision;
 - b) Mr Crothers' reason for requesting the information was to pursue a personal position which Mr Veitch submitted ran counter to the findings of the scientific community; and
 - c) It was not clear if the information requested would offer any value to Mr Crothers.
- 4 Dr Veitch set out in his decision that the Application was received by the Department on 26 October 2021 and accepted on 10 November 2021.
- 5 The decision did not contain details of the right to make an application for internal review of the decision. Instead, it erroneously advised Mr Crothers that he could apply to my Office for an external review of the decision under s45 of the Act. On 19 January 2022, Mr Crothers made such an application, and on 20 January 2022, my Office advised Mr Crothers that his application for external review could not proceed under s44 of the Act because an internal review had not been carried out. My Office also wrote to the Department on this date to provide advice about Mr Crothers' internal review rights.
- 6 On 20 January 2022, Mr Crothers applied to the Department for an internal review of Dr Veitch's decision. On 15 February 2022, Mr Michael Casey, a

delegate under the Act, issued an internal review decision. This decision affirmed the previous delegate's decision, namely that the Application was vexatious and refused it under s20(b) of the Act.

- 7 Mr Casey's reasoning for this decision is summarised as follows:
 - a) The Application formed part of a series of requests, responding to which placed an unreasonable present and future burden on the Department while managing the COVID-19 response.
 - b) Mr Crothers requested information for an improper purpose, namely:
 - i. to expose the failings in public health in response to the COVID-19 pandemic; and
 - ii. to cause annoyance to the Department by diverting its resources.
 - c) Despite being expressed in reasonable terms, the tone of the Application was in fact an attempt to embarrass, expose or disgrace the Department because it should be considered in the wider context of Mr Crothers':
 - i. wider campaign to expose the COVID-19 virus as a hoax; and
 - ii. dissatisfaction with the information previously disclosed by the Department or which was in the public domain.
 - d) The tone of online publications were accusatory against the Department and individual named officers.
- 8 On 21 February 2022, Mr Crothers applied to my Office for an external review and this application was accepted under s44(1) of the Act as he received an internal review decision and sought my review within 20 working days of receiving it.

Issues for Determination

- 9 I must determine whether the Application may be refused under s20(b) of the Act, on the basis that it is a vexatious application.

Relevant legislation

- 10 Relevant to this matter is s20 of the Act, a copy of which is attached at Attachment 1 to this decision. I also attach at Attachment 2 a copy of a guideline issued by my Office under s49(1)(b) of the Act – Guideline 2/2010 – *Guideline in Relation to Refusal of an Application for Assessed Disclosure under the Right to Information Act 2009, s20*.

Submissions

- 11 Mr Crothers provided the following submissions in support of his external review application:

I am clearly not a 'lone prophet' driven by 'all the characteristics of a preoccupied and unreasonable campaign lacking any serious purpose', 'thwarted at every turn by a conspiracy that in his view includes the Director of Public Health and the political parties'. The language used by Mr. Casey is intemperate and his speculations as to the character of my person and my motives are immaterial. Only the RTI questions put to the public authority are relevant.

Since I am a highly accomplished scientist with an extensive publication record and international reputation, having lectured in many countries over a period of at least 15 years, and appearing in a recent science documentary funded by the Russian Ministry for Culture, I do indeed have an extensive 'digital footprint'; but that too is immaterial. As the lead scientist of my team of experts I act as spokesman and RTI applicant. In order for independent analyses to be conducted, data and other information known only to the public authority are required.

I note that neither the character of my person nor my motivation for requesting information are terms setting constraints on RTI applications under the Right to Information Act 2009 (Tas). Any member of the public is entitled to request information under the Act and I am a member of the public:

(...)

The Tasmanian people are entitled to know, by independent professional analyses, the scientific bases, if any, for the claims made by public officials for diagnosis of Covid-19 cases on RT-PCR outputs, the experimental character of the so-called Covid-19 vaccines, the safety and efficacy of those experimental vaccines, whether face masks are fit for purpose, the fitness for purpose and management of swab kits used to procure biological samples, the scientific validity, if any, for the public health directives made by Mr. [sic] Veitch and the state of emergency declared by him. Yet Mr. Veitch refuses to supply the information.

I am [a] scientist, occupational hygienist and forensic investigator with 40 years field experience carrying out inquiries into injuries and fatalities in workplaces and public spaces for insurance companies and law firms, with extensive experience in physical chemical and biological hazards and their management. I and my team of experts are more than adequately qualified to independently assess these RTI matters, in the public interest. To do so, scientific data is essential, the very data that Mr. Veitch refuses to supply. I suspect that Mr. Veitch refuses to answer RTI questions because he has no scientific bases for his claims and measures.

- 12 The Department did not make specific submissions in response to this external review, beyond the reasoning of its decisions. In the absence of submissions, I have primarily had regard to the internal review decision, as it represents the Department's most recent and detailed position on the Application.
- 13 Mr Casey noted the Department's position relating to the refusal of the Application under s20(b) of the Act, which is relevantly set out as follows [footnotes partially omitted]:

Essentially, s20 is concerned with the effect of a request on the public authority and its officers. It should be interpreted in the context of the importance of the right to access to information provided under s7 of the Act and not be used to undermine that right. In recognising that a request may be vexatious, the following factors may be relevant to a finding that a request (which may be the latest in a series of requests or other related correspondence) is vexatious:

- i. *It would impose a significant burden on the public authority.*
- ii. *It does not have serious purpose of value.*
- iii. *It is designed to cause disruption or annoyance to the public authority.*
- iv. *It has the effect of harassing the public authority.*
- v. *It would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.*

...

Applying the approach and adopting three of the consideration [sic] in the context of this request.

The previous request of RTI2021-005, submitted 11 September 2020 requested [full text of request omitted, request related to COVID-19 testing]...

A subsequent request for information, RTI202122-059, received 25 October 2021 requested [full text of request omitted, request related to vaccination status and test results for two individuals testing positive to COVID-19 in October 2021]...

The series of request [sic] for information places a burden on the very public authority that is responsible for managing the response to COVID, the testing processes associated with the public health threat, the public hospital system and the delivery of vaccinations within the community.

Furthermore, the future burden must be considered. The history demonstrates a high likelihood that, if the public authority had

responded in the normal way to the request, it would have faced further requests. These would have placed a quite unreasonable burden on the public authority's officers and represented a wholly disproportionate drain on resources.

The requests submitted by the applicant and his digital footprint show that the applicant regards himself as a lone prophet, a man with a mission to expose the alleged failings of the government in the field of health and safety, particularly, whose efforts in the public interest have been thwarted at every turn by a conspiracy that in his view now includes the Director of Public Health and the political parties.

I could present to you a great deal of additional information proving that the COVID19 pandemic is a hoax but to do so would lead to a massive volume of documents. With what I have given to you herein you have enough to understand the fraud and to investigate further if you wish.

Our major political parties have betrayed us for the proverbial 30 pieces of silver. I suggest that you help to vote them out of office at the first opportunity and replace them with an entirely new political representation. Thereafter all the perpetrators of and collaborators in this heinous crime against us must be brought to justice and face the full force of the true Rule of Law¹.

In forming this view, the campaign undertaken by the applicant signals a reluctance to consider an alternative view, believing the requests have a serious purpose of uncovering failings in public health which he believes to be potentially life threatening. However, this consideration is more than outweighed by the other considerations, discussed here, which lead me to the conclusion that, taken in the round, the request is vexatious.

Such behaviour indicates that the applicant demonstrates all the characteristics of a preoccupied and unreasonable campaign lacking in any serious purpose.

There is nothing objectionable about the tone of the request. It is expressed in perfectly reasonable terms. However, it is judicious to see the request in the context of a tone questioning the veracity of the science to identify the existence of the virus. Within this context, expressing dissatisfaction with the information previously disclosed, or that is in the public domain, by framing requests submitted to this and

¹ Stephen Crothers, An Open Letter to Australian Citizens, available at freeadelaide.org/wp-content/uploads/2021/10/Stephen-Crothers-open-letter-RT-PCR.pdf

one other jurisdiction as a disconcerting challenge, in an attempt to embarrass, expose or disgrace someone.

Further, I note the applicant's intention cannot be disregarded when seeking to cause annoyance by diverting the resources of the public authority.

I put eight points of inquiry to the Department of Health Tasmania (see Document 1) in my first request for information under the *Right To Information Act 2009* (Tas). Only one point of inquiry therein did I care about and to which I knew the answer beforehand (the other points of inquiry were mere busy work to divert attention): ...²

The applicant particularised his intention for disruption³ by seeking to obtain information that he does not already have:

In my second request for Further and Better Particulars (see Document 3), I advanced four points of inquiry. The fourth point of inquiry contained nine sub-points of inquiry. The only points of inquiry I cared about are 4(a), 4(b), and 4(d), to which I knew the answers beforehand, the others being mere busy work to divert attention⁴.

The [sic] there is a tendentious and haranguing tone exhibiting an intention to argue a viewpoint to further a campaign that has no reasonable prospect of success.

...The second request for information was responded to by Mr Casey. Concerning point 4(d) in relation to the number of cycles recorded in each and every PCR 'test' for the alleged COVID-19, Mr. Casey said nothing. The reason for his silence is because the numbers of cycles have never been recorded for any RT-PCR 'test' by any public health officer in Tasmania, or by any of the public authority's servants or agents relative to the alleged COVID-19 pandemic. Consequently the PCR kit responses claimed by public officers for the public authority, or relevant servants or agents thereof, be they positive or negative or indeterminate, are worthless. The absence of any such records can easily be proven by subpoena. Concerning point 4(b) in relation to full citations of

² Stephen Crothers, *Admission by Dr Mark Veitch, Director of Public Health, and Michael Casey, Senior Consultant Right to Information Re COVID-19 and SARS-CoV-2*, (10 June 2021), available at www.vaxrisk.org/FLOYD-CROTHERS-INDICTMENT-PCR.pdf

³ *Ward v Information Commissioner*, EA/2009/0093, 25 May 2010

⁴ See Note 2.

peer-reviewed published papers for isolation by purification of the alleged SARS-CoV-2 contagion, Mr. Casey provided only a clutch of journal names; no citations whatsoever. The reason for this is that no such peer-reviewed published papers exist. Consequently the PCR kit responses that have been claimed by any public health officer in Tasmania, or by any of the public authority's servants or agents relative to the alleged COVID-19 pandemic, be they positive or negative or indeterminate, are worthless. Once again, the absence of the necessary peer-reviewed published papers can be easily proven by subpoena.

Concerning point 4(a) as to the genetic sequence of any element of the alleged SARS-CoV-2 virus, required to prime the PCR kit, Mr. Casey's statement is most damning:

The information custodian advised that the sequence information is commercial in confidence and not known to the public authority.

First, it is difficult to see how the genetic sequence of any part of the alleged SARS-CoV-2 contagion could be 'commercial in confidence' since the alleged contagion is also alleged by the relevant personnel of the Department of Health to be a natural organism, not a GMO. Patents can be applied to a GMO but not to any natural organism. I defer this issue to our lawyers for their expert consideration at law.

Secondly, Mr Casey admits that the public authority, the Department of Health, Tasmania, and hence its entire relevant personnel, do not even know what they are testing people for with the RT-PCR kits they use, so all reports by the relevant public officers for positive 'cases' of COVID-19 infection and also negative (free of infection) are false. These public officers, led by Dr. Mark Veitch, have been making false representations to the public at large in television and radio announcements and commercials, and in written media both paper and electronic. Dr. Veitch has also advanced numerous false representations in a publicly circulated document entitled 'COVID-19: A Second Challenging Year' (see Document 4, pp.1-2). So too has Dr Shannon Melody, Specialist Medical

Advisor, Tasmanian Vaccination Emergency Operations Centre (see Document 4, pp.4-5)⁵.

The extracts speak for themselves. The tone of this writing also suggests an accusatory behaviour against the public authority and individual named officers.

I am not swayed by the grounds submitted by the applicant and concur with the delegates [sic] summation that:

...the request is a fishing expedition that is an abuse of process provided under the Act which will add little more to what has been previously advised and is in the public domain.

For the reasons detailed, my decision is the request for information is vexatious under s20 of the Act whereby it compromises government efficiency, unsettling the intended balance between public authorities and applicants.

Analysis

- 14 The Department determined both in its initial decision and the internal review decision, that the Application should be refused under s20(b) of the Act, on the basis it was vexatious.
- 15 Section 20(b) of the Act provides:

Repeat or vexatious applications may be refused

If an application for an assessed disclosure of information is made by an applicant for access to information which –

(…)

(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.

- 16 This Office has created a Guideline⁶ in accordance with s49(1)(b) of the Act relating to the factors that should be considered when determining to refuse an application under s20 (Guideline). Relevantly, I note:
 - a) It is the *application* which must be vexatious and not the applicant.

⁵ See Note 2.

⁶ Ombudsman Tasmania, Guideline No. 2/2010, *Guideline in Relation to Refusal of an Application for Assessed Disclosure under the Right to Information Act 2009*, s20, available at www.ombudsman.tas.gov.au/right-to-information

- b) Regard must be had to the object of the Act contained in s3(1) which is *to improve democratic government in Tasmania* –
- (a) *by increasing the accountability of the executive to the people of Tasmania; and*
 - (b) *by increasing the ability of the people of Tasmania to participate in their governance; and*
 - (c) *by acknowledging that information collected by public authorities is collected for and on behalf of the people of Tasmania and is the property of the State.*
- c) Consideration should be given to whether the application might be refused under another, more specific provision.
- 17 The Guideline also provides that, depending on the circumstances, consideration may also be given to the following factors:
- a) the wording of the application and whether it is obscure, unreasonably long or unreasonable complex;
 - b) the stated or apparent purpose of the applicant in making the request and whether that purpose is consistent with the objects of the Act; and
 - c) whether the application is part of a pattern/course of conduct.
- 18 I have been clear in previous decisions⁷ that it is the *application* which must be vexatious, not the applicant, and that other, unrelated conduct between the applicant and public authority is not relevant in the assessment of an application under the Act. This is consistent with the Guideline which emphasises that [I]n view of the objects of the Act, the opinion that an application is vexatious should not be lightly reached.
- 19 Whilst s20 of the Act requires the application to be vexatious *in the opinion of the public authority*, this opinion must be reasonably held and in accordance with the objects of the Act and the factors to be considered in the Guideline.
- Series of requests and future burden
- 20 Mr Casey reasoned that the Application formed part of a series of requests, which places an unreasonable present and future burden on the Department which is tasked with managing the response to COVID-19. Mr Casey also submitted that *the history demonstrates a high likelihood that, if the public authority had responded in the normal way to the request, it would have faced further requests.*
- 21 Mr Casey set out that Mr Crothers made a request for information on 11 September 2020. He then applied for internal review of the decision on 5 January 2021, requesting further additional information outside the scope of

⁷ Andrew McCullagh and Northern Midlands Council, issued 23 June 2022; Laurence Archer and Dorset Council, issued 17 June 2021; Darryl Howlin and City of Clarence, issued 18 February 2021; available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

the initial application. The Department considered that this partially formed a new application for information under the Act. Mr Crothers then made the Application (which is the subject of this decision) on 11 October 2021, and sought an internal review of the Department's original decision on 20 January 2022. Mr Crothers made a further request for information on 25 October 2021 and sought an internal review of the decision on 19 January 2022. The Department therefore indicated that Mr Crothers has made:

- a) three applications for information under the Act;
 - b) one internal review application which was considered by the Department to be a partially new request; and
 - c) two other internal review applications.
- 22 The Department has not provided any detail on why responding to these applications placed an unreasonable burden on the Department, beyond a brief and general commentary on the Department's role in managing the response to COVID-19. In the absence of any such detail, it is difficult to assess how processing three (or four) new requests, and their subsequent internal review applications, spaced out over an approximately sixteen month period is unduly burdensome for the Department. I note that the requests are clearly worded, specific in their terms and do not appear to be unreasonably long or complex. I am also concerned by the Department's indication that it has taken into account the possibility of future requests and their future burden on the Department, which is entirely in the realm of supposition and cannot be used to refuse a current application.
- 23 In any event, I note that the Department has not refused the Application, or any previous application, under s19 of the Act, which allows for the refusal of requests in certain circumstances where the work involved in providing the information requested would substantially and unreasonably divert the public authority's resources from its other work. I also note that the Department has not assessed the Application under or relied on s20(a) of the Act, which allows for the refusal of requests in certain circumstances where the information is the same or similar to information sought under a previous application.
- 24 At this point, I would reinforce to the Department that Mr Crothers is entitled to exercise his statutory rights to request information under ss7 and 13 of the Act, and seek a review of the decisions made by the Department under s43 of the Act. Indeed, s7 provides that Mr Crothers has a *legally enforceable right to be provided, in accordance with this Act, with information in the possession of the public authority...unless that information is exempt information.*
- 25 It is not apparent that the volume of Mr Crothers' applications, or the size of the individual requests, is excessive and I do not consider that any inappropriate burden on the Department has been demonstrated or is a valid justification to refuse his request under s20(b).

Improper purpose

- 26 Mr Casey asserted that Mr Crothers requested the information for an improper purpose, namely:
- i. uncovering failings in public health in response to the COVID-19 pandemic; and
 - ii. to cause annoyance to the Department by diverting its resources.
- 27 I am concerned from the outset that Mr Casey considered an alleged attempt to *uncovering failings in public health* to be in any way an improper purpose. The explicit object of the Act in s3 is to increase the accountability of the executive and clearly attempting to expose failings in public health is part of such accountability. It would be an abuse of the Act to label any request for information which sprung from an attempt to hold a public authority to account or scrutinise its work as vexatious.
- 28 Dr Veitch's comments that the request being a *fishing expedition...which will add little more to what has been previously advised and is in the public domain* and thus being *an abuse of process under the Act* are also concerning. It is not an abuse of the Act to seek information for a purpose not considered 'worthy' by a public authority or to go on a 'fishing expedition' for information. The Act is explicit that the public has a right to government information, unless it is exempt. Public information is not to be only provided to applicants with a purpose considered suitable by public authorities, it should be provided openly wherever possible to all.
- 29 There are improper purposes which attract the operation of s20(b), but this should only be used when the purpose is not truly to obtain information but to annoy the public authority. The second justification proffered by Mr Casey is such a purpose, when he alleges that Mr Crothers' request is intended to cause annoyance to the Department by diverting its resources rather than being made due to him actually wanting to obtain the relevant information.
- 30 In forming a conclusion on these matters, Mr Casey referred to external online material alleged to be authored by Mr Crothers, the content of which is set out in the Submissions above. Mr Casey had clearly sought out this material in undertaking his own research into Mr Crothers as part of responding to the application for information, it was not provided with the Application itself.
- 31 Whilst the Guideline indicates that the applicant's apparent purpose may be taken into account when deciding whether an application is vexatious, this must be balanced against the other factors set out in the Guideline. Most notably the s3 object of the Act, particularly around the improvement of democratic governance. I also note that Mr Crothers has elaborated on his purpose for requesting the information in his external review application, the content of which is set out in the Submissions above and reproduced below for ease of reference:

The Tasmanian people are entitled to know, by independent professional analyses, the scientific bases, if any, for the claims made by public officials for diagnosis of Covid-19 cases on RT-PCR outputs, the experimental character of the so-called Covid-19 vaccines, the safety and efficacy of those experimental vaccines, whether face masks are fit for purpose, the fitness for purpose and management of swab kits used to procure biological samples, the scientific validity, if any, for the public health directives made by Mr. Veitch and the state of emergency declared by him.

- 32 Again I note that Mr Crothers' stated purpose goes to the crux of the s3 object of the Act – to improve democratic government by increasing the accountability of the executive to the people and by increasing the ability of the people to participate in their governance. I reinforce the fact that it is the *application* which must be vexatious and not the applicant, and the Department's assessment of vexatiousness should have been confined to the terms of the application itself and not from information it had sought out from online sources.
- 33 I strongly criticise the choice of language used in the internal review decision, such as to opine that Mr Crothers *regards himself as a lone prophet* and that his *behaviour indicates that the applicant demonstrates all the characteristics of a preoccupied and unreasonable campaign lacking in any serious purpose*. This language creates a tone in the decision which is disrespectful, unprofessional and unnecessary. Mr Crothers justifiably objected to being described in these terms. Many public authorities deal with individuals who question their integrity and publicly criticise their actions. Applicants for information may hold different beliefs to public authorities or question scientific orthodoxy. However, public authorities maintain obligations of professionalism and to ensure an appropriate level of access to legal processes (such as the Right to Information process) is provided uniformly to everyone. Refusal of access to information under s20 of the Act should not be used as a punishment for an applicant's behaviour in other fora, to suppress critical commentary of a public authority's actions or be applied specifically to those who hold differing views.
- 34 The Department contended that Mr Crothers allegedly claimed in an online post⁸ to have already known the answers to some of the points in past information requests, and these were included merely to create additional work for the Department. This is of justifiable concern regarding Mr Crothers' motivations and could potentially demonstrate vexatiousness in different circumstances. It is critical, however, that this material relates to previous information requests and does not relate to the Application specifically. There is also no indication that Mr Crothers' online comments were provided to the Department as part of the Application. Rather, they appear to have been obtained by the Department independently from researching what it called the applicant's *online footprint*. This is not consistent with the requirement that it

⁸ See Note 2.

must be the *application* which is vexatious and not the applicant, as is required by the Act.

- 35 This now leads me to address a fundamental aspect of decision making in the exercise of public power. Refusing a right to information application on the basis of material found online and external to the actual application is highly problematic. This is because it is contrary to the principle of procedural fairness, which requires decision makers to observe fair procedures when making decisions which affect a person's rights or interests⁹. Procedural fairness comprises (i) the hearing rule¹⁰, whereby *a person whose interests are liable to be affected to be given notice of relevant matters and a reasonable opportunity to present his or her case*¹¹; and (ii) the rule against bias¹² to ensure the objective appearance of impartiality and the absence of pre-judgment¹³.
- 36 I strongly criticise the Department's reliance on external material it had independently sourced in the internal review decision without giving Mr Crothers a right of reply. Drawing conclusions on Mr Crothers' motivations for making the Application based on such material did not afford him a chance to respond to the allegations made, and gave the impression that the Department had already pre-judged the Application based to a large extent on the external material.

Tone

- 37 I disagree with Mr Casey's reasoning regarding the tone of the Application. He even sets out in his decision that *there is nothing objectionable about the tone of the request...it is expressed in perfectly reasonable terms*. I cannot reconcile his reasoning that *the context of a tone questioning the veracity of the science to identify the existence of the virus makes this an attempt to embarrass, expose or disgrace someone with the s3 object of the Act*. The Act is intended to release information to all, and this is not limited to those who agree with the Department or the scientific orthodoxy. The tone of the actual application for information is the only relevant consideration, not the Department's view on his general beliefs around COVID-19 or other online posts written for an entirely different audience. It was not appropriate for Mr Casey to draw these conclusions or give weight to extraneous material to interpret Mr Crothers' tone. I do not consider that any part of the tone of this request provides justification for its refusal under s20(b) of the Act.

⁹ *Kioa v West* (1985) 159 CLR 550; 60 ALJR 113, per Mason J at 584 (CLR)

¹⁰ *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361; 311 ALR 387; [2014] FCAFC 83, per Allsop CJ, Middleton and Foster JJ at 84

¹¹ Westlaw AU, *The Laws of Australia* (at 8 February 2024) 2. Administrative Law, 2.5 Judicial Review of Administrative Action: Procedural Fairness at 2.5.20

¹² See Note 10.

¹³ See Note 11.

Adequacy of Statement of Reasons

38 I take this opportunity to comment on the adequacy of the reasons provided by the Department. There are a number of long accepted important purposes for a statement of reasons, including that:

- i. they "encourage better and more rational decision-making";
- ii. they "enhance government transparency and accountability and give legitimacy to a decision by showing that the decision was not made arbitrarily and that issues raised by interested parties are being adequately considered"; and
- iii. in compliance with procedural fairness, they enable those affected by the decisions to decide whether the decision has been lawfully made and why they have not succeeded.¹⁴

39 Guidance is also provided by the Administrative Review Council about the value of a statement of reasons:

A statement of reasons affords a person affected by a decision the opportunity to have the decision explained. The person can then decide whether to exercise their rights of review and appeal, and, if they decide to do so, they are then able to act in an informed manner.

Describing the reasoning process can also help decision makers think more carefully about their task and be more careful in their decision making. Further, the preparation of statements of reasons can help agencies identify relevant principles and create standards to guide future decision making.

Bodies that review government decisions - courts, tribunals, ombudsmen and other oversight bodies - pay close attention to reasons for decisions when deciding whether a decision should be set aside, a new decision made, or other remedial action taken. A decision maker is likely to face criticism when the reasons for a decision are deficient or do not provide a full or accurate account of why the decision was made¹⁵.

40 This guidance also states that a well written statement of reasons should contain the decision made, the findings on material facts, the evidence on which each material finding of fact is based, and the reasons for the decision:

The actual reasons relied upon by the decision maker at the time of making the decision must be stated. Every decision should be amenable to logical explanation. The statement must detail all steps in

¹⁴ Justice Melissa Perry, *Statements of Reasons: Issues of Legality and Best Practice*, 10 June 2020, available at www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-perry/perry-j-20200610#_ftnref3 (accessed 8 February 2023), in which her Honour cites Professors Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis, 5th ed, 2019) at 1200-1202.

¹⁵ Administrative Review Council, *Decision Making: Reasons, Best Practice Guide 4*, August 2007, page 1

the reasoning process that led to the decision, linking the facts to the decision¹⁶.

- 41 Dr Veitch's original decision did not inform Mr Crothers of his right to apply for a review of the decision under s43 of the Act. Instead, it erroneously informed Mr Crothers he could apply to my Office for external review of the decision. My Office was, however, unable to accept Mr Crothers' application for external review under s44 of the Act because Mr Crothers had not yet sought internal review of the decision. Providing confusing information regarding review rights could have resulted in Mr Crothers being unable to comply with the time limit under s43 of the Act for applying for internal review, thereby losing his right to seek either an internal or external review of the decision. I strongly suggest the Department ensures any future decisions issued contain correct information as to review rights, as this is a mandatory requirement under s22(1)(c) of the Act.
- 42 In relation to the internal review decision of Mr Casey, while this complied with the mandatory requirements, I consider that the following matters should be noted:
 - i. Pages 3 to 8 of the internal review decision comprise a general discussion of the Department's interpretation of the law regarding vexatiousness. Mr Casey does not make findings on the material facts until much later in the decision. This approach is confusing for the recipient and I encourage the Department to be more concise or more clearly set out which parts of the decision are academic discussion only rather than specifically applicable to the application in question.
 - ii. All of the case references in Mr Casey's decision are to cases in the United Kingdom. The Department is encouraged to limit references to international case law and legislation, as this is not binding in Australia and confusing to applicants.

Preliminary Conclusion

- 43 For the reasons given above, I determine that the Department was not entitled to refuse this application under s20(b) of the Act. I direct the Department to assess the information requested for disclosure in accordance with the provisions of the Act.

Conclusion

- 44 As the above preliminary decision was adverse to the Department, it was made available to it on 14 March 2024 under s48(1)(a) to seek its input before finalising the decision.
- 45 The Department advised on 19 April 2024 that it would not be making any submission in response to the preliminary decision and that it will prepare a fresh decision in relation to Mr Crothers' application.

¹⁶ See Note 15 at page 8.

- 46 Accordingly, for the reasons set out above, I determine that the Department was not entitled to refuse this application under s20(b) of the Act. I direct the Department to assess the information requested for disclosure in accordance with the provisions of the Act.
- 47 I apologise to the parties for the inordinate delay in finalising this decision.

Dated: 19 April 2024



Richard Connock
OMBUDSMAN

Attachment I

20. Repeat or vexatious applications may be refused

If an application for an assessed disclosure of information is made by an applicant for access to information which –

- a) in the opinion of the public authority or a Minister, is the same or similar to information sought under a previous application to a public authority or Minister and the application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information; or
- b) is an application which, in the opinion of the public authority or Minister, is vexatious or remains lacking in definition after negotiation entered into under section 13(7) –

the public authority or Minister may refuse the application on the basis that it is a repeat or vexatious application.

Attachment 2

Guideline No. 2 /2010

Right to Information Act 2009, s 49(1)(b)

GUIDELINE IN RELATION TO REFUSAL OF AN APPLICATION FOR ASSESSED DISCLOSURE UNDER THE RIGHT TO INFORMATION ACT 2009, s 20

This Guideline is issued by the Ombudsman under s 49(1)(b) of the Right to Information Act 2009.

The Guideline relates to the factors to be considered when determining to refuse an application under s 20 of the Act.

I. The subject of this Guideline

Section 20 states that an application for the assessed disclosure of information may be refused on the basis that it is a repeat or vexatious application.

The section states that refusal on this basis may occur where the public authority or Minister (which has responsibility for making a decision on the application under the Act) is of the opinion –

1. that the information which is the subject of the application is the same or similar to information sought in 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 - see s 20(a);
2. is vexatious-see s 20(b);
3. remains lacking in definition after negotiation entered into under s 13(7) - sees 20(b).

The factors which need to be considered when determining to refuse an application on grounds 1 and 3 readily appear from the section.

In relation to ground 1, it is first necessary to compare the current application with the former application, and to form an opinion on whether they are the same or significantly similar. If they are the same or similar, it is then necessary to consider whether the current application, on its face, discloses a reasonable basis for again seeking access to the same or similar information. There are no factors which might be usefully put forward to assist in determining these matters.

There are also no factors which might be usefully put forward in relation to ground 3. The only question that arises here is whether the public authority or Minister is of the opinion, following negotiation under s 13(7), that the terms of the application are sufficiently precise for them to know what information the applicant is seeking.

On this reasoning, this Guideline only deals with the factors to be considered when determining to refuse an application on the ground that it is considered to be vexatious.

2. S 20(b) - the factors to be considered

It is to be noted that s 20(b) of the Act requires that the opinion be formed that the application is vexatious, not that the applicant is vexatious.

The notion of a "vexatious application" seems to be similar to that of vexatious proceedings, in litigation. The Macquarie Dictionary defines the word in that context as meaning "instituted without sufficient grounds, and serving only to cause annoyance". Guidance might also be obtained from definitions such as that in the *Vexatious Proceedings Act 2008 (NSW)*, s 6, where "vexatious proceedings" are defined as –

- "a) proceedings that are an abuse of the process of a court or tribunal, and*
- b) proceedings instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose, and*
- c) proceedings instituted or pursued without reasonable ground, and*
- d) proceedings conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose."*

In considering whether an application is vexatious within the terms of s 20(b), all of the surrounding circumstances should be taken into account.

The following specific factors should be considered in this process -

- a) the objects of the Act as stated in s 3; and
- b) whether the application might be refused under another, more specific provision, for instance ss 19 and other elements of s 20 - in which case the more specific provision should be applied.

Depending on the circumstances, the factors for consideration may also include -

- c) the wording of the application, and in particular whether it is-
 - i. intemperate;
 - ii. obscure;
 - iii. unreasonably long;
 - iv. unreasonably complex -
- or otherwise inappropriate;
- d) the stated or apparent purpose of the applicant in making the application, and in particular whether that purpose is consistent with the objects of the Act; and

- e) whether the making of the application is part of a pattern or course of conduct by the applicant.

In view of the objects of the Act, the opinion that an application is vexatious should not be lightly reached.



Right to Information Act Review

Case Reference: R2311-023

Names of Parties: T and Department of Health

Reasons for decision: s48(3)

Provisions considered: s36

Background

- 1 T has diabetes and over a period of years engaged with the Tasmanian Health Service and other medical care providers to have his diabetes treated after suffering from severe complications related to his condition.
- 2 On 14 June 2023, Ms Lisa Grosser, a Senior Associate at Hobart law firm Phillips Taglieri, wrote to Launceston General Hospital on behalf of T to request a copy of T's medical records from 1 January 2019 to 14 June 2023.
- 3 This request for information was taken to be an application for assessed disclosure under the *Right to Information Act 2009* (the Act) by the Department of Health (the Department)¹. On 17 October 2023, a Senior Legal Advisor – Right to Information at the Department and a delegated officer under the Act, issued a decision to T. The Department identified 74 pages of information as being responsive to the applicant's request. The Department decided to release 21 of those pages to the applicant in full, while 53 pages were released to the applicant in part. The Department held that the information not released was exempt under s36 of the Act, on the basis that it was the personal information of a third party.
- 4 On 20 October 2023, Mr Alex Kendall, also a Senior Associate at Phillips Taglieri, wrote to the Department requesting an internal review of the Department's decision. On 20 November 2023, Ms Megan Hickey, General Manager – Legal Services and a delegated officer under the Act at the Department, issued an internal review decision affirming the original decision.
- 5 On 30 November 2023, Mr Kendall submitted an application for external review of Ms Hickey's internal review decision to Ombudsman Tasmania. This application was accepted on the basis that the application was submitted within the timeframes set out in the Act, and the relevant fee had been paid.

¹ I note that it does not appear that the original request would have met the minimum requirements in Regulation 5 of the *Right to Information Regulations 2021* for a request for information under the Act. I urge the Department to ensure its processes are compliant in this respect in future.

Issues for Determination under the Act

- 6 I must first determine whether information not released by the Department is eligible for exemption under s36.
- 7 As s36 is contained in Division 2 of Part 3 of the Act, my assessments are subject to the public interest test contained in s33. This means that should I determine that information is *prima facie* exempt from disclosure under s36, I am then required to determine whether it would be contrary to the public interest to release it, having regard to at least, the matters contained in Schedule 1 of the Act.

Relevant legislation

- 8 A copy of s36 is at Attachment A.
- 9 Copies of s33 and Schedule 1 are also at Attachment A.

Submissions

The Applicant

- 10 Mr Kendall made substantial submissions as part of his application for internal review. He provided the following in criticism of the Department's original decision, which found that s36 applied to exempt from disclosure the names of medical staff, administrative staff, and details revealing T's next of kin:

We note that your delegate has concluded that "...the information regarding the officers and other parties is personal information and exempt information". We contend that this aspect of her decision is wrong.

We refer you to the definition of "personal information" in s 5 of the RTI Act. Your delegate fails to give any consideration to the ordinary and natural meaning of the words in that definition. Your delegate also fails to give consideration to Parliament's use of the word "about". It is clear from that definition that the information or opinion must be about the person whose identity is apparent or reasonably ascertainable. In the case of medical records, the information or opinion is "about" the person seeking access to their medical records. Therefore, the redacted information is not personal information.

- 11 Mr Kendall then provided the following submissions detailing why he believed the public interest test was misapplied in the original decision:

Your delegate then goes on to apply the public interest test:

I. Your delegate correctly applies Schedule 1 Clause (1)(a) but fails to consider that the provision of personal information is a statutory right under the PIP Act as a consideration under this sub-clause or generally under s 33

of the Act. She then fails to give sufficient weight to the nature of the statutory right.

2. Your delegate fails to consider sub-clause (j) and that the refusal to provide unredacted medical records significantly frustrates the administration of justice, in that a person or their legal practitioner may be deprived of sufficient information to decide whether a cause of action accrues, the identity of a prospective defendant, or whether any other disciplinary process or action ought be instituted.

3. Your delegate considers and places excessive weight on sub-clause (m). It is an accepted part of being a medical practitioner, nurse or allied health practitioner that you must make medical records and those records may come under scrutiny in the future. Allied health professionals are acutely aware that their medical records may be scrutinised by a court, tribunal or coroner in the future. Further, your delegate fails to refer to any evidence in support of her conclusion that release “could create apprehension in the mind of the person concerned enough to disclosure [sic] unreasonable”. This is pure speculation. As you know, making a decision without evidence or based on speculation constitutes jurisdictional error.

4. Your delegate considers and places excessive weight on sub-clause (p), in circumstances where the performance of the Department’s professional staff is ultimately regulated by the Australian Health Practitioner Regulation Agency. A person is entitled to know the name of the registered person involved in their care so as to complain about that person to AHPRA. Further, your delegate fails to refer to any evidence in support of her conclusion. As you know, making a decision without evidence constitutes jurisdictional error.

5. Your delegate considers and places excessive weight on sub-clause (q) and fails to consider that medical records have been disclosed in an unredacted form since before the RTI Act commenced and there is not any evidence of industrial issues arising therefrom. As you know, making a decision without evidence constitutes jurisdictional error.

6. Your delegate fails to consider sub-clause (s) and that a failure to provide unredacted medical records is likely to result in:

a. Significant litigation against the State of Tasmania to compel disclosure of unredacted medical records; and,

b. The commencement of proceedings against the State of Tasmania unnecessarily because redacted records do not evince a complete picture of the liability; where both scenarios will significantly increase the workload of your Department and the Office of the State Litigator.

7. Your delegate also fails to consider generally under s 33 that, according to emails from the Department's Legal Services Unit, the Unit is suffering from a significant workload as a result of a "400% increase" in the volume of requests. This is unsustainable and, as a matter of public interest, resources would be better directed to frontline positions than dealing with pointless RTI issues contrived by your Department's own decisions.

- 12 Mr Kendall made further submissions criticising what he believes to be a developing pattern of conduct by the Department. He set out:

On 1 June 2023, the same delegate as in this matter wrote to this firm in respect of an application for assessed disclosure on a different matter.

[The delegate] wrote, "There is [sic] 1346 pages of information to review and assess, however, if you can confirm that the potential defendant is NOT the State of Tasmania, I can release these records tomorrow, without the need for redactions in accordance with the Right to Information Act 2009" [her emphasis].

The logical conclusion from [this] email is that assessed disclosure has nothing to do with the public interest in protecting personal information and everything to do with the State protecting its own interests.

We are prepared to accept that [this] email was sent on instructions from senior executives of the Department. Given recent events, we are confident you will appreciate the political, legal, and disciplinary ramifications of [this] email on behalf of the Department, and how it destroys any argument that her, and now your, assessment of the public interest is bona fide.

If this matter goes further, we will take instructions to adduce [this] email as evidence of an unconscionable motive to deprive our client of complete access to his personal information.

- 13 As part of his application for external review, Mr Kendall explained why the redacted information helped to solve crucial issues of liability, rather than simply identify potential defendants:

Certainly there are circumstances where the identity of a health practitioner is relevant to determining the correct defendant. An example of this may be where the State engaged a nurse or doctor

as an independent contractor rather than as an employee or where the admitting medical practitioner [sic] at fault merely had admitting rights and the State is not liable for his or her wrongs. Ms Hickey's observations about Rule 184 demonstrate a misunderstanding of the common law relating to obtaining leave to amend, particularly where the limitation period has expired.

The redacted information is relevant to fundamental issues of liability and the analysis of the relevance of this information starts with the Civil Liability Act 2002.

S 11(l)(a) imports the common law notion of reasonable foreseeability. Who knew what and when about a patient's medical treatment is directly relevant to foreseeability. The identity of that person is relevant to whether they had the expertise to do something about an issue and whether they did actually do something about it.

S 11(l)(c) requires an analysis of response to risk. Thus, for example, the identities and position descriptions of staff in the records are directly relevant to what resources and expertise was available to respond to the risk.

S 13 is the statutory restatement of the "but for" test of causation. The identities and position descriptions of staff involved in care is directly relevant to the assessment of causation.

S 22 modifies the standard of care for professionals if that professional acted in a manner that was accepted by their peers. Therefore, the identity of that health practitioner is essential to assessing whether their conduct was consistent with peer opinion. Additionally, the identity is relevant to whether that health practitioner ought to have been providing medical treatment within their scope of practice.

The foregoing is by no means an exhaustive list of examples, but conclusively demonstrates why the names and position descriptions of the public authority's staff are relevant to more than identifying the correct defendant.

The Department

- 14 The Department did not make specific submissions in relation to this external review, beyond the reasoning of its decisions. On internal review Ms Hickey affirmed the Department's original decision that s36 validly applied to exempt requested information from disclosure, setting out:

. . . the information that has been redacted, namely the personal information (such as phone numbers and names of staff), is personal information about those third-parties, not the patient. The interpretation presented by the applicant is one that appears to be based on the Freedom of Information Act 1982 (Vic) which stated,

“information related to the personal affairs of a person”. This is erroneous as the Act does not include this wording.

- 15 Ms Hickey also addressed arguments made by Mr Kendall that the public interest test was applied incorrectly in the Department's original decision. Ms Hickey set out her arguments as to why she considers the redaction of medical staff's personal information contained in the requested information does not frustrate the administration of justice:

The redaction of personal information of third-parties does not prevent the applicant from determining whether there may have been circumstances that would warrant the bringing of a claim. The medical records, in terms of its [sic] contents pertaining to diagnosis, treatment, and the like, remain unredacted. On that basis, an applicant may determine that they wish to bring a claim against the public authority based on the contents of their health information and the grievance they have. The personal information of a third-party is irrelevant to determining whether a potential tort that warrants proceedings has occurred. Furthermore, the Supreme Court Rules 2000 (Tas), at section 184, allow at any stage of proceeding [sic] that the parties be amended. This includes that a name should be joined or struck from proceedings, or where a genuine mistake regarding the bringing of a proceeding has been made. This amendment to proceedings will be treated as though it formed part of the original proceedings.

- 16 Ms Hickey set out why, in her belief, Schedule 1 matter (j) did not weigh in favour of disclosure:

As previously discussed, the fact that unredacted files have been provided previously does not mean that those disclosures were done in accordance with the proper construction of the statutes. Previous practice does not override a legal obligation, or a lack thereof. The public authority has, such as in this decision, provided reasons as to why the disclosure of personal information of third-parties is contrary to the public interest in these circumstances. If that information is contrary to the public interest, then the public authority does not have the obligation to disclose it.

As for the industrial issues, I refer to my reasons for paragraph 7. The public authority's employees must feel safe at work, and it is the duty of the public authority as their employer to minimise risks and deliver a safe workplace. Employees of the public authority also must have confidence that appropriate support will be provided to them in circumstances where claims are brought against them, especially prior to any fault being established through formal proceedings. Failing to do this also creates issues for recruitment and retention of employees, which is detrimental to the wider health system in Tasmania.

- 17 Ms Hickey also addressed Mr Kendall's submissions that the failure to provide such information requested by the applicant would result in significant litigation for the State, and that, accordingly, Schedule 1 matter (m) weighed in favour of the disclosure of information identified as exempt by the Department:

If proceedings are deemed viable by a party, that is whether a case in tort has merit, it will be brought against the State without the identity of those parties. Information relating to parties that are not employed by the public authority, or not under the direction of the Crown, should be sought from those parties individually, or their employer, not the public authority.

I also note, as stated previously in paragraph 5, that the complete picture as required for the bringing of proceedings, and basing the success of those proceedings, should not rely on the identity of particular individuals. The prospect of a successful claim can be determined prior to the inclusion of the names of all parties. If a claim is deemed to have the likelihood of success, then a Writ should be issued, and the necessary documents obtained through discovery and the appropriate judicial processes. This is especially the case when the public authority employs those parties.

- 18 Finally, Ms Hickey also suggested that the release of this information was not in the public interest at all, but rather, was of interest to the applicant:

The second reading speech, in respect of the Act, also discusses the public interest test and the difference between “in the public interest” and “things which interest the public”. “There has also been confusion regarding whether “in the public interest” means “things which interest the public” which is of course very different to “things that are in the interests of the public to know”.

This is also noted in the Ombudsman’s RTI Manual at 1.2.4, where it states that “the ‘public interest’ here refers to the wider public good, not to what the public might find interesting”. While the applicant argues that it is in the public interest to not apply section 36, I am of the opinion that the argument is more based in the applicant’s interest of understanding “the identity of a prospective defendant”, which aligns more with personal interest of the applicant’s representatives. This is especially compounded by the Supreme Court Rules 2000 allowing for the amendment of proceedings for this very purpose.

Analysis

Preliminary issue – The Department’s email to Phillips Taglieri dated 1 June 2023

- 19 As part of his submissions, Mr Kendall contended that the Department was regularly withholding patient medical records from law firms, seemingly in an attempt to protect the State from potential litigation.
- 20 In support of this submission, Mr Kendall provided my office with a copy of the abovementioned email sent from the Department’s Senior Legal Advisor – Right to Information and the author of the original decision in this matter. As part of this email, it was indicated that the Department would be willing to provide requested information far more quickly and without redactions if Phillips Taglieri made an undertaking that the requested information would not be used in litigation against the State.
- 21 I must make it clear that this approach to the disclosure of the requested information is not in accordance with Act. The public has a right to information, unless it is exempt information or the request is able to be refused under a provision of the Act. Any use of the information received in litigation or for any other purpose should not guide the response to the application. I am concerned that this approach was ever considered appropriate by the Department, particularly following the criticism and scrutiny of such obstructive information access processes by the Commission of Inquiry into the Tasmanian Government’s Responses to Child Sexual Abuse in Institutional Settings.
- 22 The Department has advised me that it has *never sought to prevent a party from exercising their right to commence legal proceedings against the Department and or the State*. It has further advised that it will no longer suggest undertakings from law firms regarding the use of information disclosed. I am pleased that it has indicated that it has adjusted its course but will continue to monitor practice in this area to ensure it is in compliance with the Act.

Section 36 – Personal information of a person other than the applicant

- 23 Section 36(1) of the Act provides that information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making the application for assessed disclosure. Section 5 of the Act defines personal information as information that would lead to a person’s identity being reasonably ascertainable.
- 24 The Department has applied s36 of the Act to exempt information contained in 53 of the 74 pages of information identified as responsive to T’s request. The Department has redacted the names, contact numbers, signatures and identification details of various people who were involved with the treatment of T, including administrative staff, doctors and nurses. The Department has

also redacted the names and addresses of medical clinics and the personal information of T's next of kin.

- 25 I will not address each individual application of s36 by the Department, rather I will assess the Department's application of s36 of the Act in relation to the following categories of people:

- Employees of Launceston General Hospital;
- Information identifying medical clinics, medical professionals and administrative staff; and
- T's next of kin.

Employees of Launceston General Hospital

- 26 On numerous occasions, the Department found the names, position descriptions, signatures, and contact and identification numbers of hospital staff exempt from disclosure under s36 of the Act. Doctors, nurses and administrative staff employed by Launceston General Hospital are to be considered officers of a public authority. As I have explained in previous decisions, the names of public officers performing their regular duties are not usually exempt under s36. It is also standard Australian practice that the personal information of public servants which relates to the performance of their regular duties (i.e. name, position information, work contact details) is not exempt from release either, unless there are specific and unusual circumstances which justify such an exemption. There is no indication that such circumstances apply here and, accordingly, I find that the personal information of Launceston General Hospital staff involved with the treatment of T is not exempt under s36. This should be made available to T.
- 27 I am disappointed that I am required to make this finding, having consistently expressed this position for many years, including in decisions relating to the Department.² The Department has provided no specific or unusual circumstances to justify these redactions and has even indicated that it has a standard policy of redacting staff names in medical records. This is not in accordance with the Act and I urge the Department to cease this practice immediately. Information should only be withheld when it is exempt under the Act, particularly when contained in a patient's own medical records.
- 28 I do not so find regarding direct contact numbers, internal staff identification numbers and direct email addresses which are not usually provided to the public. A public authority is entitled to direct contact from the public through established channels and I am satisfied that there is no particular benefit in the release of this information, and some risk of harm to the interests of individuals through its disclosure. It is exempt under s36 and should not be released to T.

² See Camille Bianchi and Department of Health (4 November 2021), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

Information identifying medical clinics, medical professionals and administrative staff

- 29 Information identified as responsive to T's request includes the personal information of other medical and administrative staff involved with the treatment of T, who were not public officers employed by Launceston General Hospital or the Department. This includes the names of doctors, nurses and administrative staff who treated T and their contact emails, and phone and fax numbers and signatures. It also includes the names and street addresses of private clinics involved with the treatment of T and their contact details, such as emails addresses and phone numbers.
- 30 Though this is considered personal information under the Act, the Department has not discharged its onus under s47(4) to show why it would be contrary to the public interest for the names of doctors, nurses and administrative staff who treated T, or the clinics they work for to be released to the applicant. These individuals are undertaking paid employment and providing medical treatment, it is not apparent what harm to their interests would result if this information was released. It is strongly in the public interest for a person to be able to access their own health records and be able to ascertain the names and job titles of medical staff and the names and clinics who have treated them. There is also no justification not to release the publicly available contact details for these clinics and staff. Accordingly, I do not consider that this information is exempt under s36 and it should be released to T.
- 31 However, I am satisfied that there is some risk of harm in releasing direct phone and fax numbers, signatures, and the email addresses of staff not employed by a public authority (where these are not routinely provided to the public) who were involved in the treatment of T. I find this information is exempt under s36 and should not be released to the applicant. The release of this information would not add value or meaning to the information, but could pose a risk to the interests of these individuals.

T's next of kin

- 32 Though I recognise that this is the personal information of a person other than the applicant, in this instance, this is the personal information of T's de facto partner. T was the person who provided this information, when entering emergency contact details on a form. In these specific circumstances, I cannot see any reason why the release of this particular information to T would be contrary to the public interest. Accordingly, it is not exempt and should be made available to him.

Section 33 public interest test

- 33 Notwithstanding my findings above, I find it appropriate to set out an explicit public interest assessment to explain my conclusion that it is not contrary to the public interest for information identifying employees of the Launceston General Hospital or information identifying other medical clinics, medical professionals and administrative staff to be released.

- 34 Having reviewed the material subject to this review I find that Schedule I matters (a), (i), and (j) are relevant and weigh in favour of disclosure. I also find that matter (m) weighs against disclosure.
- 35 Schedule I matter (a) - the general public need for government information to be accessible – is always relevant and weighs in favour of disclosure. It is especially relevant here, as the need for individuals to be able to access their own health records held by public authorities is particularly important.
- 36 I find that Schedule I matter (i) - whether the disclosure would promote or harm public health or safety or both public health and safety – is relevant and weighs in favour of disclosure. The disclosure of the names of doctors, nurses and administrative staff who were involved with treating the applicant will help him to be able to review the standard of treatment received and pursue further action, if warranted. The release of information that will assist in providing accountability and transparency in relation to healthcare promotes public health and safety, as it incentivises the provision of appropriate medical care and treatment. It is also likely to be required to be released as part of pre-trial disclosure should a legal action be brought, even if it was considered exempt under the Act.
- 37 I find that Schedule I matter (m) - whether the disclosure would promote or harm the interests of an individual or group of individuals – is relevant and weighs primarily in favour of disclosure. I acknowledge that the release of information identified by the Department may expose the Department, or the doctors, nurses, and administrative staff who treated the applicant, to a risk of litigation and this could harm their interests. However, I note that the extent to which this matter weighs against disclosure is substantially mitigated against by the fact that the release of this information will promote the interests of the applicant, and potentially promote the interest of the wider public if it can assist in ensuring there is accountability and transparency in medical practice.
- 38 Overall, I am satisfied that it would not be contrary to the public interest to release the majority of the information identified by the Department. Save for some direct contact details, none of the information is exempt from disclosure under s36 of the Act and it may be released to T.

Preliminary Conclusion

- 39 For the reasons given above, I determine that exemptions claimed pursuant to s36 are varied.

Conclusion

- 40 As the above preliminary decision was adverse to the Department, it was made available to it on 5 March 2024 to seek its input before finalisation, pursuant to s48(1)(a) of the Act.
- 41 On 8 March 2024, Ms Megan Hickey of the Department confirmed that *the public authority makes no comment in relation to the preliminary decision.*

42 Accordingly, my findings remain unchanged. I determine that exemptions claimed by the Department pursuant to s36 are varied.

Dated: 12 March 2024

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

Richard Connock
OMBUDSMAN

ATTACHMENT A – Relevant Legislation

Section 36 – Personal information of a person

- (1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13.
- (2) If –
 - (a) an application is made for information under this Act; and
 - (b) the information was provided to a public authority or Minister by a third party; and
 - (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party –
the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –
 - (d) notify that person that the public authority or Minister has received an application for the information; and
 - (e) state the nature of the information that has been applied for; and
 - (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.
- (3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f), decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.
- (4) A notice under subsection (3) is to –
 - (a) state the nature of the information to be provided; and
 - (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
 - (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.
- (5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) –
 - (a) until 10 working days have elapsed after the date of notification of that person; or
 - (b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or
 - (c) until 20 working days after notification of an adverse decision under section 43; or

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

Where :

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

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

Section 33 – Public Interest Test

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

Schedule I – Matters Relevant to Assessment of Public Interest

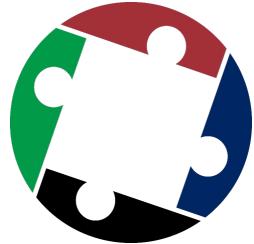
I. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:

- (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;
- (l) whether the disclosure would promote or harm the environment and or ecology of the State;
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

OMBUDSMAN TASMANIA

DECISION



Right to Information Act Review Case Reference: R2209-004

Names of Parties: Thomas Bade and Huon Valley Council

Reasons for decision: s48(3)

Provisions considered: s30, s36

Background

- 1 Mr Thomas Bade (the Applicant) is a resident of a semi-rural area within the Huon Valley local government area. He has been in dispute with a nearby landholder (Y) regarding earthworks on Y's property.
- 2 On 6 December 2021, Y was issued an enforcement notice by Huon Valley Council (Council). This notice required Y to undertake no further work, to engage a suitably qualified person to provide plans for remediation work and, following approval by Council, carry out that remediation work.
- 3 Y subsequently lodged an appeal against this notice with the Tasmanian Civil and Administrative Tribunal (TASCAT) and on 31 January 2022, Council withdrew the enforcement notice.
- 4 On 4 April 2022, Mr Bade made an application for assessed disclosure under s13 of the *Right to Information Act 2009* (the Act). The application was made to the Department of Justice, was received on 8 April 2022, and concerned:

Enforcement Notice issued to [Y] and [Z] of [Address].

- 5 Specifically, the application sought:
 - *all information regarding the investigation, analysis, consideration, issue and subsequent withdrawal of the Enforcement Notice issued in relation to unapproved works by [Y] and the diversion of the watercourse and spill from the dam located on the [Y]'s property at [Address].*
 - *reasons for the withdrawal of notice.*
 - *all engineer's and hydrologist's reports, including those of [Y] and Council*
 - *all correspondence between [Y] and Council*

- *all correspondence between Council and Dept. of Primary industries, Parks, Water & Environment 'DPIPWE'*
 - *all relevant correspondence with TASCAT*
- 6 On 11 April 2022, the Department of Justice transferred the application in full to Council pursuant to s14 of the Act.
- 7 On 14 July 2022, Mr Matthew Grimsey, a delegate for Council under the Act, released a decision to the Applicant. Mr Grimsey identified a *number of documents* responsive to the application but determined that no information would be released. Mr Grimsey set out that he did not undertake any third-party consultation, *given the nature of the dispute*, and determined:

The entire information is subject to both enforcement of the law exemptions under sections 30(1)(c) and the internal deliberative information exemption under section 35.
- 8 Mr Grimsey further determined that:

Any report provided both to the Council and TASCAT is the subject of Copyright for which the Council is unable to provide a copy of. ...

... All relevant correspondence with TASCAT is in the possession of that Tribunal in relation to a specific action before that Tribunal. The Act does not apply to this information.
- 9 On 22 July 2022, Council emailed Mr Bade, relevantly indicating that:

During the TASCAT process the Council received undertakings that rectification works would be undertaken and that a development application would be lodged.

The notice was withdrawn on that basis and the rectification works have been undertaken and a development application has been lodged for any works to be retained on the property.
- 10 On 3 August 2022, Mr Bade sought internal review and, on 22 August 2022, the then General Manager of Council, Mr Jason Browne, released the internal review decision. This decision upheld the original decision, although for different reasons, no longer relying on s6 and copyright, and now finding all the identified information exempt pursuant to s30(1)(a)(i) and (ii), (c) and (f).
- 11 On 30 August 2022, Mr Bade sought external review and his application was accepted on 23 February 2023 on the basis that:
 - Mr Bade was in receipt of a decision made by a principal officer; and
 - the application was made within 20 working days of receiving the decision.

- 12 On 29 February 2024, as part of the review process, my office wrote to Council seeking confirmation that claims of exemption pursuant to s30 of the Act were maintained due to the finalisation of TASCAT proceedings.
- 13 On 21 March 2024, Mr Lachlan Kranz, Chief Executive Officer of Council, advised that Council's position had been revised and that some of the information previously claimed to be exempt could be released to the Applicant. Other information was re-assessed as being out of the scope of the application. The remainder was still considered to be exempt.
- 14 On 4 April 2024, Council released further information to Mr Bade with some parts redacted due to exemptions being claimed pursuant to ss30 (information relating to the enforcement of the law) and 36 (personal information) of the Act.
- 15 On 14 June 2024, Council released further information to Mr Bade and advised that no further correspondence with the then Department of Primary Industry, Parks, Water and Environment (DPIPWE) was in Council's possession. Council also provided my office with a record of searches undertaken.

Issues for Determination

- 16 I must determine whether the relevant information is exempt from disclosure under s30, s36 or any other section of the Act.
- 17 Section 30 is contained within Division 1 of Part 3 of the Act and so the application of the section is not usually subject to a public interest test. However, s36 is contained within Division 2 of Part 3 of the Act and so is subject to the public interest test in s33.
- 18 This means that, should I determine that any of the relevant information is *prima facie* exempt from disclosure under s36, I must then determine whether it would be contrary to the public interest for it to be disclosed. In making this assessment I must have regard at least to the matters contained in Schedule 1 of the Act.

Relevant legislation

- 19 I attach a copy of ss30 and 36 of the Act to this decision at Attachment 1. Copies of s33 and Schedule 1 of the Act are also included at Attachment 1.

Submissions

Applicant

- 20 In his application for external review, Mr Bade made no specific comment regarding the application of exemptions under the Act, but submitted (verbatim):

The Council is simply making misleading statements.

No rectification works have been undertaken, a development application has been publicised and no further work on the existing illegal diversion of water is entailed in the DA.

The Department of Natural Resources (former DPIPWE) is still investigating and I was assured during several phone conversations with the Department that negotiation between the Department and the Huonville Council are still under way.

To claim, that there are no records of this, is simply not plausible.

I am basically dissatisfied in the way the Council is dealing with the matter by holding back crucial information without reasonable explanations ... I am defending myself against the ludicrous claim of maliciously complaining to the Council about the illegal diversion of water onto my land.

Council

- 21 Council was not required to provide submissions for this external review, as it had provided its reasoning in its decisions.
- 22 In the original decision, Mr Grimsey reasoned:

The information broadly deals with Council's methods and procedures for investigating and dealing with matters arising out of potential breaches of the law being an alleged breach of the Land Use Planning and Approvals Act 1993.

The Council deals with many complaints regarding potential breaches of the law and needs to be able to investigate complaints in a manner directly with the respondent to the complaint.

It is important that the Council's ability to provide the respondent with information and to obtain information from a respondent in good faith is maintained and that a respondent is not provided with particular information that would allow them to circumvent the process.

Disclosing the information as requested would likely prejudice the Council's ability to properly investigate complaints and obtain good faith response in the future if it were known that this information would otherwise be generally available to the public. I find it exempt on that basis.

To the extent that any information is not specifically captured under section 30(1)(c) I also find the information discussing various courses of action and details would also be exempt under section 35 of the Act as deliberative information in determining how to proceed with any specific action.

I do not consider it is in the public interest in that release of the information would hinder equity and fair treatment of persons in their dealings with Council in respect of law enforcement matters.

- 23 In the internal review decision, Mr Browne abandoned reliance on s6 of the Act, as well as copyright, and reasoned in relation to s30:

I have determined that all of the Identified information is concerned with an ongoing investigation of possible breaches of the law (namely, the Land Use Planning and Approvals Act 1993) and therefore is subject to exemptions under s.30(1)(a)(i) & (ii), (c) and (f) of the Act.

As a planning authority with statutory obligations to enforcement [sic] compliance with the planning regime, it is important that the details of current enforcement matters remain confidential so as not to jeopardise Council's methods and prejudice the rights of those involved.

In addition, it is essential that Council retains the ability to communicate freely in the course of enforcement matters; this would be jeopardised if details were made freely available to members of the public.

...

- 24 In relation to s35, Mr Browne determined:

(a) Information is exempt information for the purposes of the Act if it consists of a record of consultations or deliberations between officers of public authorities (see section 35(1)(b) of the Act) in the course of, or for the purposes of, the deliberative processes related to the official business of a public authority.

(b) I have determined that:

- (i) the Identified Information contains records of consultations that fall within the exemption in sub-section 35(1)(b) of the Act; and*
- (ii) the exceptions in sub-sections 35(2), (3) and (4) of the Act do not apply under the circumstances*

- 25 In relation to s36, Mr Browne determined:

- (i) the Identified Information contains personal information as defined by the Act; and*
- (ii) the exemption in s36(1) of the Act applies to some (i.e. not all) of that personal information.*

- 26 The internal review concluded:

Ultimately, I have determined that all the Identified Information is exempt from disclosure pursuant to s.30(1)(a)(i) & (ii), (c) and (f) of the Act, and this position will not change until the relevant regulatory investigation has concluded.

Considering that finding, there is no utility in applying the public interest test to the information that is also captured by s.35 and s.36 of the Act.

- 27 In Council's revised position of 21 March 2024, Mr Kranz no longer relied upon s35 and indicated:

1. *The most recent decision [of TASCAT] did not specifically resolve the stormwater issue which underpinned Mr Bade's request for information. Mr Bade amended the grounds of his Appeal removing the stormwater issue...*

2. *Council's current position is that:*

(a) *the umbrella application of the s 30 RTI Act exemption to the Schedule of Documents ... no longer applies. Rather ... Council is now of the view that only some of the relevant information is exempt pursuant to s 30(1)(a) and or (f) of the RTI Act (..hinder, delay or prejudice an investigation of a breach or possible breach of the law which is not yet complete."); and*

(b) *the application of the exemption as to Personal Information (s 36 or the RTI Act) has also been refined and will not apply to the names, position and work contact details of Council employees as public officers ...*

- 28 Council made no further submissions regarding the application of ss 30 or 36, either generally or in relation to specific exemptions which were applied in the revised position. It is this revised position which is the subject of this external review.

Analysis

- 29 Council, as part of its revised position, provided an updated Schedule of Documents with very brief notations of the relevant section of the Act relied on to exempt information. For ease of reference, I will adopt Council's numbering in the revised Schedule. I note that, while Mr Kranz indicated that exemptions were only relied upon under s30(1)(a) and (f) and s36, Council has on separate occasions in the Schedule relied upon s30(1)(b) and (c).

Section 30 – Information relating to enforcement of the law

Documents 4/4A

- 30 Council has claimed both Documents 4 and 4A are exempt pursuant to s30(1)(b) and (f). For s30(1)(b) to apply, I must be satisfied that disclosure of the information would, or would be reasonably likely to, 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.
- 31 For s30(1)(f) to apply, it needs to be established that disclosure of the information would, or would be reasonably likely to, hinder, delay or prejudice an investigation of a breach or possible breach of the law which is not yet complete. The word prejudice is not defined in the Act and is therefore to be given its ordinary meaning. The Macquarie Dictionary relevantly defines it as *to affect disadvantageously or detrimentally.*¹
- 32 The one page Document 4 is an email from a Council Compliance Officer dated 20 December 2021 giving brief information to the recipient concerning an appeal to the Resource and Planning Stream of TASCAT and pledging to provide an extension of time. At the bottom of the page is an incomplete, earlier email to Council in relation to the same matter. It is unclear why Council has not reproduced the full email chain.
- 33 The two page Document 4A is another email from Council also dated 20 December 2021 granting the extension of time referred to in Document 4, along with a three-line summary of Council's understanding of the subject of the appeal to TASCAT. The extension of time was confirmed in the released Document 5. This summary is not confidential because it is consistent with a seven-page report written by Bass Gamlin of JMG Engineers and Planners dated 13 January 2022. This report is part of the 36-page attachment to Document 15, which Council has released and invited Mr Bade to view. Accordingly, I consider that the release of the summary in Document 4A cannot prejudice any investigation nor reveal any confidential information.
- 34 It is clear that these documents refer to the Enforcement Notice issued by Council and released to Mr Bade as Document 3. The subsequent withdrawal of this Enforcement Notice was confirmed in Document 13.
- 35 There is no information in either Document 4 or 4A which discloses, or would enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law. Council has also provided no reasons as to how or why an investigation into a withdrawn enforcement notice from 2022 is not yet complete, other than a mention that it is Council's view that the information is exempt.
- 36 I am not satisfied that Council has discharged its onus under s47(4) of the Act to show why this information should not be disclosed. I find that it is not exempt

¹ Definition of prejudice, available at www.macquariedictionary.com.au, accessed 23 May 2024.

and may be released to Mr Bade, subject to my assessment of the exemption claimed under s36.

Document 7

- 37 This document consists of a two page letter with a one-page covering email, sent to Council from BTF Lawyers on 5 January 2022. Council has applied s30(1)(a) and (f) to exempt the whole of Document 7 as a *separate legal matter*. Council has not, however, identified the document as out of the scope of Mr Bade's request.
- 38 For s30(1)(a) to apply, I must be satisfied that disclosure of the information would, or would be reasonably likely to 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.*
- 39 Council did not specifically address this document in the original decision, finding the entirety of the information exempt under s30(1)(c). This was expanded upon internal review, where the *information is concerned with an ongoing investigation of possible breaches of the law ... and therefore is subject to exemptions under s.30(1)(a)(i) & (ii), (c) and (f)*, before Council's position was revised to consider the document exempt under s30(1)(a) and (f).
- 40 The letter concerns Council's actions during the investigation of the complaint which led to the issue of the (subsequently withdrawn) enforcement notice at the heart of this application. For this reason, I cannot agree with Council's assertion that this a separate legal matter.
- 41 Furthermore, Council has not identified what any separate legal matter might be, any relevant ongoing investigation, or how any prejudice may arise due to the release of a letter from January 2022 concerning an enforcement notice which was later withdrawn. I am not satisfied Council has discharged its onus under s47(4) to show why this information should not be disclosed and, subject to my assessment of the application of s36, the document is to be released to Mr Bade.

Document 8

- 42 This document consists of four emails in a chain dated 13 January 2022 concerning an upcoming directions hearing at TASCAT and a seven page report written by Bass Gamlin of JMG Engineers & Planners, also dated 13 January 2022. Council has applied s30(1)(f) to exempt the entire document.
- 43 The emails are administrative in nature and I am not satisfied that Council has discharged its onus to show why their release would hinder, delay or prejudice

an investigation which is not complete. Accordingly, I determine that the emails are not exempt under s30(1)(f) and are to be released to Mr Bade, subject to my assessment of s36.

- 44 The report by JMG Engineers & Planners has been released to Mr Bade as part of the attachment to Document 15, which he has been invited to view at Council premises. It is accordingly not necessary to determine whether this should be released to him, as he has already been provided access to the information.

Document 10

- 45 This document is a one page email and a one page letter from Council to Y, both dated 31 January 2022. Council has applied s30(1)(a) and (f) to exempt the entire document on the grounds - *legal issue is ongoing*.
- 46 The contents of the document concern the reason and conditions for the withdrawal of the enforcement notice which is the subject of this application. This information was provided to Mr Bade by Council in an email on 22 July 2022. It is also referenced in the unredacted part of Document 13 (which includes the covering email), which Council has released to Mr Bade. Accordingly, subject to my assessment of the claimed exemption under s36, Document 10 is to be released to him.

Document 12A

- 47 This document consists of five emails dated between 31 January and 10 February 2022, between Council and Y. Council has applied s30(1)(a) and (f) to exempt the entire document, with no further reasoning given.
- 48 The first email (from Council to Y) is innocuous and refers to a requirement to lodge additional documentation for a development application. I am not satisfied that the contents could hinder, delay or prejudice any investigation or trial.
- 49 The second email (from Y to Council) refers to the development application process, as well as the report by JMG Engineers & Planners which has already been determined not to be exempt by Council. It is difficult to understand how either the subject or the language used by the third party could hinder or prejudice any investigation being carried out by professional Council officers.
- 50 The third email (from Council to Y) confirms that an investigation pursuant to s63 of the *Land Use Planning and Approvals Act 1993* had been commenced. As the email was sent by the investigating authority in early 2022, I cannot see how the contents are likely to hinder, delay or prejudice that investigation in late 2024. If that investigation were to result in a prosecution, I cannot accept the contents of the email could sway an impartial court or tribunal.
- 51 The fourth email (from Y to Council) expresses concern that Council had not initiated an investigation on the basis of the report by JMG Engineers & Planners. Council confirmed in the third email that such an investigation had in

fact commenced. Y's language is at times assertive, however I do not accept that it would influence professional Council officers to the extent that it would prejudice Council's enforcement of the law or the fair trial of any person.

- 52 The fifth email (from Council to Y) is also part of Document 10 and has already been released by Council as part of Document 13.
- 53 Overall, I am not satisfied that Council has provided sufficient justification to discharge its onus under s47(4) and to show that this information should be exempt under s30(1)(a) or (f). Subject to my assessment of the s36 exemption, this document is to be released to Mr Bade.

Document 13

- 54 This is a six page email chain from January/February 2022 between TASCAT, Council, BTF Lawyers and Y. Council has applied s30(1)(a) and (f) to exempt some information from this document. Council did not specify the exempt information, however it appears to be on page three, where 15 words have been redacted from paragraph 2 of an email sent on 10 February 2022 by BTF Lawyers to TASCAT.
- 55 The 15 words may be taken to refer to Council undertaking an investigation, and they are the writer's claim of one focus of that investigation. I am not satisfied that release of them would be sufficient to prejudice the investigation, nor am I satisfied that release would prejudice any hypothetical future court hearing should a prosecution eventually occur. The writer has no identified engineering expertise and is not in a position of authority over any Council officer. The document should be released, subject to my decision regarding s36.
- 56 In its internal review decision Council expressed concerns in general terms regarding an ongoing investigation. It may be in relation to the *stormwater issue*, although I note that Council advised that the Applicant did not pursue this issue at a 2024 TASCAT appeal hearing. In any event, council has not explained how the release of the above information would detrimentally impact that investigation.
- 57 As exemptions under s30 are not generally subject to a public interest test, the use of this section to exempt information should be restricted to when it is absolutely necessary. To do otherwise would frustrate the object of the Act.
- 58 The lack of detailed reasoning by Council as to how and why the release of documents from early 2022 would, or would be reasonably likely to, hinder, delay or prejudice a matter in mid-2024, coupled with Council's inability to specify in its revised position the relevant part of s30(1)(a) on which it relies is of concern. As this is combined with an inconsistent application of s30 across different documents containing the same information, it has led me to determine that Council has not discharged its onus to show that the information should not be disclosed. Accordingly, subject to my determination regarding personal information in the documents, they are to be released to the Applicant.

Section 36 – Personal information of person

- 59 For information to be exempt under s36 of the Act, I must be satisfied that it is information that is the personal information of a person other than the applicant. Personal information is defined as any information about an individual whose identity is apparent or reasonably ascertainable from that information, and who is alive or has not been dead for more than 25 years.

Public officers

- 60 It has been my consistent position that the names of public officers performing their regular duties are not exempt under s36 unless there are specific and unusual circumstances to justify the exemption.² This applies to signatures, and also to past employees of public authorities if the information came into existence while the person was a public officer. This is also consistent with current Australian practice.³
- 61 The exception to this is direct contact details of employees where these are not routinely provided to the public. It is valid for public authorities to limit the release of direct contact details for their staff in order to ensure public enquiries are able to be directed through appropriate channels.
- 62 Council has released the names of Council officers, but has applied s36 to exempt the names of other public officers, in particular employees of TASCAT who are mentioned in emails which are in the possession of Council. Council has not applied the public interest test and has not advanced any specific or unusual circumstances which would justify exempting these or any other names of public officers.
- 63 Therefore, I determine that the names of all current and former public officers are not exempt and are to be released to the Applicant.

External professionals

- 64 The information identified as responsive to the application contains details including names, qualifications, employment contact details and the website of a legal practitioner as well as a civil engineer, building design professional and others involved in designing and building structures to comply with development permits.
- 65 While this does constitute personal information as defined in the Act, no reasons have been advanced by Council as to why it is necessary to exempt this information. The external parties were acting at all times in their professional capacities and there is no indication that Council has considered the public interest test when making its determination to exempt the information. Accordingly, I determine that Council has not satisfied the onus to

² See, for example, *Suzanne Pattinson and Department of Education R2202-040* (August 2022); *Tarkine National Coalition and Department of Natural Resources and Environment Tasmania R2202-101* (October 2023), both available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

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

show why disclosure of the details these external professionals is contrary to the public interest. The personal information of external professionals in Documents 9, 13, 14, 15 and 16 should be released to the Applicant. This is consistent with my position in previous decisions.⁴

- 66 The exception to this is in relation to direct contact details for these third parties, if they are not routinely provided to the public. I am satisfied that this information would be exempt under s36, for the same reasons as for public servant direct contact details.
- 67 I will now turn to the specific documents which contain personal information other than in the above categories.

Document 2

- 68 On this document Council has applied s36 to partly redact Y's postal address and I assess this information as *prima facie* exempt here and also in Documents 3, 10 and 13.

Document 4

- 69 This document contains what appears to be Y's personal email address. I assess it as *prima facie* exempt here and also in Documents 4A, 5, 5A, 8, 10, 12A, 13.

Document 5

- 70 I note on this document that Council has, likely inadvertently, redacted the *hvc* part of Council's own general email of *hvc@huonvalley.tas.gov.au*. This should be released.

Document 5B

- 71 This is a 19-page document headed *Compliance Investigation Report*. It is listed as Document 5B on the Schedule of Documents, but the released document is headed Document 6 and only the final four pages coincide with the Document 6 which is listed on the Schedule. For consistency I will use the numbering on the Schedule.
- 72 On page 2 of the document, Council has applied s36 to exempt the mobile telephone number of a landowner. I assess this as personal information and it is *prima facie* exempt.
- 73 On two occasions on page 3, Council has applied s36 to exempt the name of a person who has made a complaint. This information is *prima facie* exempt, however in the first paragraph of the section of the document on page 3 headed *Findings*, the name has already been released to the Applicant.
- 74 The complainant is also identified in Document 15, which has been made available for the Applicant to view.

⁴ See, for example, R2202-024 *Clive Stott and TT-Line Company Pty Ltd* (June 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

- 75 On page 5 of this document there is an aerial photograph of the relevant area with property boundaries marked, as well as annotations indicating some property owners and the location of earthworks. Council has applied s36 to exempt the name of a property owner who is not a part of this application for assessed disclosure. I assess this information as *prima facie* exempt.

Document 7

- 76 I have determined that the exemption claimed under s30 has not been made out. However, the names of Y and Z are mentioned and I assess these names as *prima facie* exempt wherever they appear.

Document 12A

- 77 Pages 2 and 4 of this email chain mentions Y and also the name of a landowner, and I assess these names as *prima facie* exempt.

Document 16

- 78 This is a 56-page document consisting of an email between Council officers, extracts from the property title plan, extracts from the Council meeting in 2005 where the subdivision was approved, a stormwater report for a property on the Huon Highway, and other information which Council has assessed as being outside the scope of the Applicant's request.
- 79 On page 1, the name of an email recipient has been redacted. There is no reason given and the person appears to be a Council officer, so this name is not exempt information.
- 80 On page 14, within the extract of minutes from Council's ordinary meeting on 11 May 2005, three names relating to ownership and development of an address in Franklin have twice been exempted. There is no indication of the status of these people and so I assess their names as *prima facie* exempt here, twice on page 43 and twice on page 54 of this document.

Public interest test

- 81 It now falls for me to assess whether it would be contrary to the public interest to release the information that I have found to be *prima facie* exempt. Council has not made specific submissions on these exemptions and there was no consultation pursuant to s36(2).
- 82 When considering Schedule 1 of the Act, matter (a) – the general need for government information to be accessible, is always relevant and weighs in favour of disclosure.
- 83 Schedule 1 matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – is also relevant. The names and/or contact details of the persons mentioned were provided to Council in the context of complaint, enforcement and tribunal proceedings relating to a dispute concerning planning approvals and alleged unauthorised work.

Emotions may run high in these disputes, increasing the potential harm to the interests of identified persons. This matter weighs against disclosure.

- 84 Schedule 1 matter (n) – whether the disclosure would prejudice the ability to obtain similar information in future – is relevant and weighs against disclosure, notwithstanding Council’s (no doubt inadvertent) release of the name of a complainant. Council’s enforcement of laws in many areas of its responsibility depends upon the willing co-operation of the community to report matters of concern without fear of their contact details being released into the public domain.
- 85 The assessment of the matters in Schedule 1 which are relevant to the public interest test involves a consideration of competing factors. On balance, I have determined that all personal information that I have found to be *prima facie* exempt (and which has not already been released) should remain exempt as its release would be contrary to the public interest.
- 86 The only exception to this is where the names of Y and Z are mentioned in documents Council considered exempt. Given that the names have been released to Mr Bade by Council in numerous other documents and were mentioned by him in the original application for assessed disclosure, there is no utility in exempting them in these other documents. For consistency, these two names should be released to Mr Bade.

Preliminary Conclusion

- 87 In accordance with the reasons set out above, I determine:
 - exemptions claimed pursuant to s30 are not made out; and
 - exemptions claimed pursuant to s36 are varied.
- Conclusion**
- 88 As the above preliminary decision was adverse to Council, it was made available to it on 21 November 2024 to seek its input before finalisation, pursuant to s48(1)(a) of the Act.
- 89 Council did not respond to the initial request, or a follow up, or make any submissions.
- 90 Accordingly, for the reasons set out above, I determine:
 - exemptions claimed pursuant to s30 are not made out; and
 - exemptions claimed pursuant to s36 are varied.
- 91 I apologise to the parties for the delay in finalising this decision.

Dated: 18 December 2024

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

Richard Connock
OMBUDSMAN

Attachment 1 – Relevant legislation

Section 30 - Information relating to enforcement of the law

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

- (a) prejudice –
 - (i) the investigation of a breach or possible breach of the law; or
 - (ii) the enforcement or proper administration of the law in a particular instance; or
 - (iii) the fair trial of a person; or
 - (iv) the impartial adjudication of a particular case; or
- (b) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law; or
- (c) disclose methods or procedures for preventing, detecting or investigating, or dealing with matters arising out of, breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
- (d) endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person; or
- (e) disclose information gathered, collated or created for intelligence, including but not limited to databases of criminal intelligence, forensic testing or anonymous information from the public; or
- (f) hinder, delay or prejudice an investigation of a breach or possible breach of the law which is not yet complete.

(2) Subsection (1) includes information that –

- (a) reveals that the scope of a law enforcement investigation has exceeded a limit imposed by law; or
- (b) reveals the use of an illegal method or procedure for preventing, detecting or investigating, or dealing with a matter arising out of, a breach or evasion of the law; or
- (c) contains a general outline of the structure of a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or
- (d) is a report on the degree of success achieved in a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or
- (e) is a report prepared in the course of a routine law enforcement inspection or investigation by a public authority with the function of enforcing and regulating compliance with a particular law other than the criminal law if the inspection or investigation is complete; or
- (f) is a report on a law enforcement investigation, if the substance of the report has been disclosed to the person or the body that is the subject of the investigation –

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

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

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

Section 36 - Personal information of person

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

(2) If –

- (a) an application is made for information under this Act; and
- (b) the information was provided to a public authority or Minister by a third party; and
- (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party – the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –
- (d) notify that person that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information that has been applied for; and
- (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
- (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.

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

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

Section 33 - Public interest test

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

Schedule 1 - Matters Relevant to Assessment of Public Interest

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

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



Right to Information Act Review

Case Reference:

R2202-073

Names of Parties: V and the Department for Education, Children and Young People

Reasons for decision: s48(3)

Provisions considered: s36

Background

- 1 V was previously employed by the Department of Communities Tasmania, now the Department for Education, Children and Young People (the Department), as a Child Safety Officer. During his time as a Child Safety Officer, the Department held concerns that the applicant was not always maintaining professional boundaries with service users.
- 2 On 23 December 2020, V (the applicant) submitted an application for assessed disclosure to the Department under the *Right to Information Act 2009* (the Act). He requested:

a copy of all correspondence, notes, supervision notes, that specifically relate to myself or contains my name, between the following persons (Claire Lovell, Kai Kitchin, Jodie Raynor, Lisa Peterson (Anna-Lisa J Peterson) and Team Leader Cassie Tennant) from 1 July 2020 to the present day [23 December 2020].
- 3 Ms Shanti Padme of the Department subsequently offered to amend the applicant's application to encompass correspondence from 1 April 2020 to 23 December 2020, because of delays in issuing a decision to the applicant. The applicant paid the application fee on 28 May 2021.
- 4 On 19 October 2021, the applicant sought external review pursuant to s45(1)(f) of the Act, as the timeframe for a decision to be provided by the Department had elapsed and a decision had not been received.
- 5 On 13 December 2021, Ms Alison Scandrett, a delegated officer for the Department under the Act, issued a decision to the applicant. Ms Scandrett identified 22 pages of information as being responsive to the applicant's request as expressed in his 23 December 2020 application for assessed disclosure. I will refer to this as the first bundle of information. Of this information, Ms Scandrett redacted some of the information pursuant to s103 of the *Children Young Persons*

and their Families Act 1997 (the CYPF Act), which relates to the duty to maintain confidentiality. She also found information to be exempt from release pursuant to s36 of the Act, as personal information of a person. Some information responsive to the applicant's application was not provided to him in accordance with s12(3)(c)(i) of the Act, on the basis that it was information that was otherwise available. Other information was redacted as it was considered to be outside the scope of the applicant's request.

- 6 The applicant sought to extend his external review request to a full external review pursuant to s46(2) of the Act, following receipt of Ms Scandrett's decision. This request was accepted by my office on 11 January 2022.
- 7 On 8 March 2024, Ombudsman Tasmania wrote to the Department requesting that a new decision be issued to the applicant. Ombudsman Tasmania requested that this decision assess information responsive to the expanded scope of the applicant's request, as agreed between the applicant and Ms Padme. Ombudsman Tasmania also asked that this decision assess information under the Act that the Department appeared to have previously incorrectly refused pursuant to s12(3)(c)(i) of the Act.
- 8 On 8 April 2024, Ms Scandrett issued a second decision and released a second bundle of information to the applicant. The information in the first bundle of information was also included in the second bundle. The Department no longer refused to provide any information under s12(3)(c)(i) and identified 231 pages of information (including some duplicate information) as responsive to the applicant's expanded request and provided this to the applicant. As part of this decision, Ms Scandrett held that s36 of the Act, and ss103(1) and s111A(1) of the CYPF Act applied to some of this information to justify its non-disclosure.

Issues for Determination

- 9 I must first determine whether information not released by the Department is eligible for exemption under s36 of the Act, or otherwise excluded from the operation of the Act by virtue of ss103 or 111A of the CYPF Act.
- 10 As s36 is contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test contained in s33. This means that should I determine that information is *prima facie* exempt from disclosure under s36, I am then required to determine whether it would be contrary to the public interest to release it, having regard to at least, the matters contained in Schedule 1.

Relevant legislation

- 11 Copies of s36 of the Act, and ss103 and s111A of the CYPF Act are at Attachment A.
- 12 Copies of s33 and Schedule 1 are also attached.

Submissions

Applicant

- 13 The applicant criticised the Department's use of the CYPF Act to withhold requested information from him:

My concerns about this case and what has been released are that The Secretary seems to have used privacy provisions within The Children's Young Persons and their Families Act to prevent the release of information instead of editing and removing names of clients that may come under that Act. I have not sought ANY information of clients. The information I am seeking pertains to information about myself and my employer. Not my clients! Hence I cannot see how that Act can be used to justify this decision.

- 14 The applicant also queried the amount of information that was provided to him as part of the first decision issued to him on 13 December 2021:

I would also like The Ombudsman to contact the former RTI officer of Communities Ms Shanti Padme. She now works for health but I have spoken to her and she is willing to talk to your office. I had understood from her that she had, as the RTI officer, signed off on the release of approximately 300 pages (of 600). It was only a matter of sending them to me. Ms Padme has approved of me passing her name on to you.

Also, I believe at some point, perhaps around April 2001, Ms Padme accepted a change to my original request, extending the date from December 2020 to April 2021. This was opted for as it was taking Communities such a long time to process my application.

The Department

- 15 The Department did not make specific submissions to this external review, beyond the reasoning of Ms Scandrett in her decisions.
- 16 Ms Scandrett set out in her 13 December 2021 decision why some information responsive to the applicant's application was exempt from disclosure under s36 of the Act:

Some of the information contained in the files you have requested relates entirely to people other than yourself, being your colleagues.

Section 36 is conditional upon the 'public interest test' specified in section 33 of the Act. For the information to be exempt under section 36, it must satisfy the requirements of section 33 and, after taking all relevant matters into account including those specified in Schedule 1 of the Act, be contrary to the public interest to disclose the information.

In assessing public interest considerations under the Act, it is important to appreciate that the test is whether disclosure is in the public

interest, not of interest to the public. While the information may be of interest to the public, it is not necessarily in the public interest for the information to be disclosed.

Consideration of whether disclosure is in the public interest is a balancing exercise. Essentially, assessing this depends on the particular facts of the matter and the context in which it is being considered.

When applying the public interest test, the overarching consideration in favour of disclosure is the general public need for government information to be accessible (matter (a)). Release of the exempt information would promote the object of the Act, which is to disclose information where possible. Moreover, it is the public's expectation that government processes are open, transparent and accessible and that the government is held accountable. I consider this matter to be relevant to all possible exemptions discussed below.

In my view, in the context of sub-clause (m), disclosing the personal information of an individual or group of individuals would harm the interests of those people in maintaining their right to keep these details private, and would therefore be contrary to the public interest. Accordingly, I have decided to redact the information as it is not in the public interest to release this personal information.

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

It is my view that the release of this information is not in the public interest.

- 17 As part of the second decision issued to the applicant on 8 April 2024, Ms Scandrett provided the following regarding the application of s111A of the CYPFA Act to withhold information:

In relation to the CYPFA, section 111A(1) provides that the Secretary or Community-Based Intake Service must not provide information to someone who applies for information under the RTI Act if the information has been provided by an information-sharing entity (defined in section 3 of the CYPFA). Section 111A(2) provides that a person is not prevented from being able to request this information directly from that relevant information-sharing entity.

Section 3(1) defines information-sharing entity by listing entities, or people and employment-related positions, considered to be information-sharing entities, and this list includes a prescribed person. Section 14(1) defines a prescribed person by listing the employment-related positions considered to be prescribed persons. Further, section 14(2) requires prescribed persons to inform (notify) the Secretary or Community-Based Intake Service if, in carrying out their official duties,

they believe, suspect or know a child has been or is being abused or neglected. As a notification from a prescribed person is provided in accordance with section 14 to the Secretary or Community-Based Intake Service, in accordance with section 111A(1) this information has been provided by an information-sharing entity and therefore must not be provided under the RTI Act.

Some of the information you have requested contains information provided by information sharing entities, and as such this information has not been disclosed in accordance with section 111A.

- 18 Ms Scandrett's second decision also set out the following comments regarding the Department's application of s103 of the CYPFA Act to withhold requested information:

Section 103 of CYPFA relevantly provides:

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

- (a) a child; or*
- (b) a guardian of a child; or*
- (c) a family member of a child; or*
- (d) any person alleged to have abused, neglected or threatened a child –*

must not divulge that information.

(3) This section does not prevent a person –

- (a) from divulging information if authorised or required to do so by law*

This means that information may be considered under the RTI Act, but if the conclusion is reached under that Act that the material is exempt from release, then section 103 CYPFA prevents release.

You will see below that I have considered the personal information of various children, guardians and family members under section 36 of the RTI Act and concluded that the material is not able to be released under that Act. Therefore, the permission at 103(3) does not operate, and the material remains confidential under CYPFA. The Schedule of Documents provided below specifies when section 103 of the CYPFA has been applied to information.

- 19 Ms Scandrett's second decision also provided the following comments regarding the Department's application of s36 of the Act to information contained in the second bundle of information:

Some of the information you have requested is the personal information of other people whose information has not been obtained during the course of the administration of the CYPFA. This information is therefore personal information relevant to section 36 of the RTI Act.

After consideration of clause (m) in Schedule 1 of the RTI Act, disclosure would be contrary to the public interest as the members of the public named would feel harmed by someone being provided with their information when that information is irrelevant to the person requesting the information. Further, there are no relevant pro-disclosure matters, and as the information is irrelevant to the applicant and the disclosure of this information would in no way benefit to the applicant this information is therefore exempt information and is not being disclosed.

The Schedule of Documents provided below specifies when section 36 of the RTI Act is the reason for exempt information in that particular document. The note will not include a reference to the relevant matter in Schedule 1 of the RTI Act as only clause (m) is relevant, which has been stated here.

Some of the information you have requested also contains the personal information of government employees. This information is not considered to be personal information obtained in the administration of the CYPFA and is therefore information relevant to section 36 of the RTI Act.

In deciding whether to disclose this personal information, a three-tiered test is commonly applied by the Tasmanian Right to Information Ombudsman. The disclosure of the personal information of government employees is not considered to be contrary to the public interest if they:

- are acting in the course of their duties*
- are already publicly identifiable as being employed in that area, and*
- on the fact of it, do not appear to be at any personal risk by the disclosure.*

The comments that I have considered for exemption are personal in nature, and do not go to the performance of their work.

In relation to Schedule 1, the information is not “government information”, it is comments of a personal nature, as such its release would not contribute to debate on a matter of public opinion, it would not provide reasons for a decision, provide contextual information about a matter, inform the public about the rules of government, or positively meet any of the matters to be considered. Release would

harm the interests of the individuals involved by releasing comments of a private nature.

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

Analysis

Does the CYPF Act apply?

- 20 The applicant submits that the Department should not be using the CYPF Act to withhold requested information, as he is requesting information about himself rather than service users.
- 21 Having reviewed the information the Department has withheld under the CYPF Act, I can see that the substantial majority of this information does not relate to the applicant, but rather relates to service users.
- 22 That this information is responsive to the applicant’s application can be explained by the fact that his request contains a request for information containing his name. The Department has been required to assess information that contains the applicant’s name, even though the information may relate to service users rather than the applicant. I am satisfied that the CYPF Act could apply and Department’s consideration of it is reasonable in the circumstances.

Is the Act excluded through the operation of s111A of the CPYF Act?

- 23 Section 111A of the CYPF Act relevantly provides:
 - (1) *The Secretary or Community-Based Intake Service must not provide information under the Right to Information Act 2009 if the information has been provided under this Act to the Secretary or Community-Based Intake Service by an information-sharing entity.*
 - (2) *Nothing in this section prevents a person from requesting, under the Right to Information Act 2009, an information-sharing entity that has provided information to the Secretary or a Community-Based Intake Service to provide that information to the person.*
- 24 The Department has relied on s111A of the CYPF Act to refuse to provide 17 pages of information contained within the second bundle of information provided to the applicant. This information consists of file notes and emails drafted by the applicant and contains information that would support an allegation of child abuse.
- 25 These file notes and emails are contained on the following pages of information in the second bundle of information provided to the applicant:
 - *Pages 142 – 143 (file notes)*
 - *Page 145 (file notes)*
 - *Page 146 (file notes)*

- *Page 147 (email)*
 - *Pages 149 – 150 (file note)*
 - *Page 151 – 153 (file note)*
 - *Page 154 (email)*
 - *Page 155 (emails)*
 - *Pages 156 – 158 (file note)*
 - *Page 164 (file note sent via email)*
 - *Page 166 (email)*
- 26 It is the Department's contention that s111A(1) of the CYPF Act operates to prohibit the Department from releasing information provided to it by an information-sharing entity, setting out that:
- The Secretary or Community-Based Intake Service must not provide information under the Right to Information Act 2009 if the information has been provided under this Act to the Secretary or Community-Based Intake Service by an information-sharing entity.*
- 27 I do not consider this a correct interpretation of this provision. Section 111A of the CYPF Act cannot operate to exclude information from the assessment under the Act when this was generated from the work of Departmental staff undertaken as part of their ordinary duties. Such staff are acting as delegates or agents for the Secretary under the CYPF Act. In these circumstances the relevant information has not been 'provided' to the Secretary, but rather has been generated by the Secretary through their delegates or agents.
- 28 I consider that s111A aims to, where possible, re-direct requests for information to organisations that provide such information to the Department, rather than to simply exclude it from the operation of the Act entirely. If s111A(1) of the CYPF Act operated to exclude the Act from information generated by Department employees undertaking their ordinary duties, as contended by the Department, it would exclude the operation of the Act from all of this information which would make s111A(2) meaningless regarding such information. This is clearly not the intent of the section.
- 29 As I have found that s111A(1) of the CYPF Act does not operate to prohibit the Department from releasing the abovementioned information generated by the applicant, I will consider whether any of this information is nonetheless exempt from disclosure under s36 of the Act.

Section 36 – Personal Information

Information not released by the application of s103 of the CYPF Act

- 30 The Department has applied s103(1) of the CYPF Act to refuse to release a range of information requested by the applicant. Section 103(1) of the CYPF Act operates to prevent the release of information by people, who in the course of

the administration of the CYPF Act, obtain personal information relating to a child, a guardian of a child, a family member of a child, or any person alleged to have abused, neglected, or threatened a child.

- 31 I note however that s103(1) of the CYPF Act does not operate to prevent the release of such information where *authorised or required to do so by law*. Accordingly, it will only be prevented from release under the Act if an exemption is applicable. While the Department acknowledged that this was the case, Ms Scandrett still indicated that it was s103 of the CYPF Act which operated to prevent the release of information requested under the Act rather than s36. I encourage the Department to express its reasons with greater clarity in future.
- 32 Section 36(1) of the Act provides that information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making the application for assessed disclosure. Section 5 of the Act defines personal information as information that would lead to a person's identity being reasonably ascertainable.
- 33 I will, for the most part, not address each individual application of s36 or s103(1) of the CYPF Act by the Department. Instead, I will assess the Department's application of s36 the Act and s103 of the CYPF Act in relation to the following categories of people:
 - Personal information of service users, their carers, families, and their partners;
 - Personal information of public officers, including team leaders, child safety officers, and police officers.
- 34 I accept that all of this information is *prima facie* exempt under s36.
- 35 The Department sought to exempt the first and last names of various service users, their service user ID numbers, their date of birth and age, and the names of their family members and their age from disclosure pursuant to s36 of the Act and s103(1) of the CYPF Act. This information is clearly the personal information of a person other than the applicant and is therefore *prima facie* exempt pursuant to s36(1) of the Act.

Instances where the Department has relied on s103(1) of the CYPF Act which require further analysis under s36 of the Act

- 36 I have already determined the names of the individuals set out above are *prima facie* exempt under s36 and this applies equally in the following documents. My assessment relates to whether the release of this information might lead to the identity of a person being reasonably ascertainable.

Pages 6 and 7 (Duplicated at pages 163-164)

- 37 This information consists of a file note made by the applicant. The first four (except for the place name in the second sentence), sixth, and last two paragraphs of this file note are not *prima facie* exempt pursuant to s36 of the Act. However, the fifth and seventh paragraphs detail allegations of child sexual

abuse and other information which, if released, would leave the identity of a person reasonably ascertainable. I also consider that the place names in the first and last paragraphs and the nicknames for relatives are information which may lead to the identity of a person being reasonably identifiable. Accordingly, this information is *prima facie* exempt pursuant to s36(1) of the Act.

Page 9

- 38 This information indicates that children have disclosed ‘quite significant details of sexual abuse’. Though I acknowledge that this is sensitive information I am not satisfied that the release of this statement, without the release of further details, will lead to a person other than the applicant being reasonably ascertainable. Accordingly, this information is not *prima facie* exempt pursuant to s36(1) of the Act.

Pages 10-12

- 39 This information consists of a file note drafted by the applicant. It is a very detailed file note. I am satisfied that all paragraphs of this file note, with the exception of the third paragraph, are *prima facie* exempt from disclosure pursuant to s36(1) of the Act as they detail allegations of child sexual abuse. If this information was released it may leave the identity of service users, their families, and alleged perpetrators reasonably ascertainable.
- 40 The majority of the third paragraph of this file note is not exempt from disclosure. All information in this paragraph of the file note, with the exception of the names of service users, should be made available to the applicant.

Page 64

- 41 The Department has applied s103(1) of the CYPF Act to information contained within three body paragraphs of an email sent to Ms Cassie Tennant of the Department by the applicant. After reviewing this information, I am satisfied that if it was released it would leave the identity of people other than the applicant reasonably ascertainable. Accordingly, this information is *prima facie* exempt pursuant to s36(1) of the Act.

Page 67-68

- 42 The Department appears to have applied s103(1) of the CYPF Act to information contained in 11 dot points within an email sent from Ms Monique Howard to Ms Peterson.
- 43 The information redacted was not written by the applicant and solely relates to details of children and their carers except for the penultimate dot point which references action the applicant has taken. As V has not sought personal information of such people, I do not need to assess the remaining dot points and find the exempt under s36 by agreement between the parties.
- 44 In relation to the dot point referencing V, I do not consider that the identities of any individuals would be reasonably ascertainable if the first, fourth, eleventh, fifteenth, seventeenth, twenty-first and thirty-sixth word were removed. This

information is not exempt and should be released to V. The remainder is *prima facie* exempt under s36.

Pages 119-122

- 45 The Department relied on s103(1) of the CYPF Act to not release substantial amounts of information contained on a referral form. In total there are six substantive sections of information contained on this referral form that were not released to the applicant pursuant to s103(1) of the CYPF Act. The smaller redactions are all *prima facie* exempt under s36. Broadly speaking, the information not released relates to serious allegations of child sexual abuse and details the applicant's frustrations at the way in which the Department handles some aspects of related matters.
- 46 The Department has released a significant amount of this referral form and I am satisfied that the information it has sought to exempt is *prima facie* exempt under s36, as its release could lead to service users and their families identities being reasonably ascertainable. The only exception is the last line under *Brief history of the client*, which would not make any person identifiable following the removal of the name. This should be released to V.

Information previously not released by the Department pursuant to s111A of the CYPF Act, which I will now assess for disclosure pursuant to s36 of the Act.

Pages 142-143

- 47 This information consists of a file note by the applicant. Having reviewed this information I can see that it contains details relevant to allegations of child sexual abuse. Tasmania is a small State, and in cases of child sexual abuse public authorities must be careful releasing any information as it may, even if unintentionally, identify victims of child sexual abuse and alleged perpetrators to those who have some knowledge of the alleged abuse.
- 48 Having reviewed this information, I am satisfied that its release would be likely to leave the identity of people other than the applicant reasonably ascertainable. Accordingly, I find that all information that was not released by the Department in accordance with s111A(1) of the CYPF Act, is in fact *prima facie* exempt from disclosure pursuant to s36(1) of the Act.

Pages 145

- 49 This information consists of a series of detailed dot points contained in an email from the applicant to Ms Raynor. Having reviewed the information contained in these dot points, I can see that it contains sensitive details relating to alleged child sexual abuse. Again, I am satisfied that if this information was released, the identity of people other than the applicant would be reasonably ascertainable. Therefore, this information is *prima facie* exempt pursuant to s36(1) of the Act.

Page 146

- 50 Again, this information relates to allegations of child sexual abuse. The information not released concerns the same subject matter as information I have found to be *prima facie* exempt pursuant to s36(1) of the Act earlier in my decision. Accordingly, I find that this information is also *prima facie* exempt from disclosure pursuant to s36(1) of the Act.

Page 147

- 51 This information consists of the first four words of the second line in the body paragraph of the applicant's email to Ms Raynor. Though the details are high level, I find that this information if it was released, would leave the identity of a person other than the applicant reasonably ascertainable. Accordingly, this information is *prima facie* exempt from disclosure pursuant to s36(1) of the Act.

Page 149-150

- 52 This information consists of part of the file note by the applicant assessed on pages 6-7. My findings are the same.

Page 151-153 (Duplicated at pages 156 to 158)

- 53 This information consists of a file note authored by the applicant. The majority of this file note is sufficiently related to allegations of child sexual abuse. I am satisfied that if this information was released it would leave the identity of victims, their families and or alleged perpetrators reasonably ascertainable and therefore is *prima facie* exempt from disclosure pursuant to s36(1) of the Act.
- 54 However, my finding in this regard does not extend to information contained in the second paragraph (except for the first sentence), the third paragraph and the first sentence of the fourth paragraph. Again, the names of service users and carers remain *prima facie* exempt pursuant to s36(1) of the Act. The remainder of this information may be released to V.

Page 154

- 55 This information consists of the body of an email from the applicant to a Tasmania Police officer. I am satisfied that the redacted information is *prima facie* exempt pursuant to s36(1) of the Act. If this information was released it would leave the identity of a person other than the applicant reasonably ascertainable.

Page 155

- 56 This information consists of the body of two emails sent between the applicant and a Tasmania Police officer. Having reviewed this information, other than the names of service users and their family members, I am not satisfied that it contains information which if released would leave the identity of a person reasonably ascertainable. Accordingly, with the exception of the names of service users and their families, which are *prima facie* exempt from disclosure pursuant to s36(1) of the Act, this information should be made available to the applicant.

Page 166

- 57 This information consists of a reference to the date service users were due back in Court. As Court proceedings and appearances are often publicly available, I am satisfied that the release of this information may leave the identity of the service users reasonably ascertainable. Accordingly, this information is *prima facie* exempt from disclosure pursuant s36(1) of the Act.

Other applications of s103 of the CYPF Act or s36 of the Act

Page 32

- 58 The Department has applied s103(1) of the CYPF Act to withhold the first two paragraphs of information contained in an email from the applicant to Kai Kitchin of the Department. The same email has been released on page 57 with minimal redactions of names and relationships only. This information is *prima facie* exempt but I am not satisfied that the rest of the information contained in this email is exempt from disclosure. All information other than the names of service users in this email should be made available to the applicant. I encourage the Department to be more consistent in its application of exemptions.

Application of s36 of the Act to information contained pages 51, 57, 92, 97, 98, 100, 103, 105, 108, 109, 112, and 159

- 59 The Department has applied s36(1) of the Act to exempt from disclosure information contained within emails exchanged between public officers. This information is located on pages 51, 57, 92, 97, 98, 100, 103, 105, 108, 109, 111, 112, and 159 of the second bundle of information provided to the applicant. The Department described this information as comments from its employees that are *personal in nature, and do not go to the performance of their work*.
- 60 Having reviewed this information I agree that it is *prima facie* exempt from disclosure pursuant to s36(1) of the Act, as the individuals making the comments are named and clearly identifiable. However, I will reserve my judgement as to whether it is contrary to the public interest to release this information until later in my decision, when I conduct a public interest assessment this information I have identified as *prima facie* exempt pursuant to s36(1) of the Act.

Apparent accidental application of s39 of the Act

- 61 The Department does not rely on the exemption in s39 of the Act (information obtained in confidence) in either of its decisions, but has noted two redaction under this exemption on page 188 of the second bundle of information provided to V. This is an email from Ms Rayner to Ms Dennison.
- 62 This appears to be an error and to have been intended to be an application of s36(1). I am satisfied that this information is *prima facie* exempt under that section, as it contains the personal information of a people other than V.

Where no exemption is claimed

Page 55

- 63 The Department has sought to exempt in full page 55 of the second bundle of information provided to the applicant but has not detailed the basis on which it claims to do so.
- 64 This page of information contains an email exchange between the applicant and Ms Peterson. Other than third party names, which the applicant has agreed he does not seek and are exempt under s36, I am not satisfied that the Department has discharged the onus it bears pursuant to s47(4) of the Act to establish why I should consider this information is exempt from disclosure. Accordingly, it should be made available to the applicant.

Section 33 - Public interest test

- 65 As I mentioned earlier in my decision, s36 of the Act is subject to the public interest test in s33, so I now turn to assess whether it would be contrary to the public interest to release the information I have found to be *prima facie* exempt pursuant to s36(1). In making this assessment, I am required to consider all relevant matters. At a minimum, I am to have regard to the matters contained in Schedule 1 of the Act.

Personal information of service users, their families and carers, and other third parties

- 66 In its original decision, the Department did not identify any Schedule 1 matters as weighing in favour of disclosure. However, it did identify Schedule 1 matter (m) to be relevant and weighed this matter against disclosure.
- 67 I disagree with the Department that no Schedule 1 matters are relevant to favour disclosure. I find that matter (a) – the general public need for government information to be accessible – is always relevant and will always weigh in favour of disclosure. Though I do recognise in the circumstances of this case, the extent to this matter weighs in favour of disclosure of some of this information is limited due to s103 of the CYPF Act.
- 68 However, I do agree that Schedule 1 matter (m) - whether the disclosure would promote or harm the interests of an individual or group of individuals – is relevant and I find that this matter weighs very heavily against disclosure in relation to much of this information.
- 69 This is the case in relation to information I have identified as *prima facie* exempt pursuant to s36(1) of the Act which consists of information which, if released, would leave the identity of people other than the applicant reasonably ascertainable. The people that may be identified include potential victims of child sexual abuse, their families and carers, and alleged perpetrators. The release of this information would at the very least infringe on their right to privacy and would at worst potentially undermine their personal safety.
- 70 I also find that matter (n) – whether the disclosure would prejudice the ability to obtain similar information in the future – to be relevant and to weigh strongly

against disclosure. As I have mentioned, the release of information I have found to be *prima facie* exempt pursuant to s36(1) of the Act has the potential to infringe on the privacy of affected persons or risk their personal safety. If it became common practice that details of allegations of child sexual abuse could be made public through the right to information scheme prior to proper investigation processes being completed, then victims may be less likely to come forward about alleged abuse to the appropriate public authorities.

- 71 Parliament has decided through s103 of the CYPF Act that this type of information should not ordinarily be disclosed and there is no justification to do so in this matter. I am satisfied that it would be contrary to the public interest to disclose all of the information relating to service users, their families and carers and related third parties which I have identified as *prima facie* exempt pursuant to s36(1) of the Act.

Information on pages 51, 57, 92, 97, 98, 100, 103, 105, 108, 109, 111, 112, 159 and 188 of the second bundle of information

- 72 It is necessary to conduct a separate public interest test assessment for this information, due to the different content and considerations regarding whether it should be disclosed. The Department also set out specific reasoning regarding why this information should be exempt pursuant to s36.
- 73 The Department reasoned that it would be contrary to the public interest to release this information, as:

In relation to Schedule 1, the information is not “government information”, it is comments of a personal nature, as such its release would not contribute to debate on a matter of public opinion, it would not provide reasons for a decision, provide contextual information about a matter, inform the public about the rules of government, or positively meet any of the matters to be considered. Release would harm the interests of the individuals involved by releasing comments of a private nature.

- 74 I cannot accept this as an accurate characterisation of much of the information in question. With the exception of information identified for exemption on pages 92 and 108 and in Ms Rayner’s 9am email on page 98, I find that all of the comments made by the public officers are related to their professional duties, notwithstanding their often informal nature.
- 75 Regarding the redacted information contained on pages 92 and 108, I find that these comments are of a pastoral nature and are examples of public officers taking steps to check on the wellbeing of colleagues. The third, fourth and fifth words of the email of Ms Rayner on page 98 relate to a third party and is of a personal nature. I accept that this information, if released, could cause harm to the individuals concerned. Accordingly, I find that it would be contrary to the public interest for this information to be made publicly available and find it exempt under s36.

- 76 Of the remainder of the redacted information contained on these pages, I find that the majority of this information contains comments made by public officers relating to concerns held about the performance of colleagues and some information provided in confidence. As such I recognise that matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – is relevant and weighs against disclosure, as the release of this information would harm the wellbeing and interests of the public officers to which these comments relate. Accordingly, I find that it would be contrary to the public interest to release the redacted information contained in:
- Ms Rayner's 1.14pm email on page 97;
 - the first redacted sentence in Kai Kitchin's 1.09pm email on page 97;
 - Ms Rayner's 12:57pm email on page 97 except for the fifth and sixth sentences;
 - the first redaction at the top of page 98; and
 - pages 105, 111, 112 and 188.
- 77 I find that matter (m) has a further role to play, however, in relation to the interests of V. V has been subject to disciplinary proceedings and seeks further information to dispute allegations made against him. It would clearly advance his interests to obtain the further information he seeks regarding the actions of the Department. I consider that this consideration favours disclosure.
- 78 It is also an important public interest consideration that it is not the purpose of the Act to enable public authorities to use exemptions to shield themselves from embarrassment resulting from overly informal or unprofessional comments made by public servants undertaking their regular duties and committed to writing in official records. Transparency is not only relevant in relation to positive or innocuous content, government must be transparent regarding all information which is not justifiably exempt.
- 79 Having reviewed the remainder of the redacted information contained on pages 51, 57, the remainder of page 98, 100, 103, 108 and 109 of the second bundle of information, I am not satisfied that it would be contrary to the public interest for this information to be released. I am not satisfied that their release would harm any individual to the extent that it would be contrary to the public interest for them to be released. This information is not exempt from disclosure pursuant to s36(1) of the Act, and should be made available to V.

Preliminary Conclusion

- 80 For the reasons set out above, I determine that exemptions claimed pursuant to s36 are varied.

Conclusion

- 81 As the above preliminary decision was adverse to the Department, it was made available to the Department on 5 June 2024 to seek its input prior to finalisation in accordance with s48(1)(a) of the Act.
- 82 The Department advised on 6 June 2024 that it did not wish to make a submission responding the preliminary decision, as such its findings remain unchanged.
- 83 Accordingly, for the reasons set out above, I determine that exemptions claimed pursuant to s36 are varied.

Dated: 6 June 2024



Richard Connock
OMBUDSMAN

Attachment I

Relevant Legislation

Section 36 – Personal information of a person

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

(2) If –

- (a) an application is made for information under this Act; and
- (b) the information was provided to a public authority or Minister by a third party; and
- (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party – the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –
- (d) notify that person that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information that has been applied for; and
- (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
- (c) inform the person to whom the notice is addressed of –
 - (i) that person's right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and
 - (iii) the time within which the application must be made.

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

- (a) until 10 working days have elapsed after the date of notification of that person; or
- (b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or
- (c) until 20 working days after notification of an adverse decision under section 43 ; or
- (d) if during those 20 workings days the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or
- (e) if the information is information to which a decision referred to in section 45(1A) relates –
 - (i) during 20 working days after the notification of the decision; or

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

Section 33 - Public interest test

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

Schedule 1 – Matters Relevant to Assessment of Public Interest

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

- (a) the general public need for government information to be accessible;
- (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
- (c) whether the disclosure would inform a person about the reasons for a decision;
- (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
- (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
- (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
- (g) whether the disclosure would enhance scrutiny of government administrative processes;
- (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
- (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
- (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
- (k) whether the disclosure would promote or harm the economic development of the State;
- (l) whether the disclosure would promote or harm the environment and or ecology of the State;
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;

- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;
- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

Section 103 of the Children Young Persons and Their Families Act

1997 – Duty to Maintain Confidentiality

- (1) A person engaged in the administration of this Act who, in the course of that administration, obtains personal information relating to –
 - (a) a child; or
 - (b) a guardian of a child; or
 - (c) a family member of a child; or
 - (d) any person alleged to have abused, neglected or threatened a child – must not divulge that information.
Penalty: Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 2 years, or both.
- (2) A person who attends a family group conference must not divulge any personal information obtained at the conference relating to the child, his or her guardian or a member of the child's family.
Penalty: Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 2 years, or both.
- (2A) Subsections (1) and (2) do not apply in respect of the disclosure and use of personal information relating to a person to, or by –
 - (a) that person; or
 - (b) a person seeking to bring an action, whether criminal or civil, if –
 - (i) the person to whom the personal information relates is an intended defendant to the action or an alleged perpetrator in respect of the matter to which the action relates; and
 - (ii) the personal information is relevant to that action; or
 - (c) a person responding, on behalf of the State, to an action, whether criminal or civil and whether proposed or commenced, against the State if the personal information is relevant to that action; or

- (d) a Commission established under the Commissions of Inquiry Act 1995 if the personal information is relevant to the inquiry for which that Commission was established; or
- (e) a person undertaking an employment screening or review process, or disciplinary investigations or proceedings, in respect of the person to whom the personal information relates if the person to whom the personal information relates is –
 - (i) an employee or contractor, or prospective employee or contractor, of the person to whom the information is disclosed; or
 - (ii) a volunteer or assistant, or prospective volunteer or assistant, whether paid or unpaid, of an organisation of which the person, to whom the information is disclosed, is in a position of management or control.

(2B) Subsections (1) and (2) do not apply in respect of the disclosure and use of personal information if the information –

- (a) is disclosed to or used by –
 - (i) a person seeking to bring an action, whether criminal or civil; or
 - (ii) a person responding, on behalf of the State, to an action, whether criminal or civil and whether proposed or commenced; or
 - (iii) a person undertaking an employment screening or review process, or disciplinary investigations or proceedings; and
- (b) in the case of information disclosed to or used by a person referred to in paragraph (a)(i) or (ii), the information –
 - (i) is relevant to the action; and
 - (ii) does not disclose the identity of, or lead to the identification of, a person other than an intended defendant to the action or an alleged perpetrator in respect of the matter to which the action relates; and
- (c) in the case of information disclosed to or used by a person referred to in paragraph (a)(iii), the information –
 - (i) is relevant to the employment screening or review process, or disciplinary investigations or proceedings, being undertaken by the person to whom the information is disclosed; and
 - (ii) does not disclose the identity of, or lead to the identification of, a person other than the person being screened or reviewed or the subject of those disciplinary investigations or proceedings.

(2C) Personal information disclosed under subsection (2A)(c) or (e) is subject to the rules of procedural fairness in respect of the person whose personal information is so disclosed.

(2D) A person to whom personal information is disclosed under subsection (2A) or (2B) must not use or disclose the personal information other than –

- (a) for the purpose for which the information was so disclosed to the person; or
- (b) as authorised or required to do so by law.

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

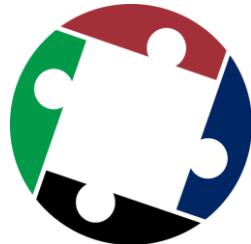
(3) This section does not prevent a person –

- (a) from divulging information if authorised or required to do so by law; or
- (b) from divulging statistical or other data that could not reasonably be expected to lead to the identification of any person to whom it relates; or

(c) engaged in the administration of this Act from divulging information if it is necessary or appropriate to do so for the proper administration of this Act.

Section 111A of the Children, Young Persons and Their Families Act 1997

- (1) The Secretary or Community-Based Intake Service must not provide information under the Right to Information Act 2009 if the information has been provided under this Act to the Secretary or Community-Based Intake Service by an information-sharing entity.
- (2) Nothing in this section prevents a person from requesting, under the Right to Information Act 2009 , an information-sharing entity that has provided information to the Secretary or a Community-Based Intake Service to provide that information to the person.

**Right to Information Act Review****Case Reference:** R2305-012**Names of Parties:** Warren Davis and City of Launceston**Reasons for decision:** s48(3)**Provisions considered:** s37

Background

- 1 New Creative Group is a Tasmanian-based private investment group with a primary focus on creative and cultural industries. This consortium was founded and is headed by Mr Chris Billing, who is also the sole director of Foundry, a private creative arts school, and a director at property developer Creative Property Holdings.
- 2 In June 2020, New Creative Group announced its plans for the development of a multi-million dollar creative arts precinct in central Launceston (the development).¹ The development was to receive funding from various stakeholders including the City of Launceston (Council), the Tasmanian State Government, the Federal Government and private investors.
- 3 Recent media has cast doubt over the long-term viability of the development,² while its progression appears to have stalled as a result of a contractual dispute.³
- 4 Mr Warren Davis is a director at Bricktop. Bricktop is an investment firm that provides capital for the development of businesses, property, and projects and is considering providing funds for the development.
- 5 On 1 March 2021, Council accepted an application for assessed disclosure under the *Right to Information Act 2009* (the Act) from a journalist (the primary applicant) seeking information relating to the development. Specifically, the primary applicant requested the following information:

¹ *Launceston creative precinct: \$90m project unveiled – The Examiner* (2 July 2021, first published 6 June 2020), available at <https://www.examiner.com.au/story/6781955/new-vision-for-launcestons-creative-future/>, accessed 24 October 2023.

² Baker E, Humphries A., *Staff at Foundry arts school go unpaid, with 'serious questions' needing answers, Education Union says-* ABC (12 May 2020), available at <https://www.abc.net.au/news/2020-05-12/staff-at-foundry-arts-school-go-unpaid/12236072>, accessed 24 October 2023.

³ Clark, N., *Judge finds no binding car park sale contract existed-* The Examiner (27 November 2021), available at <https://www.examiner.com.au/story/7527774/cloud-over-90m-precinct-after-legal-loss/>, accessed 24 October 2023.

1. Council's application for the Building Better Regions Fund drought \$10m grant.
 2. All internal correspondence related to the proposed creative precinct and/or bus interchange since January 1 2020.
 3. All correspondence with State Government employees in relation to the proposed creative precinct/bus interchange since January 1 2020.
 4. All correspondence with Don Allen and/or Car Parks Super/owner of the Old Birchalls car park since January 1 2020.
 5. All correspondence with Chris Billings [sic] /Creative Property Holdings/Foundry/New Creative Group since January 1 2020.
- 6 On 5 May 2021 Council notified Mr Davis, among other third parties, that it had received an application for assessed disclosure under the Act. Council sought Mr Davis' input as to whether information obtained from Bricktop that was responsive to the application should be made available to the primary applicant. Bricktop, however, did not object to the release of this information.
- 7 On 10 June 2021, third parties consulted were advised that Ms Louise Foster, a delegate of Council under the Act had decided to release some but not all relevant information following a public interest assessment of relevant exemptions.
- 8 Two third parties who believed they would be negatively impacted by the release of information (not Mr Davis) applied for the internal review of Ms Foster's decision. After a lengthy delay, internal review decisions were issued by Council's Chief Executive Officer, Mr Michael Stretton, on 22 and 29 March 2023.
- 9 On 16 May 2023, Mr Duncan Campbell of Council notified Mr Davis that a decision had been made to release information pertaining to Bricktop's involvement in the Launceston Creative Precinct. The information includes the attached PDF and other information relating to Bricktop's stated involvement including references to funding rights etc (the information). Mr Campbell went on to suggest to Mr Davis that he contact Ombudsman Tasmania if he wished to object to the release of this information as a matter of urgency.
- 10 On 17 May 2023, my office received a phone call from Mr Davis who raised his concerns about the impending release of information, and applied for the external review of Mr Stretton's decision. Mr Davis was of the opinion that the release of this information would be likely to cause Bricktop a competitive disadvantage, and as such should be exempt from release to the primary applicant.
- 11 My officers undertook further investigations to ascertain whether Mr Davis was able to apply for the external review of Mr Stretton's 29 March 2023 decision under the Act.

- 12 After obtaining further information, I was satisfied that Mr Davis was able to seek an external review of Mr Stretton's decision pursuant to s45(2)(b) of the Act. This is because an internal review decision had been made under s43 and Mr Davis, being a person other than the person who made the application, was adversely affected by the decision. His application for review was formally accepted on that basis on 14 September 2023.

Issues for Determination

- 13 I am to determine whether the information proposed to be released by Council is eligible for exemption under s37, or any other relevant section of the Act.
- 14 As s37 is contained in Division 2 Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that should I determine that information is *prima facie* exempt from disclosure under s37, I must then determine whether it would be contrary to the public interest to release it to the applicant. In making this assessment I must have regard to, at least, the matters listed in Schedule 1 of the Act.

Relevant legislation

- 15 I attach a copy of s37 of the Act to this decision at Attachment 1. Copies of s33 and Schedule 1 are also included at Attachment 1.

Submissions

Applicant

- 16 Mr Davis has asked that his submissions on this matter not be quoted in my final decision. However, I note that Mr Davis made substantial submissions relating to why he considered the release of information subject to this external review would be likely to expose Bricktop to a competitive disadvantage. He also queried whether Council conducted third party consultation in accordance with the Act, and raised concerns at not being provided the opportunity to seek an internal review of Mr Stretton's decision.

Council

- 17 Council asserted that it did conduct third party consultation in accordance with requirements set out in the Act. The following is an extract from an email sent by Mr Campbell to Mr Davis on 18 May 2023:

The formal contact provisions in section 36 and 37 are triggered when information that is determined to be of concern/substantial concern is provided by the person so concerned. Because the information was provided by way of a third party, the formal notice provisions were not triggered.

In terms of an internal review, the decision was made by the City of Launceston's principal officer so that an internal review is not available. In fact, the decision of the principal officer was an internal

review of the 2021 decision of the City of Launceston's General Manager Organisational Services.

- 18 However, Council did not make submissions in relation to the substantive matter of this external review, that being whether information subject to this external review would be likely to expose Bricktop to a competitive disadvantage if it was released.

Analysis

Preliminary issue one- the principal officer's obligation to consult

- 19 Before proceeding to my analysis of whether the requested information is exempt from disclosure, I find it necessary to address the question of whether Council, by failing to obtain Bricktop's input as to whether the information should be released to the primary applicant, failed to conduct third party consultation in accordance with the Act.
- 20 When a public authority receives an application for assessed disclosure for information provided to it by a third party, s37(2) of the Act is explicit in requiring that the principal officer consult with the third party that provided the requested information to the public authority to seek their input as to whether the requested information should be released, if the principal officer decides that disclosure of the information concerned may be reasonably expected to be of substantial concern to the third party.
- 21 The principal officer's obligation to consult contained in s37(2) of the Act only extends to consultation with the third party that actually provided the information to the public authority, where it is decided by the principal officer that the release of the relevant information may be reasonably expected to be of substantial concern to that third party. The principal officer is not obliged by s37(2) to consult with every third party who might be concerned by the release of information subject to an application for assessed disclosure. This is the only interpretation available of this section, as the wording is explicit in this regard.
- 22 Accordingly, Council was not under a mandatory obligation to seek Bricktop's input as to whether the information should be released to the primary applicant. The letter was provided to Council by Mr Billing with the covering email correspondence attached, and so Council's obligation to consult under s37(2) only extended to an obligation to consult with Mr Billing. This occurred and Mr Billing sought internal review of this decision.
- 23 I note that Mr Davis was afforded the opportunity to provide input regarding the release of information he had provided to Council which was also responsive to the primary applicant's request for information. Council also advised him of the impending release of the information which is the subject of this review, which allowed him to seek review. I do not consider that Council has failed to comply with its consultation obligations under the Act in relation to Mr Davis or Bricktop.

Preliminary issue two- Mr Davis' concern at not being provided the opportunity to seek an internal review of Mr Stretton's decision

- 24 In email correspondence to Council dated 17 May 2023, Mr Davis expressed his concern at not being afforded the opportunity to seek an internal review of Mr Stretton's decision. This appears to be a misunderstanding of his rights under the Act.
- 25 Mr Stretton is the Chief Executive Officer of Council, which is an alternate title for general manager and is defined as a Council's principal officer in s3 of the Act. Decisions of a public authority's principal officer may only be reviewed by the Ombudsman. Mr Davis has now sought external review and I am undertaking that review. I do not consider that there has been any error by Council in relation to not affording Mr Davis an internal review right.

Section 37- information relating to business affairs of third party

- 26 Information may be exempt from disclosure under s37(1) of the Act if *its disclosure under this Act would disclose information related to the business affairs acquired by a public authority or Minister from a person or organisation other than the person making the application under section 13 (the “third party”) and -*
 - (a) *the information relates to trade secrets; or*
 - (b) *the disclosure of the information under the Act would be likely to expose the third party to competitive disadvantage.*
- 27 The information subject to this external review does not contain trade secrets, and so I will only consider s37(1)(b) of the Act.
- 28 As to the meaning of competitive disadvantage, in the matter of *Forestry Tasmania v Ombudsman [2010] TASSC 39*, Porter J held at [52]:

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

- 29 At [59] Porter J added:

The application of the correct approach involves an assessment of the facts, and findings as to likely exposure to the relevant disadvantage.
- 30 At [41] the Court interpreted the meaning of 'likely' to be *a real or not remote chance or possibility, rather than more probable than not.*
- 31 I note here that in the New South Wales Supreme Court decision of *Kaldas v Barbour* it was held that the Ombudsman is not subject to the supervisory

jurisdiction of the courts in New South Wales.⁴ I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to s33 of the *Ombudsman Act 1978*, and that I am also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.

- 32 Accordingly, the value of *Forestry Tasmania v Ombudsman* as precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases ‘competitive disadvantage’ and ‘likely to expose’, all of which are instructive and with which I agree.
- 33 Mr Davis is objecting to the release of information related to Bricktop’s involvement in the development. This information is contained in various letters and email correspondence. Mr Davis argues that the release of this information would be likely to expose Bricktop to a competitive disadvantage, and as such is exempt from disclosure under s37(1)(b) of the Act. I will assess each document below.

Mr Davis’ letter to Mr Billing dated 10 January 2020 and covering email correspondence

- 34 This first part of the letter confirms Bricktop’s interest in providing funding for the development. Bricktop has not been formally linked to the project but I am not satisfied that the mention of an investment firm considering investing in a project is sufficient to cause competitive disadvantage. Bricktop has chosen to engage with Tasmanian local and State government regarding investment and I do not consider that the mere naming of a business seeking to invest in a public project would cause it competitive disadvantage.
- 35 The second paragraph of Mr Davis’ letter advises Mr Billing that Bricktop provides and sources capital for investment in projects with an enterprise value between \$20 and \$100 million. This information is already publicly available on Bricktop’s website,⁵ and as such, its release could not cause competitive disadvantage.
- 36 The third part of the letter sets out four ‘high level principles’ regarding funding, feasibility, risk and approvals that must be satisfied prior to Bricktop investing in the development. The conditions attached to Bricktop’s willingness to fund the project are very high level, and lack the kind of detail likely to cause competitive disadvantage. For instance, with regard to risk assessments, the letter does not reveal any details relating to how Bricktop conducts its risk assessments or calculates its returns. Nor does this letter reveal any details of the terms or conditions regarding funding.
- 37 The only matter which is more likely to raise the consideration of competitive disadvantage relates to funding being paid by the Council and State Government to Creative Property Holdings. I am not persuaded that the release of this information would be likely to cause competitive disadvantage to

⁴ [2017] NSWCA 275 (24 October 2017).

⁵ Bricktop., available at <https://www.bricktop.com.au/funding-solutions/>, accessed 17 October 2023.

Bricktop, however, as it relates to a proposed payment to Creative Property Holdings by public entities. It does not directly relate to Bricktop.

- 38 At an earlier stage in the process, I may have accepted Mr Davis' argument regarding the revelation of the current status of the project and Bricktop's concerns about delays might have caused competitors to gain an advantage. But this information is now 3.5 years old and the delays and issues with the project have been extensively ventilated in the public domain. At this late stage, I cannot see that there is any reasonable likelihood of competitive disadvantage occurring as a result of the release of this information.
- 39 On 2 December 2020, Mr Billing forwarded on Mr Davis' letter to Council, with the covering email correspondence attached to it.
- 40 The information contained within the covering correspondence is innocuous. It details that Bricktop owns the funding rights for the project and that Mr Billing is updating a letter that acknowledges that the feasibility study has been completed and that Creative Property Holdings can deliver the project as agreed. It also notes that Mr Davis hopes for Bricktop's involvement in the project to remain confidential.
- 41 Again, I am not satisfied that there is any information in this document that would be likely to cause Bricktop a competitive disadvantage if released at this point in time. Accordingly, I am not satisfied that this information is *prima facie* exempt under s37(1)(b) of the Act and it should be made available to the primary applicant.

Mr Billing's letter to Mr Stretton dated 3 December 2020 and covering email correspondence

- 42 On 3 December 2020 Mr Billing wrote to Mr Stretton of Council to advise him that he is confident that the funding required to progress the development will be secured, and that Creative Property Holdings are completing due diligence processes. Mr Billing also reiterates the confidential nature of the letter dated 3 December 2020 sent to Council by Bricktop.
- 43 I am not satisfied that there is any information in this letter or covering email correspondence that would be likely to cause Bricktop a competitive disadvantage in the current circumstances. Accordingly, it is not exempt under s37(1)(b) of the Act and should be made available to the primary applicant.

Mr Stretton's email to Mr Billing dated 13 May 2020

- 44 On 13 May 2020, Mr Stretton wrote to Mr Billing to express his concern at recent media reports detailing that Foundry had failed to pay staff entitlements on time. As mentioned, Mr Billing is the sole director of Foundry.
- 45 Mr Stretton wrote to Mr Billing to ask that that he and his investment partners provide a *clear and compelling* statement to Council to alleviate its concerns about the future viability of Foundry, and its ability to be part of the creative industries precinct.

- 46 Again, I find that there is nothing in this letter that would be likely to cause Bricktop a competitive disadvantage if it was released. Accordingly, this letter should be made available to the primary applicant in full.

Mr Billing's email to Mr Stretton dated 13 May 2020

- 47 On 13 May 2020, Mr Billing wrote to Mr Stretton to respond to his and Council's concerns about the on-going viability of Foundry. Mr Billing explained that he was available to speak with concerned councillors about the media reports, and that he was waiting to hear back from Mr Davis about how Bricktop can respond to Council's concerns. Mr Billing also advised that he was preparing information packs to respond to the media reports. This email also included testimonials from Foundry students, teachers and their family members attesting to the high-quality education provided by Foundry.
- 48 This email merely makes a passing reference to Bricktop as an investor providing capital for the development. I am not satisfied this information would be likely to cause Bricktop a competitive disadvantage if it was released. Accordingly this email is not exempt from disclosure under s37 of the Act, and should be made available to the primary applicant in full.

Mr Billing's letter to City of Launceston Councillor's dated 13 May 2023

- 49 This is a letter sent from Mr Billing to City of Launceston councillors in an attempt to alleviate their concerns about the on-going viability of the development after recent media reports alleged that Foundry had failed to pay staff entitlements.
- 50 In this letter, Mr Billing explains that Foundry and Creative Property Holdings are distinct entities and that the success of the development is not reliant on the success of Foundry. This letter goes on to explain the impact the COVID-19 pandemic has had on the education sector and that the development retains the support of investment partners.
- 51 This letter makes no reference to Bricktop, but rather simply refers to funding partners in passing. I do not consider that the release of this information would be likely to expose Bricktop to a competitive disadvantage under s37 of the Act. Accordingly, I find that this information should be made available to the primary applicant in full.
- 52 As I have not identified any information as being *prima facie* exempt under s37 of the Act, it is not necessary for me to consider the public interest test contained in s33.

Preliminary Conclusion

- 53 For the reasons given above, I determine that the information proposed to be released by Council is not exempt pursuant to s37.

Submissions to the Preliminary Conclusion

- 54 The above preliminary decision was made available to both Mr Davis and Council on 10 November 2023 under s48(1)(b) of the Act to seek their input prior to finalisation. Council's submissions were limited to how third party consultation unfolded between Council and Bricktop, and I have amended paragraph 6 of my decision slightly to reflect this further information.
- 55 Mr Davis provided submissions on the substantive point of why the release of information subject to this review would expose him or Bricktop to competitive disadvantage. However, as previously mentioned, Mr Davis has asked that his submissions not be published as part of this decision, and I will respect his request.
- 56 The submissions provided by Mr Davis in response to my preliminary decision are general in nature and do not contain sufficient detail to make it clear to me exactly why the release of information subject to this external review would be likely to expose Mr Davis or Bricktop to competitive disadvantage. I remain satisfied that the information subject to this external review is largely innocuous. As I have mentioned, the most contentious information is over 3.5 years old and much has already been reported in the media or released in other documents. I remain satisfied that the release of the information subject to this external review would not be likely to expose Mr Davis to a competitive disadvantage.

Conclusion

- 57 Accordingly, for the reasons set out above, I find that the relevant information is not exempt from disclosure pursuant to s37 of the Act. It is to be released to the original applicant.

Dated: 28 February 2024



Richard Connock
OMBUDSMAN

ATTACHMENT I – Relevant Legislation

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

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

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

(2) If –

- (a) an application is made for information under this Act; and
- (b) the information was provided to a public authority or Minister by a third party; and
- (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of substantial concern to the third party –

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

- (d) notify the third party that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information applied for; and
- (f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority, state the name and designation of the person who made the decision; and
- (c) inform the third party of –
 - (i) its right to apply for a review of the decision; and
 - (ii) the authority to which the application for review can be made; and

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

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

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

Section 33 – Public Interest Test

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

Schedule 1 – Matters Relevant to Assessment of Public Interest

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

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

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

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