

# OMBUDSMAN TASMANIA

## DECISION

**Right to Information Act Review**

**Case Reference:** O1712-001

**Names of Parties:** Adam Stanway and Tasmania Police

**Reasons for decision:** s48(1)(a)

**Provisions considered:** s34, s35, s36

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### **Background**

- 1 Mr Adam Stanway sought information from Tasmania Police regarding its classification of the Warwick WFAI bolt action rifle<sup>1</sup> as a prohibited firearm.
- 2 Specifically, on 13 September 2017 the applicant submitted to Tasmania Police an application for assessed disclosure under the *Right to Information Act 2009* (the Act) for the following:
  - (a) *All documents from 2010 to now on the subject of the proper classification of the Warwick WFAI under Tasmanian firearms laws.*
  - (b) *The reasons for the decision to classify the WFAI as a prohibited firearm.*
  - (c) *Who was the FCAC [Firearms Categorisation Assessment Committee] comprised of?*
  - (d) *What were their qualifications?*
  - (e) *What was the firearm that the WFAI substantially duplicated the appearance of?*
- 3 On 17 October 2017, Constable Michelle Cowling, a delegated officer under the Act, released a decision to the applicant. Responses were provided to all questions. However, in relation to questions (c) and (d), information was provided regarding only three of the four members of the FCAC.
- 4 Constable Cowling advised that the fourth member was engaged by Tasmania Police from another jurisdiction and was unable to be contacted in relation to the release of their personal information as they were currently overseas.
- 5 Constable Cowling considered that disclosure of that fourth person's personal information might be reasonably expected to be of concern to them and decided this information was exempt pursuant to s34 as information obtained

<sup>1</sup> Manufactured in Australia by Warwick Firearms.

from another jurisdiction, and s36 as personal information of a person other than the applicant.

- 6 On 28 October 2017, the applicant requested Tasmania Police undertake an internal review of the original decision.
- 7 On 8 November 2017 Commander G A Keating, another delegated officer, released an internal review decision to the applicant. The decision reached the same conclusion as the original decision, for similar reasons. Commander Keating determined that Tasmania Police had provided all available non-exempt documentation.
- 8 On 30 November 2017 the applicant sought external review by this office. Mr Stanway advised he had a decision from the Australian Criminal Intelligence Commission [ACIC] under the *Freedom of Information Act 1982* (Cth) [FOI Act]. He said the ACIC had located information that fell within the scope of his application to Tasmania Police but which it had not identified. Mr Stanway sought the opportunity to provide that material to this office and make submissions about it. He subsequently did so, on 10 February 2018.
- 9 On 1 December 2017 this office advised Tasmania Police that it had accepted the application for external review under s44(1)(b)(i) of the Act. It sought further clarification from Tasmania Police regarding:
  - (1) the process for classification of a firearm; and
  - (2) whether it was common for there to be little documentation in relation to this process.
- 10 Sergeant Mark Woodland replied to this office, answering these enquiries. In relation to the second, his reply included

*... the fact that no further documentation was produced was more unique to this particular example as the decision to prohibit the firearm was based on appearance.*
- 11 As the original decision had advised Mr Stanway in relation to his question (e):

*The firearm that the WFA-1 is similar to is the WFM4 Low visibility carbine. It is similar in appearance, overall dimensions and external mechanical features.*
- 12 This office asked further questions of Tasmania Police regarding the existence of the information responsive to the application. The office sought provision of the information in order to assess it.
- 13 Sergeant Lee Taylor emailed a short professional biography of the FCAC member to this office and advised that the member was ...not adverse to the release of this information.
- 14 This office also requested that Tasmania Police search for the information provided to the applicant by the ACIC, identified by the ACIC as responsive to the scope of his FOI application to it.

- 15 On 30 April 2018, Sergeant Taylor provided two of four emails released to the applicant by the ACIC:
  - one email dated 15 February 2017; and
  - the other dated 13 March 2017.
- 16 Sergeant Taylor said Tasmania Police was unable to locate any further relevant emails.
- 17 On 3 May 2018, this office instructed Tasmania Police to assess the two emails it had extracted and provide a decision to the applicant on those. On 8 May 2018, Sergeant Taylor released his decision to Mr Stanway regarding the emails, determining some information exempt under s35 as internal deliberative information and/or s36 as the personal information of a person other than the applicant.
- 18 The decision advised Mr Stanway of his right to apply for a review of it under s43 of the Act, and the process and 20 working day time limit for doing so. This office did not receive further correspondence from Mr Stanway until it contacted him in April 2021.

### **Issues for Determination**

- 19 I must determine if the information claimed exempt by Tasmania Police under s34, s35 or s36 is exempt.
- 20 Because ss34, 35 and 36 are in Division 2 of Part 3 of the Act they are subject to the public interest test contained in s33; if I determine the information is provisionally exempt under any of those provisions, then it is only exempt if disclosure of it would be contrary to the public interest, having regard to, at least, relevant matters contained in Schedule 1.<sup>2</sup>

### **Relevant legislation**

- 21 Sections 34 and 36 were relied on in both the original decision and in the internal review decision. Sections 35 and 36 were relied on in the further information located and subsequently assessed. A copy of these sections are attached to this decision.
- 22 The definition of *personal information* in s5(1) is relevant to s36 and is referred to later in this decision.
- 23 A copy of Schedule 1, listing matters which must be considered in determining the public interest test, is also attached.

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<sup>2</sup> Subsection 33(2).

## **Submissions**

- 24 On 28 October 2017, the applicant applied for internal review of Tasmania Police's original decision. He set out a number of reasons for doing so, including, in summary, Tasmania Police's:
1. *Failure to set out a schedule of documents*
  2. *Reliance on the 'prejudice to State-Commonwealth relations' exemption*
  3. *Conclusion that it is against the public interest to offer detailed reasons for banning a rifle.*
- 25 In relation to his point 2, the applicant believed the claimed exemption under s34 was inappropriate. He asserted that:
- It strains credibility to believe that information provided by other States or the Commonwealth about one type of commercial rifle is of such gravity that the release of the information would strain State-Commonwealth relations. ...*
- 26 He submitted the FCAC member's qualifications could be released without identifying that member and proposed the individual be contacted to gain consent. He also stated that the decision did not explain why it would be contrary to the public interest to disclose documents, and believed it:
- ...appropriate that all information that led to the decision be available and that the decision be so exposed to public scrutiny.*
- 27 In its review decision dated 8 November 2017, Tasmania Police responded by saying there were no further documents available and the sole reason for the classification had been provided. Commander Keating said, in relation to the applicant's concerns regarding the s34 exemption:
- This exemption has been applied to the experience and qualifications of the FCAC member from an interstate jurisdiction and does not relate to information regarding the type of commercial rifle.*
- 28 Commander Keating further argued that non-disclosure was appropriate in these circumstances.
- 29 In his request of 30 November 2017 for external review, the applicant referred to emails provided to him in response to an FOI application he had made to the ACIC. Mr Stanway said the ACIC had identified information that fell within the scope of his application to Tasmania Police, but which the latter not identified. Mr Stanway sought the opportunity to provide that material to this office and make submissions about it. He subsequently did so, on 10 February 2018.
- 30 Mr Stanway submitted that the Ombudsman should be afforded, by Tasmania Police, copies of all the documents listed in the schedule to the FOI decision by the ACIC. This office subsequently sought that information from Tasmania Police, though with limited success, as noted earlier.

## **Analysis**

*Tasmania Police initial response to applicant's questions (c) and (d)*

- 31 In relation to questions (c) and (d), the original and internal review decisions of Tasmania Police both claimed that the name and qualifications of one member of the FCAC were exempt information under both ss34 and 36. These sections are considered below.
- 32 Commander Keating's internal review decision described the member as *an independent person from an interstate jurisdiction whose services were engaged by Tasmania Police.*

### **Section 36**

- 33 Personal information is defined in s5(1) of the Act to mean:

*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.*

- 34 Section 36, headed *Personal information of a person*, applies to such information, in conjunction with s33 which contains the public interest test. Copies of s36 and s 33 are attached to this decision.
- 35 Subsection 36(1) provisionally renders information exempt from release if doing so would disclose the *personal information of a person other than the person making an application under section 13?*
- 36 I say provisionally because as already noted, the above exemption is subject to the s33 public interest test. Hence, such information, provisionally exempt from release under s36(1), is only exempt if, *after taking into account all relevant matters, ... it is contrary to the public interest to disclose the information: s33(1).*
- 37 Relevant matters which must be considered when applying the public interest test include those matters specified in Schedule 1 of the Act: s33(2). A copy of Schedule 1 is attached to this decision.

*No consultation by Tasmania Police: s36(2)*

- 38 Subsection 36(2) of the Act provides that, 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.*

- 39 Subsection 36(2) thereby requires consultation with a third party who has provided information if the requirements of ss36(2)(a), (b) and (c) are met and consultation is *practicable*.
- 40 Both the original and internal review decisions stated that the unnamed FCAC member was unable to be consulted. In her original decision, Constable Cowling stated that *This person has previously been consulted, in March 2017 as to the release of their information and they objected to the disclosure at that time.*
- 41 Constable Cowling added later in her decision:

*I have been unable to contact this person for permission to disclose their experience or qualifications as they are overseas until November 2017 and I reasonably believe that disclosure of this information would be of concern to them.*

- 42 Commander Keating similarly said in the internal review decision:
- his response to similar requests when consulted was that he objected to disclosure of his experience and qualifications. Therefore I have no reason to believe, based on this previous advice that this individual would have consented to the release of his personal information on this occasion.*
- 43 Commander Keating added that *As my role is only to review the disclosure made by Constable Cowling I will not be making contact with this individual.*
- 44 Presumably therefore, both decision makers considered that consultation was not *practicable* within the timeframes required for their decision. The decisions then relied on the member's objection in response to previous consultation(s) regarding earlier RTI application(s).

*Public interest test: s33*

- 45 In her text, *Freedom of Information and Privacy in Australia: Information Access 2.0*, Associate Professor Moira Paterson writes, *A decision-maker is not obliged to comply with the wishes expressed by any third parties consulted.*<sup>3</sup>

<sup>3</sup> (2015) (2<sup>nd</sup> ed) at [3.120], p235.

- 46 Hence, even if the member had objected to disclosure in the current case, Commander Keating needed to go further than merely relying on that. It was necessary to apply the public interest test under s33, as Constable Cowling had done (albeit to a limited extent) in her original decision.
- 47 As it turned out, however, it was unduly speculative for either decision maker to rely on previous advice from the member to assume he would not consent to release of the information sought in this application's questions (c) and (d). During the course of the external review application, Sergeant Taylor advised this office that the FCAC member had been contacted in response to the review.
- 48 Sergeant Taylor provided the name and qualifications of the FCAC member and advised that the member was ...not adverse to the release of this information. Sergeant Taylor advised that

*This information was not provided to Tasmania Police as stated in Constable Cowlings [sic] 'Statement of Reasons' to Mr Stanway, but now has been provided upon request of this office to Mr Fleetwood directly.*

- 49 In *Tziolas v NSW Department of Education and Communities* [2012] NSWADT 69, the New South Wales Administrative Decisions Tribunal stated, in relation to the Government Information (Public Access) Act 2009 (NSW) [GIPA Act]:

*Section 54(2)(a) of the GIPA Act requires agencies, as far as reasonably practicable, to consult with persons before disclosing their personal information. If a person consents or does not object to the disclosure of their personal information, the application of clause 3(a) will be without effect or at least without weight in the application of the public interest test.<sup>4</sup>*

- 50 This passage is applicable in the present context in relation to the public interest test in the RTI Act, s33, given the similar triggers for consultation under the GIPA Act, s54(2)(a) and the RTI Act, s36(2).<sup>5</sup>
- 51 Both Acts also contain closely matching definitions of *personal information*.<sup>6</sup>
- 52 Applying the passage of *Tziolas* quoted above to the present facts indicates that the consent or lack of objection by the member to disclosure of his name and

<sup>4</sup> *Tziolas v NSW Department of Education and Communities* [2012] NSWADT 69 at [53].

<sup>5</sup> Consultation is only required under the GIPA Act, s54(2)(a) if, amongst other matters:

- *information, includes personal information about the person, (s54(2)(a)) and*
- *the person may reasonably be expected to have concerns about the disclosure of the information, (s54(1)(b)) and*
- *those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information (s54(1)(c)).*

<sup>6</sup> Personal information is defined in the GIPA Act, Sch 4(4)(1) as follows:

*... information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion.*

qualifications would, under the GIPA Act, renders its equivalent exemption to the RTI Act, s36 *without effect or at least without weight* in determining whether there is an overriding public interest against disclosure of government information.

- 53 The GIPA Act defines *government information* to mean *information contained in a record held by an agency*.<sup>7</sup> The RTI Act similarly defines *information in the possession of a public authority*<sup>8</sup> to mean *information in the possession of a public authority that relates to its official business, ...[unless – not applicable here] for the sole purpose of collation and forwarding to a body other than another public authority*.
- 54 The reasoning in the passage of *Tziolas* quoted above is applicable to the RTI Act and the above quote applies to the present facts regarding the member who consented or did not object to disclosure of their name and qualifications when consulted during the course of the external review.
- 55 The effect of *Tziolas* is to leave *without effect or at least without weight* matters in Schedule 1 of the RTI Act that might otherwise favour non-disclosure of the name and qualifications of the member who did not object. In this context, Constable Cowling's original decision relevantly considered matters (m) and (n) *at Schedule 1 of the Act to favour non-disclosure of the third parties [sic] information*, although she did not explain further (for example, she did not explain *why or how* those matters favoured non-disclosure).
- 56 By contrast, matters (a), (d), (f) and (g) favour disclosure of the member's name and qualifications. I say this based in part on submissions by Mr Stanway in which he claimed Tasmania Police wielded *public power in declaring as prohibited [the Warwick WFA1 rifle]* ... by way of *administrative action taken by public officials*<sup>9</sup> [acting on advice from the FCAC].
- 57 Further to this, in returning a telephone call to this office on 19 April 2021, Mr Stanway provided verbal submissions supplementing his written submissions noted above. He submitted that the FCAC produces reports (I am unsure as to reports, but I would say, at least, assessments) which inform Tasmania Police decisions as to whether a firearm is prohibited. He claimed that the FCAC's assessments also influence equivalent decision makers in other jurisdictions. Therefore, he said, the committee's membership should be public information. I note, without placing any weight on it, that during the conversation Mr Stanway accurately volunteered the member's name and a number of his qualifications / relevant experience.

<sup>7</sup> GIPA Act, s4(1).

<sup>8</sup> Under the RTI Act, s5(1), *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.*

<sup>9</sup> Submissions by Mr Stanway emailed to Commissioner Hine 28 October 2017.

- 58 In the above circumstances, particularly having regard to the qualifications provided by the FCAC member during the external review and the reasoning in *Tziolas*, I do not consider releasing his name and qualifications to be contrary to the public interest, as required for exemption under s33.
- 59 Therefore, I determine the member's name and qualifications are not exempt under s36(1) and attach them to these reasons for my decision. This biographic information completes the answers to the applicant's questions (c) and (d).
- 60 It is apparent, at least with the wisdom of hindsight, that in the circumstances of this application it would have been prudent for Tasmania Police to use the additional time granted to it by s15(5) to consult the member as required by s36(2) prior to making its decisions.
- 61 If necessary, Tasmania Police could have sought an extension of time under s15(4) for this consultation (for example, if the member was not contactable overseas for an extended period), starting by seeking agreement with the applicant under s15(4)(a). This office provided general advice to all public authorities in April 2020 regarding the process for applying for extensions of time in the context of responses to COVID-19.

#### Section 34

- 62 Both the original and internal review decisions found that the name and qualifications of the fourth member of the FCAC was exempt under s34. Both decision makers stated they were satisfied that disclosure *would be reasonably likely to compromise relations between Tasmania [Police] and the interstate jurisdiction and hence any and all information relating to the member's experience [and qualifications] attract exemptions pursuant to section 34 and [section] 36 of the Act.*
- 63 Information is only exempt information under s34(1) if, relevantly:
- its disclosure under the Act would prejudice relations between a State and the Commonwealth; [s34(1)(a)(ii)] or
  - it was communicated in confidence:
    - to a public authority (or a person acting on its behalf)
    - by a Commonwealth authority (or a person acting on its behalf) [s34(1)(b)].
- 64 In either case, disclosure must also be *reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future*: s34(1).
- 65 Section 34 is subject to the public interest test under s33.<sup>10</sup>
- 66 Even though the name and qualifications of the FCAC member were obtained by Tasmania Police from the ACIC or its employee on its behalf, this does not of itself mean that release would prejudice relations between the authorities.

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<sup>10</sup> This is because s34, like s36, is found in Division 2 of Part 3 of the Act: see s33(1).

The information is not intelligence, but is of a nature that could be exchanged in the ordinary course of dealings between the authorities (for example, in order to confirm that the member was suitably qualified for appointment to the FCAC).

- 67 Likewise, I do not consider release of the information reasonably likely to impair the ability of Tasmania Police to obtain similar information in the future as required for exemption under s34(1).
- 68 I am fortified in the above reasoning by the biographic information provided by the member to Tasmania Police during the external review process and the member's lack of objection to its disclosure.
- 69 Therefore, I determine the information is not exempt under s34.
- 70 It is therefore not necessary for me to proceed to apply the public interest test in relation to s34. Had I needed to do so, for reasons equivalent to those set out earlier in the context of s36, I would not have considered disclosure to be contrary to the public interest.

#### *Emails*

- 71 As described earlier, the applicant's submissions to this office included redacted emails he had received from the ACIC pursuant to a decision by it of 23 November 2017 under the FOI Act. These and the applicant's submissions were forwarded to Tasmania Police by this office in April 2018, noting that the emails appeared to come within the scope of Mr Stanway's application under the RTI Act.
- 72 Tasmania Police responded:

*I have contacted the officer who sent the emails – two of which are attached.*

*Unfortunately this officer is unable to locate any further emails in relation to your request.*
- 73 The two emails Tasmania Police located were sent (Tasmanian time) on:
  - 15 February 2017, at 9:15AM and
  - 13 March 2017, at 10:04AM.
- 74 This office then asked Tasmania Police to assess those emails under the RTI Act and provide a decision to Mr Stanway. In its decision to the applicant dated 8 May 2018, Tasmania Police found those emails to be exempt in part under s35 and s36.
- 75 On 10 March 2021, this office wrote to Tasmania Police, requesting that it conduct a further search for two emails it had been unable to locate in 2018, dated 8 March 2017 and 21 March 2017.
- 76 On the same day, Sergeant Taylor advised that the officer in charge of Firearms Services within Tasmania Police had, in 2018, searched all its *email and*

*information systems available to her. She could only locate the two that were provided... Sergeant Taylor added :*

*I have again spoken to the Policy and Research Officer of Firearms Services who the additional two emails came from and as provided by ACIC, who advises that all emails from 2017 have been permanently deleted.*

...

*Sorry I can't be any further help.*

- 77 This office followed up, to which Sergeant Taylor replied on 11 March 2021:

*Unfortunately, and as advised previously, the Inspector of Firearms Services at the time conducted a search for these emails upon request from this office and was only able to locate the two provided. As recently as yesterday, I conducted my own searches of TasPol databases for any additional emails, without success. I also contacted the Policy and Research Officer of Firearms Services (who was also the Policy and Research Officer in 2017) who advises that all her emails from 2017 were permanently deleted some time ago, therefore are non-accessible.*

*I am unable to advise as to why the original delegate did not provide these emails at the time (if they were available).*

*... I am unable conduct specific investigations with the concerned person/s and have exhausted all available avenues of enquiry.*

...

*Sorry I cant [sic] be of any further assistance.*

- 78 It appears to me that, at a minimum, the initial search by Tasmania Police in 2017 for information responsive to the application was insufficient in that it did not produce all the emails provided to Mr Stanway, redacted in part, by the ACIC.
- 79 Unfortunately, now, as Sergeant Taylor advised (having done all he could), relevant emails from 2017 were permanently deleted some time ago, therefore are non-accessible.
- 80 As unsatisfactory as that is, there is nothing further I can usefully do regarding the missing emails from 2017 which Tasmania Police cannot produce since it says those emails have been permanently deleted from its systems.
- 81 I will, however, consider the two emails that were produced by Tasmania Police. These emails are from the inspector of Firearms Services in Tasmania Police to one or more members of the FCAC. The addressee(s) of both emails include the member from the ACIC.

- 82 Tasmania Police, in its decision to the applicant dated 8 May 2018 regarding these emails found them to be exempt in part under s35 and s36.
- 83 Tasmania Police advised the applicant he had a right to internal review, and the timeframe for that. The applicant did not apply to this office for external review of the decision of 8 May 2018. Nevertheless, the two emails, and others Tasmania Police cannot now locate, should have been produced in response to Mr Stanway's original application, which he did appeal to this office. In his application for external review, Mr Stanway provided, by reference to the material he had from the ACIC under the FOI Act, reasonable grounds for his belief that there had been an insufficiency in Tasmania Police's searching for the information he sought from it.
- 84 Having considered the two unredacted emails provided to this office by Tasmania Police, I will assess them below.
- 85 A threshold point is that the two redacted emails released to Mr Stanway by Tasmania Police with its decision dated 8 May 2018 were both prefaced with a third of a page fully redacted being information claimed to be exempt pursuant to s36 and s35(b). These redactions were simply the inspector who had sent the emails in 2017 forwarding them to Sergeant Taylor on 30 April 2018 with the words 'As requested', and an email signature.
- 86 As such, these 2018 emails were outside the scope of the 2017 application so ought not have been included. Furthermore, they were unnecessarily confusing for anyone without the unredacted version since they were not explained in the decision, which contained no schedule of information (the lack of which in the 2017 decisions Mr Stanway had already criticised).

*Personal information: s5(1) and s36*

- 87 Tasmania Police applied s36 to parts of both emails, so as to exempt:
- names (other than that of the emails' author, the inspector of Firearms Services in Tasmania Police);
  - email addresses; and
  - the [former – no longer current by April 2018] telephone number of the author.
- 88 I am satisfied that the names, email addresses and telephone numbers are personal information as defined by the Act. That makes them provisionally exempt information, subject to the public interest test.
- 89 The personal information claimed to be exempt was that of Tasmania Police officers or the ACIC member, except for one name of a member of the public.
- 90 Helpfully, Mr Stanway advised this office by telephone on 19 April 2021 that he did not require this personal information. In doing so he, in effect, refined his application to allow the redactions to the emails made by Tasmania Police

relying on s36. This was confirmed by the office in writing to Mr Stanway on 21 April 2021, to which he had not replied by 3 May 2021.

- 91 Therefore, I need not further consider that information so redacted, which would have required me to apply the public interest test.<sup>11</sup>

*Internal deliberative information: s35*

- 92 In summary, Sergeant Taylor's decision of 8 May 2018 applied 's. 35(b)' [sic – he meant s35(1)(b)] to claim that some information in the emails was exempt information.

- 93 Section 35 is attached to this decision. It contains multiple requirements which have been previously considered, for example in *Rebecca White MP and Minister Barnett, Minister for Resources, Minister for Building and Construction* (January 2021).<sup>12</sup>

- 94 In addition, s35 is subject to the public interest test.<sup>13</sup>

- 95 It is not necessary I say more about s35 here, for reasons which will follow.

*Email dated 15 February 2017: s35 and scope of application*

- 96 Sergeant Taylor made three redactions purportedly pursuant to s35 to the email dated 15 February 2017, all within its first paragraph.
- 97 The first redaction contains a greeting and then immediately following words regarding the FCAC. All this redaction was disclosed in the same email provided to Mr Stanway by the ACIC with its 23 November 2017 decision under the FOI Act. As such, they are already available to Mr Stanway, and others with whom he may choose to share that information. Consequently, instead of relying on s35 here (which I do not consider justified, particularly given the public interest test), Tasmania Police could have refused under s12(3)(c)(i) to provide Mr Stanway with most of the email's substantive content due to that information already being in his possession.
- 98 Given the above circumstances, I reject Tasmania Police's first application of s35 to the email's first paragraph. However, due to s12(3)(c)(i) I make no further direction regarding this first redaction.
- 99 The second and third exemptions claimed under s35(1)(b) listed the names of various firearms. These were redacted, whereas the name 'Warwick WFAI' in the list was released. Apparently, according to an earlier part of the email released, firearms in the list were to be discussed at the first FCAC meeting.
- 100 The same second and third redactions had been made to this email by the ACIC, citing the FOI Act, s22(1)(a)(ii), before it released the email to Mr Stanway. That provision of the FOI Act applies if an agency decides:

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<sup>11</sup> The public interest test is required before concluding that information is exempt based on any section that falls within Division 2 of Part 3 of the Act: s33(1). Section 36 is in Division 2 of Part 3.

<sup>12</sup> OI706-057 at <https://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions>

<sup>13</sup> The public interest test is required under s33(1) as s35 is in Division 2 of Part 3 of the Act.

*that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access;*

...

- 101 In this regard, Sergeant Taylor's reasons for his reliance on s35(1)(b) relevantly included that the information he redacted ... *is outside the scope of your application and ...*
- 102 I agree the information in the second and third redactions is outside the scope of the RTI application, which did not ask about specific firearms beyond the WFAI and the firearm it substantially duplicated. Therefore, the other firearm names are outside the scope of the application. They should remain redacted, but as outside the application's scope rather than being considered exempt information under s35.
- 103 That renders it unnecessary for me to decide if the names of other firearms would have been exempt information under s35 (and the associated public interest test), had they been within scope of the application.

*Email dated 13 March 2017: s35 and scope of application*

- 104 Purportedly under s35, Sergeant Taylor made one redaction to the email dated 15 February 2017, determining its first two paragraphs and associated attachment to be exempt in full. This information consists of inter-governmental communications regarding an amended generic firearm assessment form and the blank assessment form attached to the email.
- 105 This information, including the attached blank assessment form do not contain information pertaining to the classification of the WFAI. The paragraphs are far more general in nature and, as such, are most appropriately categorised as outside the scope of the application.
- 106 The same first and second paragraphs were redacted from this email by the ACIC, citing the FOI Act, s22(1)(a)(ii), before it released the email to Mr Stanway.
- 107 In this regard, the extract of Sergeant Taylor's reasons for his application of s35(1)(b) cited earlier remains apt, namely that the information he redacted ... *is outside the scope of your application ...*
- 108 I agree the information in the first and second paragraphs redacted from this email, and the blank assessment form attached to it, are outside the scope of the RTI application. They should remain redacted, but as outside the application's scope rather than being considered exempt information under s35.
- 109 That renders it unnecessary for me to decide if the information in those paragraphs and attachment would have been exempt information under s35 (and the associated public interest test), had it been within scope.

## Preliminary Conclusion

- I10 For the reasons given earlier, I determine the following.
- I11 The name and biographic information of the FCAC member attached to this decision, provided by Tasmania Police for release with his consent, is not exempt information under ss34 or 36. It is disclosed to complete the answers to questions (c) and (d) of the application.
- I12 In relation to the decision of 8 May 2018 by Sergeant Taylor of Tasmania Police regarding its email dated 15 February 2017, I determine the following.
- I13 I set aside the first use of s35 to redact the greeting and immediately following information at start of the email's first paragraph. However, this greeting and immediately following information was released to the applicant by the ACIC pursuant to its 23 November 2017 decision under the FOI Act. Therefore, due to s12(3)(c)(i) it need not be provided to him again.
- I14 The second and third exemptions claimed under s35(1)(b) listed the names of various firearms. These were redacted, whereas the name 'Warwick WFAI' in the list was released.
- I15 The information in the second and third redactions is outside the scope of the RTI application, which did not ask about specific firearms beyond the WFAI and the firearm it substantially duplicated. Therefore, the other firearm names are outside the scope of the application. They should remain redacted, but as outside the application's scope rather than being considered exempt information under s35.
- I16 That renders it unnecessary for me to decide if the names of other firearms would have been exempt information under s35 (and the associated public interest test), had they been within scope of the application.
- I17 The eight page *Firearms Categorisation Guidelines* document attached to the email was released to the applicant by the ACIC pursuant to its 23 November 2017 decision under the FOI Act. Therefore, due to s12(3)(c)(i) it need not be provided to him again.
- I18 In relation to the decision of 8 May 2018 by Sergeant Taylor of Tasmania Police regarding its email dated 13 March 2017, I determine the following.
- I19 The information in the first and second paragraphs redacted from the body of the email of 13 March 2017, and the blank assessment form attached to it, are outside the scope of the RTI application. They should remain redacted, but as outside the application's scope rather than being considered, as Tasmania Police claimed, exempt information under s35.
- I20 I need not determine if this information would have been exempt under s35, had it been within scope of the application.
- I21 The remaining information under review, which Tasmania Police claimed exempt under s36, need not be disclosed for the reasons given in this decision.

The basis for that includes the co-operative approach of the applicant in not pursuing the personal information in the two emails Tasmania Police produced.

### **Submissions to the Preliminary Conclusion**

- I22 The above preliminary decision was adverse to Tasmania Police, so a copy was forwarded to its Commissioner, seeking input before finalising the decision, as required by s48(1)(a).
- I23 On 4 May 2021 Tasmania Police replied, extremely promptly and co-operatively, to advise that Tasmania Police do not wish to provide a submission in relation to this application.

### **Conclusion**

- I24 For the reasons given earlier, I determine the following.
- I25 The name and biographic information of the FCAC member attached to this decision, provided by Tasmania Police for release with his consent, is not exempt information under ss34 or 36. It is disclosed to complete the answers to questions (c) and (d) of the application.
- I26 In relation to the decision of 8 May 2018 by Sergeant Taylor of Tasmania Police regarding its email dated 15 February 2017, I determine the following.
- I27 I set aside the first use of s35 to redact the greeting and immediately following information at start of the email's first paragraph. However, this greeting and immediately following information was released to the applicant by the ACIC pursuant to its 23 November 2017 decision under the FOI Act. Therefore, due to s12(3)(c)(i) it need not be provided to him again.
- I28 The second and third exemptions claimed under s35(1)(b) listed the names of various firearms. These were redacted, whereas the name 'Warwick WFAI' in the list was released.
- I29 The information in the second and third redactions is outside the scope of the RTI application, which did not ask about specific firearms beyond the WFAI and the firearm it substantially duplicated. Therefore, the other firearm names are outside the scope of the application. They should remain redacted, but as outside the application's scope rather than being considered exempt information under s35.
- I30 That renders it unnecessary for me to decide if the names of other firearms would have been exempt information under s35 (and the associated public interest test), had they been within scope of the application.
- I31 The eight page *Firearms Categorisation Guidelines* document attached to the email was released to the applicant by the ACIC pursuant to its 23 November 2017 decision under the FOI Act. Therefore, due to s12(3)(c)(i) it need not be provided to him again.

- I32 In relation to the decision of 8 May 2018 by Sergeant Taylor of Tasmania Police regarding its email dated 13 March 2017, I determine the following.
- I33 The information in the first and second paragraphs redacted from the body of the email of 13 March 2017, and the blank assessment form attached to it, are outside the scope of the RTI application. They should remain redacted, but as outside the application's scope rather than being considered, as Tasmania Police claimed, exempt information under s35.
- I34 I need not determine if this information would have been exempt under s35, had it been within scope of the application.
- I35 The remaining information under review, which Tasmania Police claimed exempt under s36, need not be disclosed for the reasons given in this decision. The basis for that includes the co-operative approach of the applicant in not pursuing the personal information in the two emails Tasmania Police produced.

**Dated:** 4 May 2021

**Richard Connock**  
**Ombudsman**

## **Attachment I**

### **Right to Information Act 2009**

#### **Section 34**

*(1) Information is exempt information if –*

- (a) its disclosure under this Act would prejudice relations between –*
  - (i) two or more States; or*
  - (ii) a State and the Commonwealth; or*
  - (iii) the Commonwealth or a State and any other country; or*
- (b) the information was communicated in confidence to –*
  - (i) a public authority; or*
  - (ii) a person on behalf of the public authority –*

*by –*

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

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

*(2) Information is exempt information if –*

- (a) the information was communicated to –*
  - (i) a public authority; or*
  - (ii) a person on behalf of the Government or public authority*

*– by –*

  - (iii) the Government or an authority of the Commonwealth or of another State; or*
  - (iv) a person on behalf of the Government or an authority of the Commonwealth or of another State; and*
- (b) notice has been received from the Government or an authority of the Commonwealth or of the other State that the information is not required to be disclosed under, as the case may be, a corresponding law of the Commonwealth or of the other State.*

*(3) In this section –*

**corresponding law** means a law of the Commonwealth or of another State that is declared by the regulations to be a law that corresponds to this Act;

**State** includes the Northern Territory and the Australian Capital Territory.

## **Section 35**

- (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**

- (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, under s5(1):

*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.

**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.

## **Attachment 2**

### **Qualifications and training of Gary Fleetwood (ACIC South Australia) and member of Tasmania Police FCAC.**

*1969-1978 - Family firearm business (1951-1991) as a gunsmith, repairing firearms and warrantee gunsmith for major brand names within Australia*

*1971-1973 - Army Reserve - Armourer 107 Field WKSP Adelaide*

*1978-1990 - SA Police – Armourer, then Firearm Instructor and then Special Weapons Sgt/Instructor within STAR group.*

*1990-1996 - Advisor RPNGC Aid Project PNG - firearm and tactics/armoury repair procedure - Special Services Division (SSSD) McGregor Barracks Pt Moresby and other locations*

*1998-2004 - Sporting Shooters Association of Australia (SSAA) – Director Special Projects and Canberra based lobbyist*

*2004-present - ACIC Manager Firearm Identification and Trace Program*

*Fleetwood has been a Firearm Dealer in South Australia*

*Fleetwood was selected by SA Police to work with Price Waterhouse to identify and value firearms for the 1996 National Firearm Buyback*

*Fleetwood has travelled extensively both in Europe and the USA since 1981 researching firearm history and manufacturing techniques. Most recent was in 2017 travelling to Canada, USA and Europe meeting with firearm manufacturers and law enforcement officials.*

*Fleetwood has undertaken various armourers' courses within the private sector*

*Fleetwood has since 2005 advised the Commonwealth at various international United Nations meetings on Small Arms & Light Weapons (SALW) – with attendance requested by DFAT at the Review Conference on SALW in June 2018 New York.*

**OMBUDSMAN TASMANIA**  
**DECISION**

**Right to Information  
Act Review**

**Case Reference:** O1905-104  
R2202-032

**Names of Parties:** Alexandra Humphries and University of Tasmania

**Reasons for decision:** s48(3)

**Provisions considered:** s38, s39

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**Background**

- 1 The University of Tasmania (the University) has purchased several properties in Hobart's central business district, including the former Fountainside, MidCity and Theatre Royal hotels, and stated its intention to move its campus from Sandy Bay to central Hobart. The purchase and refurbishment of these buildings and others owned by the University to make them fit for purpose as learning facilities, or to accommodate students, has involved significant expenditure. Whether the new direction for the University and the associated expenditure is appropriate has generated media and public interest. The University is also entitled to an exemption from paying general rates for properties used for educational purposes, which led the media to question the impact of this on the Hobart City Council due to the University's now significant property portfolio in central Hobart.<sup>1</sup>
- 2 On 12 February 2019, Ms Alexandra Humphries, a journalist with the Australian Broadcasting Corporation made an application under the *Right to Information Act 2009* (the Act) to the University for the following information:
  - a. *Details of the price paid to purchase the Fountainside Hotel, including costs for the building, as well as any additional amount paid to purchase the business.*
  - b. *Details of any engineering reports from the last 10 years regarding the old commerce building on French St, Sandy Bay.*
  - c. *Details of the cost to refurbish the Fountainside, MidCity and Theatre Royal hotels to provide student accommodation; and*
  - d. *The amount the University paid in rates to the Hobart City Council.*
- 3 On 25 March 2019, Mr Richard Griggs, a delegated officer under the Act, released a decision to Ms Humphries. All information, except for

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<sup>1</sup> <https://www.abc.net.au/news/2019-02-12/utas-paying-three-times-value-of-forestry-building/10804612>

an Occupancy Permit, was claimed to be exempt under s38(a)(ii) of the Act, for the following reasons:

*In relation to (b), please find attached an Occupancy Permit (as Schedule 2). This is also publicly available upon request from the Hobart City Council and payment of a fee.*

*As discussed by email, attached to an Occupancy Permit are engineering reports the Hobart City Council require for the process of issuing of occupancy permits. I have omitted this information having formed the view it should be exempt from release under section 38 of the Right to Information Act 2009 (the ‘RTI Act’).*

*In relation to (a), (c) and (d) I have formed the view that this information should be exempt from release under section 38 of the RTI Act.*

*Section 38 of the RTI Act exempts from disclosure information if it is “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”.*

*I have determined that each of the necessary limbs of this section are satisfied for the exempt information, namely that:*

- the University is engaged in trade or commerce generally when it offers educational opportunities to students in return for immediate or deferred payment and, specifically, when engaged in property and building works and associated payment of rates and conduct of necessary activities to comply with building owner legal obligations;*
- Information relating to purchase price, refurbishment costs, amount of rates paid and steps taken to comply with legal obligations are all of a business, commercial or financial nature; and*
- Disclosure of that information would be likely to expose the University to competitive disadvantage through the fact that other organisations the University competes against in the property market would not have similar information about their operations publicly accessible.*

*The RTI Act also further requires I assess the public interest test before making a decision on whether to release the information or not.*

*I confirm I have assessed the potential release against each of the factors, as listed in Schedule 1 to this letter, and, on balance, have determined that release of the information is contrary to the public interest. I have given particular weight to factors (n), (s), (w), (x) and (y).*

to the University being an educational rather than commercial entity and the only tertiary education provider in Tasmania.

- 5 On 9 May 2019, Ms Juanita O'Keefe, another delegated officer under the Act, provided Ms Humphries with an internal review decision. The word *DRAFT* is watermarked on that document but as this office is not aware of any other internal review decision, it is taken to be the final decision.
- 6 Ms O'Keefe maintained the use of the s38 exemption as follows:

*Regarding the Occupancy Permit already supplied, I concur with the original decision maker and have omitted the accompanying information having formed the view it should be exempt from release under section 38 RTI Act.*

*Turning to the remaining requests (a), (c) and (d), I have formed the view this information should also be exempt from release on the grounds that the University was engaged in trade or commerce at the relevant time and the information is of a business, commercial or financial nature that would, if disclosed be likely to expose the University to competitive disadvantage in accordance with section 38 (a) (ii) of the RTI Act.*

...

*The University has the statutory authority to make decisions of a business, commercial or financial nature that are in the best interests of supporting University functions, specifically to its financial benefit. The University routinely engages in activities that are authorised under section 7 of the University of Tasmania Act 1992, such as acquiring, holding and disposing of real and personal property; and as such engages in trade or commerce.*

*Disclosing commercially valuable information, such as that requested at a), c) and d), to the public results in market competitors having information that they would not ordinarily have access to. Revealing information to another person (the public) has the real and imminent potential to affect the profitability or the viability of continuing business operations, including property negotiations where the University is seeking to purchase land or land and buildings, particularly in a very competitive property market. This results in a significant competitive disadvantage that has the potential to impact on the University to act as a competitor in a market.*

*I am satisfied that all relevant aspects of the exemption in section 38 (a) (ii) have been met.*

*In applying the public interest test, I have taken into consideration the non-exhaustive list of Matters Relevant to Assessment in Schedule 1 and the Matters Irrelevant to Assessment in Schedule 2 of the RTI Act.*

*I find that the disclosure of the information sought would not be in the public interest, as its disclosure is likely to expose the University to*

*competitive disadvantage and likely to harm the business or financial interests of the University and by extension members of the community.*

*For the reasons above I affirm the decision made on 25 March 2019.*

- 7 On 14 May 2019, Ms Humphries requested an external review of the decision. Her request was accepted under s44 of the Act on the basis she was in receipt of an internal review decision and it was submitted to this office within 20 working days. The fee was waived in accordance with s16(2)(c) as it was accepted by the University that Ms Humphries *intends to use the information for a purpose that is of general public interest or benefit*.<sup>2</sup>
- 8 On the same day, Ms Humphries requested that this external review be accepted on a priority basis and the Ombudsman granted this request.
- 9 On 9 December 2021, the University confirmed that it maintains the exemptions claimed in its internal review decision.

### **Issues for Determination**

- 10 I must determine whether the information is eligible for exemption under s38 or any other relevant section of the Act.
- 11 As s38 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 that the information is *prima facie* exempt under this section, I am then required to determine whether it is contrary to the public interest to disclose it. This requires consideration of all relevant matters and, at least, of all the matters referred to in Schedule 1 of the Act.

### **Relevant legislation**

- 12 The University relied on s38 of the Act and the whole of that section is attached to this decision.
- 13 Copies of s33 and Schedule 1 are also attached.

### **Submissions**

- 14 On 14 May 2019, Ms Humphries made the following submissions as part of her application to this office for an external review of the University's decisions:
  - 1 *The public interest in having the debate and discussion about the University of Tasmania's decisions about student accommodation and building purchases in the Hobart CBD be informed by more reliable information held by the University.*
  - 2 *The poor compliance with both the legislative requirements of the RTI Act that has treated my initial request and internal review in a way that fails to demonstrate any serious consideration of both the merits and legality of my request for information.*

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<sup>2</sup> Note this was prior to the amendment of the Act to include, s16(2)(ba); *the applicant is a journalist acting in connection with their professional duties.*

*3 In particular the original decision and the internal review decision has [sic] failed to demonstrate any active consideration of my arguments for the release of the information and in particular addressing the issues associated with the application of the public interest and has ignored the requirements set out in the Gun Control decision<sup>3</sup>.*

15 Additionally, Ms Humphries further submitted in response to the University's internal review decision, her concerns that:

- 1 No reasons as to why the requested information under b) has been exempt from release. UTAS has simply listed the legislative provisions which they claim exempt the release. The University needs to engage with (and apply) the factors for and against release.*
- 2 The officer has stated that the requested info at a), c) and d) is commercially valuable, which in itself requires a bit more of an explanation. For example, I'm not sure council rates themselves are something of inherent commercial value, this to me is something of considerable public interest. Again, there is mention of market competitors having access to this information, but I believe it to be important for these competitors to be identified. Who are they competing with in these endeavours?*
- 3 The strongest argument against the disclosure I can identify, is the points raised about the potential impact that the amount paid has on future negotiations. I can imagine businesses upping their quotes for work to be done if they are aware of how much UTAS is able to pay. However, this only applies to a) and c) specifically, and certainly not the request for rates information at d). Also, I don't believe that every single amount which would be contained in their documentation would be exempt. Further, since the internal review, the purchase price for the recently purchased K&D Warehouse has been disclosed. Aside from the differences in the way that the two properties were purchased (the K&D site will not be settled for 2 years), it is difficult to determine how the impact of releasing the purchase price of Fountainside may differ from that of the K&D site.*

16 On 21 August 2020, Ms Humphries provided an update and further submissions. In relation to item (a), Ms Humphries cited articles by journalists Emily Baker and Blair Richards, submitting (verbatim):

- *The purchase price on the Fountainside Hotel was \$18.76 million, the Midcity hotel was \$23.5million (or \$25.85 million),<sup>4</sup> Crayfish*

<sup>3</sup> *Gun Control Australia Inc v Hodgman and Archer [2019] TASSC 3.*

<sup>4</sup> *Emily Baker, 'UTAS splashes the cash in CBD property buying spree' (The Mercury, 13 February 2019)* [\*https://www.themercury.com.au/realestate/utas-splashes-the-cash-in-cbd-property-buying-spree/news-story/8f248b94cfb2f537d304a5b1595267f1.\*](https://www.themercury.com.au/realestate/utas-splashes-the-cash-in-cbd-property-buying-spree/news-story/8f248b94cfb2f537d304a5b1595267f1)

*Point in Taroona was \$2.2 million, and the Forestry Tasmania site in Melville St was \$15 million.<sup>5</sup>*

- *These articles were published around the same time that the application was lodged with UTAS, meaning that this information had already been granted to other applicants when ...[Ms Humphries] was refused access. UTAS has also disclosed figures for other investments of a similar nature.*
  - *It is not stated whether these figures include the costs for the building, as well as any amounts paid to purchase the business.*
- 17 She further indicated that no information had become publicly available regarding the ‘old commerce building’ or the refurbishment costs for the hotels she had requested at items (b) and (c) of her application.
- 18 Ms Humphries indicated that some information regarding the University’s payment of rates to the Hobart City Council (item (d) of her request) had become available, asserting that:
- *HCC and UTAS have agreed that UTAS will pay the equivalent of general rates on all inner-city buildings. In the first year of the agreement, this will amount to \$350,000. The agreement will last for 10 years.<sup>6</sup>*
  - *The HCC and UTAS appear to have agreed that this information does not fall under the exemption in s38 RTI, or at least, they have decided the information is in the public interest and have not invoked this exemption.*
- 19 Ms Humphries confirmed on 18 November 2021 that she wished to proceed with the external review in full, however, as none of the items she requested had been fully provided by the University or become fully available through other means.
- 20 The University’s submissions are contained in its decisions of 25 March and 9 May 2019, set out in the Background above, and it maintains its position that the information is exempt on the basis it was a public authority engaged in trade or commerce and the release of the information would expose it to competitive disadvantage.

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<sup>5</sup> Blair Richards, ‘University of Tasmania sinks further into deficit, new Auditor-General report reveals’ (The Mercury, 21 May 2019) <https://www.themercury.com.au/business/university-of-tasmania-sinks-further-into-deficit-new-auditorgeneral-report-reveals/news-story/a482a4f4d834978a7afe5f824356a95d>.

<sup>6</sup> Hobart City Council, ‘Agreement for the future of Hobart (joint release with UTAS) (Media Release, 19 December 2019) <https://www.hobartcity.com.au/Council/News-publications-and-announcements/Latest-news/UTAS-rates-equivalency>.

## **Analysis**

### Section 38

- 21 The University has claimed that all information responsive to Ms Humphries' request, which has not been released to her, is exempt under s38. This section exempts information that relates to the business affairs of a public authority. It is within Division 2 of Part 3 of the Act, so that any information responsive to this request, if it is *prima facie* exempt under this section, is subject to the public interest test found in s33 of the Act.
- 22 Section 38(a)(ii) of the Act provides that:

*Information is exempt information –*

(a) if it is –

*(ii) in the case of a public authority engaged in trade or commerce, information of a business, commercial or financial nature that would, if disclosed under this Act, be likely to expose the public authority to competitive disadvantage...*

*Is the University a public authority engaged in trade or commerce?*

- 23 Ms Humphries submitted in her application for an internal review on 2 April 2019 that *The University's trading and commercial activities in relation to its property portfolio is more ad hoc, incidental and dictated by the functions set out in Section 6 [of the University of Tasmania Act 1992] rather than as [a] primarily commercial and trading venture.*
- 24 Section 6 of the *University of Tasmania Act 1992* provides that the University has the following functions:
- (a) *to advance, transmit and preserve knowledge and learning;*
  - (b) *to encourage and undertake research;*
  - (c) *to promote and sustain teaching and research to international standards of excellence;*
  - (d) *to encourage and provide opportunities for students and staff to develop and apply their knowledge and skills;*
  - (e) *to provide educational and research facilities appropriate to its other functions;*
  - (f) *to promote access to higher education having regard to principles of merit and equity;*
  - (fa) *to foster or promote the commercialisation of any intellectual property;*
  - (g) *to engage in activities which promote the social, cultural and economic welfare of the community and to make available for those purposes the resources of the University.*

- 25 Ms O'Keefe's internal review decision defended the use of the exemption under the Act and referred to s7 of the *University of Tasmania Act 1992* as evidence that it is engaged in trade or commerce. Section 7(1) provides that:

*The University, has power to do, both in Tasmania and elsewhere, all things necessary or convenient to be done for or in connection with the performance of its functions and, in particular, has power –*

- (a) *to acquire, hold and dispose of real and personal property; and*
  - (b) *to form, and participate in the formation of, companies; and*
  - (c) *to subscribe for and purchase shares in, and debentures and other securities of, companies; and*
  - (d) *to enter into partnerships; and*
  - (e) *to participate in joint ventures and arrangements for the sharing of profits; and*
  - (f) *to borrow money; and*
  - (g) *to do anything incidental to any of its powers.*
- 26 These legislative provisions satisfy me that the University is a public authority which can engage in trade and commerce. That its functions relate to education and learning do not preclude it from undertaking activities which would be considered commercial to achieve its objectives. Its functions explicitly refer to commercialisation of intellectual property and its powers include undertaking business activities. Ms Humphries is correct that trade and commerce are not the core functions of the University but s38 is not excluded from application as commercial activities are able to be engaged in by the University.
- 27 The next consideration is whether the information responsive to the request is that of a business, commercial or financial nature that would, if released, be likely to expose the public authority to competitive disadvantage.
- 28 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...*

29 The Court further held that:

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

- 30 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.*
- 31 I note here, that in the New South Wales Supreme Court decision of *Kaldas v Balbour*<sup>7</sup> 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.
- 32 Accordingly, the value of the *Forestry Tasmania v Ombudsman* case as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree.

*Item (a) - Purchase Price of the Fountainside Hotel*

- 33 Ms Humphries' first request for information was in two parts, for the purchase price of the Fountainside Hotel property and any additional amount paid to purchase the business.
- 34 While the University declined to provide any information, claiming it was exempt under s38, the purchase price is freely available on payment of a fee through the Land Information System Tasmania (the LIST), operated by Land Tasmania at the Department of Natural Resources and Environment Tasmania (NRET).
- 35 It is unclear why the University did not refer Ms Humphries to this process or provide this information actively due to it being otherwise available but the information being available to the public renders the claim to exemption void. Its release under the Act would clearly not expose the University to competitive disadvantage or be contrary to the public interest, as it is already available to any member of the public through the LIST.
- 36 Accordingly, I determine that this information is not exempt under s38, but that the University can validly refuse to provide it to Ms Humphries under s9 due to it being publicly available.
- 37 The information responsive to the second part of Ms Humphries' request *any additional amount paid to purchase the business* is not publicly available and involves different considerations.

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<sup>7</sup> [2017] NSWCA 275 (24 October 2017)

38 I am satisfied that this information is information of a business and financial nature, relating to the purchase of a private business.

39 The University has argued that:

*Revealing information to another person (the public) has the real and imminent potential to affect the profitability or the viability of continuing business operations, property negotiations where the University is seeking to purchase land or land and buildings, particularly in a very competitive property market.*

40 I accept that there is a genuine chance that the release of the additional information about the purchase price of the hotel business might lead to competitive disadvantage in future negotiations on transactions of a similar nature.

41 Accordingly, this information is *prima facie* exempt subject to the consideration of the public interest test.

*Item (b) - Engineering reports*

42 Ms Humphries' second request for information concerned details of any engineering reports from the last 10 years in respect of *the old commerce building on French Street, Sandy Bay*. The University located 30 pages of relevant documents: an Occupancy Permit dated 23 February 2011 (which was released to Ms Humphries) and 28 pages of accompanying information. The 28 pages were claimed to be exempt under s38 by the University.

43 In justifying its application of this exemption, the University provided only general reasoning which encompassed all parts of Ms Humphries' application. This focused on the University's competition with others in the property market. Why the disclosure of engineering and building compliance information from eight years previously would be likely to expose the University to competitive disadvantage is unclear. It is not certain that this is even information of a business, commercial or financial nature, as it references no dollar figures and relates to the previous renovation of a building owned at all times by the University, rather than relating to any property transaction or new acquisition.

44 I do not consider that the University has discharged its onus under s47(4) to show that this information is exempt under s38 and should not be disclosed. It is to be released to Ms Humphries in full.

*Item (c) - Refurbishment costs for the Fountainside, MidCity and Theatre Royal hotels*

45 I am satisfied that this information is of a business and financial nature, reflecting the costs to be paid for the work required to be done to refurbish the former Fountainside, MidCity and Theatre Royal hotels following their acquisition. The University and Ms Humphries both acknowledge that there is a risk of competitive disadvantage in future contractual negotiation if the details of such arrangements are made public. I also agree that there is a risk of

competitive disadvantage occurring and the information is *prima facie* exempt under s38, subject to the consideration of the public interest test.

*Rates information*

- 46 Different considerations apply in relation to the rates information sought by Ms Humphries. While this information is financial, it is not inherently business information or indicative of any likely competitive disadvantage relating to its release. Other property owners in Hobart are required to pay general rates in a manner which is determined by the *Local Government Act 1993* and transparently set by Hobart City Council each year. It would be possible to calculate the rates payable (or a close approximation) for any property not exempt from the payment of rates through publicly available information.
- 47 The University is exempt from the payment of general rates due to its status as an education provider and is the only tertiary education institution operating in Tasmania. It is not apparent that any competitor exists or what competitive disadvantage would be likely should this information be released. Additionally, as Ms Humphries submitted, information about an agreement by the University to pay an amount equivalent to general rates to the Hobart City Council has since been released publicly.<sup>8</sup> This further supports the conclusion that competitive disadvantage is unlikely to follow any disclosure.
- 48 Accordingly, I consider that the University has not discharged its onus under s47(4) of the Act to show why this information should be exempt under s38 and it is to be released to Ms Humphries.

*Public Interest Test*

- 49 When determining where the public interest lies, regard must be had to, at least, the 25 matters contained in Schedule 1 of the Act.
- 50 The University's public interest submission is contained in its internal review decision and Ms O'Keefe considered Schedule 1 and 2 as a whole without stipulating which particular matters she considered. However, she did state that the *disclosure is likely to expose the University to competitive disadvantage and likely to harm the business or financial interests of the University and by extension members of the community*. This is matter (s), Schedule 1.
- 51 The applicant refutes that there are any matters that would support exemption and asserted that Ms O'Keefe's consideration did not meet the requirements set out in *Gun Control Australia Inc v Hodgman and Archer [2019] TASSC 3*. In that decision, Justice Brett held that a decision maker is obliged to give active consideration to relevant factors in Schedule 1 and found that, in that instance, the failure to address an applicable matter in the decision led to the decision being invalid.
- 52 I consider Ms Humphries' concerns about the adequacy of the assessment of the public interest factors to be valid. An internal review is a fresh decision and

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<sup>8</sup> [https://www.utas.edu.au/\\_data/assets/pdf\\_file/0009/1289718/Rates-equivalency-agreement.pdf](https://www.utas.edu.au/_data/assets/pdf_file/0009/1289718/Rates-equivalency-agreement.pdf)

a decision maker is required to consider all factors in Schedule 1, discussing those which are relevant. It is simply incorrect that only factor (s) warrants consideration in this matter and further analysis should have occurred.

- 53 Applying the public interest test involves balancing the factors that favour release against those that do not. It is also important to note that whether or not information should be released is to be decided in the context of what is in the public interest as opposed to what might be interesting to the public.
- 54 Having considered the matters in Schedule 1 of the Act, I am of the view that matters (a), (b) and (f) favour release. I am satisfied that the information, if released, would address Ms Humphries' and the general public's need for accessible government information, would contribute to public debate, and would enhance scrutiny of the University's decision-making processes and thereby improve accountability and community participation. The change in direction of the University regarding its location and the fiscal merits of central Hobart property purchases and refurbishments are matters of legitimate public interest. The University is a public educational institution, receives significant public funding and its business activities are not its primary purpose. I accordingly afford substantial weight to these factors in favour of release.
- 55 In favour of exemption, I refer to matter (s). This matter concerns potential harm to the financial interests of the University. While it is possible that harm could be caused by the release of this information, I do not consider this factor of significant weight in these particular circumstances. The information consists of four dollar figures and is not broken down into further detail. The information is highly specific to particular properties which are unique and is not readily transferable to other premises or situations, further reducing any potential harm to the University's interests.
- 56 Another major consideration, which I acknowledge the University could not have considered at the time of its original decisions, is changes which have occurred since 2019 due to the unfortunate delay in the finalisation of this external review. Business purchase prices and refurbishment costs from over two years ago are no longer likely to cause any potential detriment to the University due to the outdated nature of this information. The University has also changed its plans regarding the Fountainside and MidCity hotels being used for student accommodation, with the Fountainside currently being used as a COVID-19 case management facility<sup>9</sup> and the MidCity under a long term lease to Vision Hotels group.<sup>10</sup>
- 57 Accordingly, I consider that the balance of the public interest factors favours release and that this information is not exempt under s38.

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<sup>9</sup> Report of debates, House of Assembly, Parliament of Tasmania, Hansard, 12 October 2021, the Honourable Jeremy Rockliff MP, Minister for Health, at page 39, available at [www.parliament.tas.gov.au](http://www.parliament.tas.gov.au).

<sup>10</sup> <https://www.themercury.com.au/business/tasmania-business/utas-secures-longterm-tenant-for-its-empty-former-midcity-hotel/news-story/2e779bdb6fdb6a7c1b63d87397e24474>

## **Preliminary Conclusion**

- 58 For the reasons given above, I determine that exemptions claimed by the University under s38 are not made out.
- 59 All information is to be released to Ms Humphries, with the exception of the purchase price of the former Fountainside Hotel which is otherwise available and may be refused under s9.

## **Submissions to the Preliminary Decision**

- 60 As the above preliminary decision was adverse to the University, it was made available to the University on 17 January 2022 under s48(1)(a) to seek its input before finalising the decision.
- 61 On 15 February 2022, Ms Jane Beaumont, General Counsel from Legal and Audit, Office of the Chief Operating Officer at the University emailed a letter providing submissions in response to the draft decision. Ms Beaumont advised that the Vice Chancellor had instructed her to provide a response.
- 62 Except for the information regarding rates and the publicly available purchase price for the Fountainside Hotel, Ms Beaumont provided submissions opposing the proposed release of information responsive to Ms Humphries' request. Following my criticism of the adequacy of the University's assessment of relevant public interest factors in its original decisions, the majority of Ms Beaumont's submissions comprised a comprehensive analysis of relevant factors in Schedule I of the Act.
- 63 In relation to exemptions claimed under s38, Ms Beaumont provided a joint analysis of the public interest factors regarding the purchase price of the Fountainside Hotel business, and the refurbishment costs for Fountainside, Theatre Royal and Midcity Hotels. Her submissions were as follows (her emphasis):

### ***Factors favouring disclosure***

1. *There is a general public need for government information to be accessible (Sch 1, para 1(a), RTI Act). This might be partly satisfied by disclosure of the information in question. However, the perceived need of the applicant, even though she is a journalist, does not equate to the “general public need”. It is incorrect to equate her need with the “general public need”. To the contrary, it is arguable that her need is one of self-interest and not public interest, in order to inform a possible journalistic endeavour.*
2. *Although the information might in part satisfy or enhance scrutiny of government decision-making and improve accountability, it does not, with respect address participation given that it is information after transactions have occurred (Sch 1, para 1(f), RTI Act).*

### ***Factors against disclosure***

1. *Disclosure of the information will not contribute to or hinder debate on a matter of public interest (Sch 1, para 1(b), RTI Act).*

*Although there is a strong public interest in taxpayers having an understanding of and involvement in democratic processes, which influence the use of their taxes , that interest is not satisfied by disclosure of the information of the kind in question. An agency such as the University which engages in the property market is entitled to do so as a player on a level playing field and to that end should be able to protect financial information of the kind the subject of the documents: Gibson v LaTrobe City Council [2008] VCAT 1340, [64]-65; City Parking v City of Melbourne (1996) 10 VAR 170;*

2. *Disclosure of the information would not inform a person about the reasons for the decision to purchase or refurbish (Sch 1, para 1(c), RTI Act). In particular, disclosure of the information would not, with the passage time [sic], inform any person about the reasons for the decision to use the premises for other purposes apart from student accommodation. That is, to engage more directly in an activity which is in a different competitive market.*
3. *Similarly, disclosure would not provide contextual information to aid in the understanding of a decision of the University (Sch 1, para 1(d), RTI Act) either to purchase or refurbish – which was the initial intention, or to use the premises for other purposes apart from student accommodation*
4. *The information does not address or provide any material which could be said to inform the public about the rules and practices of government in dealing with the public (Sch 1, para 1(e), RTI Act). To the contrary, it would be disclosing information which is of a commercially sensitive nature both at the time and on an ongoing basis given the different uses to which the premises are not being put (and might in future be put).*
5. *Disclosure of information about financial transactions after the event does not enhance or improve public participation in what is essentially a commercial transaction in a competitive property market (Sch 1, para 1(f), RTI Act).*
6. *Disclosure would not enhance scrutiny of government administrative processes (Sch 1, para 1(g), RTI Act).*
7. *Disclosure would not promote or hinder equity and fair treatment of persons or corporations in their dealings with government (Sch 1, para 1(h), RTI Act). To the contrary, it would hinder the ability of government agencies like the University to engage in commercial property transactions in future by making available potentially to the world (given the applicant's status as a journalist at the ABC) commercial, price sensitive information the sensitivity of which is not diminished over time.*
8. *Disclosure would not promote or harm public health or safety (Sch 1, para 1(i) RTI Act).*

9. Disclosure would not promote the administration of justice, affording procedural fairness or the enforcement of the law (Sch 1, para 1(j), RTI Act. To the contrary, disclosure would have the outcome of prejudicing the ability of the University to perform its statutory mandate as set out in s 7 of the University of Tasmania Act 1992 in an unhindered and unfettered manner.
10. It is arguable that the disclosure of such information about a property transaction engaged in by a governmental body, such as the University, where the University has gone on to use the properties as a commercial hotel and a medi hotel (in these uncertain COVID related times and where there was a State need), may have the effect of harming the economic development of the State (Sch 1, para 1(k), RTI Act).
11. Disclosure would not promote or harm the environment, nor would it promote or harm the interest of individuals or groups of individuals (Sch 1, para 1(l) and (m) RTI Act).
12. Disclosure would harm the business or financial interests of the University (Sch 1, para 1(s), RTI Act). It is not information which is generally available to competitors of the University in the property market. Changes which have occurred since 2019 are relevant, as the Ombudsman has correctly identified in para 56 of the preliminary decision. However, rather than the passage of time reducing the potential harm to the University, the fact that the University has moved away from the properties being used as student accommodation to the current uses increases the potential competitive disadvantage in future negotiations and the ability to compete in relation to the properties.

Therefore, on balance, it is submitted that disclosure of the information in question would be contrary to the public interest. It is contrary to the public interest for the University to not be able to conduct similar property dealings in future without disclosing its hand as to do so would undermine the statutory mandate it has, which would itself be contrary to the public interest. When coupled with the balancing factors referred to earlier, that should suffice; a public authority such as the University ought not be required to provide overriding and compelling reasons as to why disclosure would be contrary to the public interest: *Rosen v Department of Human Services [2006] VCAT 691, [66]*

**64 Ms Beaumont submitted in relation to the engineering reports regarding the 'Old Commerce Building':**

The University relied on section 38 in the original decision in relation to the engineering reports which was affirmed in the internal review. The University contends that the information is exempt and when assessing the public interest, relies on the factors against disclosure referred to above.

*In the alternative the University contends that the reports are exempt on the basis that they are confidential in accordance with the exemption in section 39. Engineering reports provided by consultants engaged by the University are commercial in confidence and UTAS may be impacted in obtaining similar reports in the future as the service provider would be unable to rely on the information remaining confidential and be exposed to additional scrutiny (s39 1 b).*

### **Further Analysis**

*The purchase price of the Fountainside Hotel business, and the refurbishment costs for Fountainside, Theatre Royal and Midcity Hotels.*

- 65 In my preliminary decision, I found that this information was *prima facie* exempt under s38 but, following consideration of the public interest test, release of the information was not contrary to the public interest and the exemption was not made out. The University disputes that conclusion, as set out above.
- 66 As discussed in my previous analysis, I agree with Ms Beaumont that matters (a) and (f) favour disclosure. I do not agree with the limited weight she appears to have ascribed these factors due to the applicant being a journalist acting out of 'self-interest and not public interest' and that the information would be disclosed after transactions have occurred. I am not persuaded by either argument and remain of the opinion that both factors should be given significant weight.
- 67 There is always a need for information to be accessible to the general public and a public authority's view on the ultimate use of the information by the applicant (or apparently poor opinion of journalists) should not reduce the weight of this factor. Similarly, scrutiny of government decision-making processes is an ongoing process and it would be illogical if such scrutiny were only considered of significant value prior to decisions being made.
- 68 I also disagree with Ms Beaumont's submissions regarding matter (b), whether disclosure would contribute to or hinder debate on a matter of public interest. Her arguments relate to the potential negative impact on the University's position as a player in the property market if the information was disclosed, not the impact of disclosure on public debate. I do not consider that the matters raised are relevant in relation to whether the matter will contribute to debate regarding the expenditure of public funds and the policy direction of Tasmania's only tertiary education institution in moving its campus. I maintain my views expressed at paragraph 54 above and will discuss Ms Beaumont's concerns in relation to matter (s) below.
- 69 In relation to matter (c) and (d), while I accept that these factors are not particularly relevant to this matter due to the information being dollar figures only which provide little contextual information or reasons for decision, I do not consider that they weigh against disclosure. They would weigh slightly in

favour, as the amount to be spent on purchase or refurbishment does provide additional detail to give context to the decisions of the University.

- 70 In relation to matter (g), I do not agree that this weighs against disclosure but accept that it does not count in favour either due to the information not providing any detail about administrative processes, only the administrative decision to spend a particular amount.
- 71 In relation to matter (h), I consider Ms Beaumont's argument misconceived. She raises concerns that disclosure would 'hinder the ability of government agencies like the University to engage in commercial property transactions in future by making available...commercial, price sensitive information the sensitivity of which has not diminished over time.' Matter (h) relates to whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government, it does not relate to potential impacts on the public authority itself. Ms Beaumont raises concerns that the University will be at a disadvantage in negotiations, but there is no indication that individuals or corporations dealing with the University would be similarly disadvantaged. I do not consider matter (h) to be relevant in this matter.
- 72 Ms Beaumont has also listed a number of matters, (i), (l), (m), as being against disclosure with no explanation as to why. I do not consider these matters are relevant, so are of neutral weight rather than weighing against disclosure.
- 73 Further concerns are raised in relation to matter (j), that disclosure 'would have the outcome of prejudicing the ability of the University to perform its statutory mandate as set out in s7 of the *University of Tasmania Act 1992* in an unhindered and unfettered manner.' I do not consider this at all persuasive, as the RTI Act is part of the statutory framework in Tasmania, within which public authorities must operate, and disclosure of information in accordance with the that Act does not prejudice or fetter the University's actions. There is no indication of any negative impact on procedural fairness, the administration of justice or the enforcement of the law in this matter.
- 74 I consider Ms Beaumont's argument in relation of matter (k) is similarly tenuous and there is no indication that disclosure of the information would harm the economic development of the State. The information sought relates to property purchase and refurbishment spending decisions of the University prior to the COVID-19 pandemic and it is not apparent why any disclosure of this information would impact the current lessee of the former Midcity Hotel or the use of the former Fountainside Hotel as a medi-hotel.
- 75 The primary factor warranting consideration is matter (s) and I accept that there are valid concerns which weigh against the release of this information regarding potential harm to the business or financial interests of the University.
- 76 Ms Beaumont strongly argued that the University is entitled to enter the property market on a level playing field and should be able to protect financial information. She stated that the passage of time and changes in planned use of

the Fountainside and Midcity hotels had not reduced the sensitivity of the information, rather that this had increased the ‘potential future commercial disadvantage in future negotiations and the ability to compete in relation to the properties’. She cited *Gibson v Latrobe City Council*<sup>11</sup> and *City Parking Pty Ltd v City of Melbourne*<sup>12</sup>, Victorian decisions relating to the *Freedom of Information Act 1982*. Needless to say, such decisions are not binding on me, though of course persuasive, and the relevant legislative provisions are not identical.

- 77 I do accept, however, that some circumstances of this matter are analogous to those in *Gibson* and considerations of potential future detriment to tender or development processes and prejudice to the ability to maximise commercial benefits to taxpayers are valid. I remain of the view, however, that very limited information in question (four dollar figures), the passage of time and change of direction regarding these proposed refurbishment spending amounts reduces the weight of these considerations.
- 78 I am least persuaded in relation to the purchase price of the Fountainside Hotel business. This relates to a concluded transaction regarding a specific commercial operation which occurred over three years ago. Beyond bald statements, the University does not provide particular reasoning to explain why significant detriment is anticipated following the release of this information.
- 79 Similarly, the University has not explained its statement that the lack of currency and change of direction has not diminished the commercial sensitivity of information in relation to the former Midcity Hotel. This information will be at least seven and a half years old by the conclusion of the five year lease currently in place for the property and any negotiations on refurbishment contracts seem unlikely to be significantly prejudiced if this information was released.
- 80 The strongest arguments relate to the planned spends on refurbishment regarding the Fountainside and Theatre Royal Hotels. These projects could, in theory, recommence at any time and negotiations regarding engaging providers to undertake the works may be imminent. I afford greater weight to matter (s) in relation to these figures, though I maintain my view that the lack of currency of the information reduces this weight to a degree, especially considering increases in costs and changed circumstances in the construction industry since early 2019.
- 81 Overall, it is the balance of these factors, for and against, which is crucial. The University submits that as it ‘would not be able to conduct similar property dealings in future without disclosing its hand’ it would be contrary to the public interest and undermine its statutory mandate. It relies upon another Victorian case *Rosen and Department of Human Services*<sup>13</sup> in its submission that it ‘ought

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<sup>11</sup> [2008] VCAT 1340, at 64-65

<sup>12</sup> (1996) 10 VAR 170

<sup>13</sup> [2006] VCAT 691 at [66]

not be required to provide overriding and compelling reasons as to why its disclosure should be contrary to the public interest'.

- 82 I accept that the University is not required to provide such reasons, however s47(4) is clear that it bears the onus to show that the information should not be disclosed and it is open to me to determine the outcome of this review on the basis that it has not discharged that onus. If the University does not attempt to provide compelling reasons to justify exemptions claimed, it is far more likely that I will determine that it has not discharged its onus. In this case, the University has provided very minimal information to explain its position that the disclosure of this specific information will cause it significant detriment in these particular circumstances.
- 83 After weighing the relevant public interest factors, I maintain the position expressed in my preliminary decision in relation to the purchase price of the Fountainside Hotel business and the planned refurbishment costs regarding the former Midcity Hotel. This information is not exempt and should be released in full to Ms Humphries.
- 84 I determine that, on balance, it would be contrary to the public interest to release the planned refurbishment costs for the former Fountainside and Theatre Royal hotels. This information is exempt under s38 and is not required to be provided to Ms Humphries.

*Engineering reports concerning the Old Commerce building, Sandy Bay*

- 85 The University did not provide any additional justification that these engineering reports should be exempt under s38, other than stating that its submissions regarding the public interest factors also applied to these reports. Accordingly, I have not changed my view expressed at paragraphs 42-44 above that this information is not exempt under s38.
- 86 The University did contend that s39(1)(b) was applicable to this information, in the alternative. Ms Beaumont submitted that:

*Engineering reports provided by consultants are commercial in confidence and UTAS may be impacted in obtaining similar reports in the future as the service provided would be unable to rely on the information remaining confidential and be exposed to additional scrutiny.*

- 87 No specific submission was made by the University to establish why this may be the case. There is no marking of confidentiality on the documents and engineers are required to maintain professional registration and adhere to standards in relation to the quality of their work, it being regularly scrutinised by planning authorities as part of the development approval process. I have previously expressed my view that paid consultants undertaking government work are unlikely to refuse to do so if it could be disclosed under the Act on

occasion.<sup>14</sup> It is not apparent why this would be the case in this instance, particularly as these reports are over 11 years old.

88 Accordingly and again, I do not consider that the University has discharged its onus under s47(4) to show that this information is exempt under s39 and should not be disclosed. This information is to be released to Ms Humphries.

## **Conclusion**

89 For the reasons given above, I determine that:

- exemptions claimed by the University under s38 are varied;
- exemptions claimed by the University under s39 are not made out; and
- information regarding the purchase price of the former Fountainside Hotel is not exempt under the Act, but is not required to be released to Ms Humphries as it is otherwise available under s9.

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

**Dated:** 24 February 2022

**Richard Connock**  
**OMBUDSMAN**

<sup>14</sup> See *Simon Cameron and the Department of Natural Resources and Environment Tasmania* (January 2022) and *Camille Bianchi and the Department of Health* (November 2021) available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions)

## **RELEVANT SECTIONS OF THE RIGHT TO INFORMATION ACT 2009**

### **Section 38 – Information relating to business affairs of public authority**

Information is exempt information –

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

### **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:** R2202-

**120 Names of Parties:** Andrew McCullagh and Northern Midlands

**Council Reasons for decision:** s48(3)

**Provisions considered:** s20

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### **Background**

- 1 Mr Andrew McCullagh is a ratepayer in the Northern Midlands Council (Council) municipality who operates a Facebook group entitled *Northern Midlands Council Watch* and takes a keen interest in Council's fiscal management and operations.
- 2 On 26 May 2020, Mr McCullagh made an application under the *Right to Information Act 2009* to Council for information regarding various projects being undertaken or proposed in the municipality. He paid the relevant fee. Specifically, he sought (verbatim):
  1. *10 Norfolk St/32 Norfolk St Perth – Please provide all additional costs (direct and indirect) associated with the preparation of these properties since the purchase. Such should include but not be limited to:*
    - a. *Works under Drummond St for drainage to Sheepwash Creek*
    - b. *Rehabilitation of site to prevent flooding at rear of proposed blocks*
    - c. *General works within a 300m proximity undertaken by Council*
    - d. *Filling in of “WELL” and all other works plus clearing of trees and ‘picnic’ site.*
  2. *Longford Recreation Ground – I note further works are being undertaken since my last enquiry. Please provide a list of all additional works since last enquiry, the cost of such works, a list of intended works not completed and the estimate for all works to date and all future works.*
  3. *Launceston Airport – Please provide a progress report of where this matter is at, all costs to date, all costs incurred since last enquiry and an estimate of all future costs including appeal hearing*
  4. *Please provide sit [sic] map of bridge number 4000 and also bridge number 1469 along with associated reports for supporting replacement of bridge 1469. Please also provide information why bridge 1469 has*

*been brought forward from 2021 to 2020. Please provide information how many properties bridge 1469 services. Please confirm the number of bridges NMC has replaced or is set to replace within a 12km radius of Rossarden within the last 3 years or next 18 months.*

5. *Please provide ALL costs associated with the redevelopment of the Campbell Town Recreation Oval along with the budgeted amount for that project.*
  6. *Please provide details of the Campbell Town Hall sale process.*
- 3 On 19 June 2020, Ms Maree Bricknell of Council, a delegate under the Act, released a decision to Mr McCullagh. The decision refused to provide the information sought pursuant to s20. She stated this was because:
1. *First, pursuant to section 20(a) of the Right to Information Act 2009 (the Act) the information sought in sections 1, 2, 3 and 4 is the same or similar to information sought under a previous application that you have made to the Council and the application does not on its face disclose any reasonable basis for again seeking access to that information.*
  2. *Pursuant to section 20(b) of the Act the application for access to the information you seek is vexatious because:*
    - (a) *the request for the information you seek is part of a course of conduct you have embarked upon where in correspondence to Council, Councillors, the Mayor, the General Manager and staff, you engage in bullying, disrespectful and extremely offensive conduct regardless of the issues you have attempted to raise...;*
    - (b) *you seek these responses to further your campaign of harassment directed at the Council, Councillors, the Mayor, the General Manager and staff.*
- 4 Mr McCullagh sought internal review of this decision on 22 June 2020, but Mr Des Jennings, the Principal Officer of Council, wrote to Mr McCullagh advising that he would not conduct an internal review as he ‘could not act impartially’ due to a conflict of interest arising from an ongoing dispute between the men. Mr Jennings has commenced an action against Mr McCullagh claiming damages for defamation in the Supreme Court of Tasmania which remains ongoing. Mr Jennings refused to delegate the internal review to another Council officer and directed Mr McCullagh to instead apply for external review.
- 5 Mr McCullagh attempted to do so but this could not be accepted until the statutory timeframe had elapsed on 16 July 2020, under s44(1)(b)(ii) of the Act.
- 6 Council was then directed by my delegated officer, pursuant to s47(1)(f), to undertake an internal review.
- 7 Ms Samantha Dhillon, of Council, a delegate under the Act, released an internal review decision on 24 July 2020. She set out that she had no hesitation in affirming the response made by Ms Bricknell in her letter dated 19 June 2020 to you and for the same reasons.

- 8 Mr McCullagh confirmed he wished to continue with his external review following this decision and his application was extended under s46(2).

### **Issues for Determination**

- 9 I must determine whether the application can be refused under s20 of the Act, on the basis that it is a repeat or vexatious application.

### **Relevant legislation**

- 10 Council has relied on s20 of the Act, a copy of which is Attachment 1 to this decision. I also attach a copy of a guideline issued by the Ombudsman 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 McCullagh provided the following submissions in support of his application for external review:

*There is no way known I have been vexatious.*

*The Council have squandered millions on flawed activities namely:*

- 1) The Longford Recreation Oval*
- 2) 10 and 32 Norfolk St Perth*
- 3) Bridges in Rossarden x 3*

*4) Court Action against the Launceston Airport Corporation which failed and they subsequently appealed.*

*5) Longford Parklet*

*And much much more.*

*The last RTI was sent in February and was answered without discussion.*

*It was unknown of course to Council how it would resonate through the Community.*

*The result of this was uproar in the Community and these matters made the local media.*

*Subsequent to that date, further works have been done on the Longford Recreation Oval which I estimate would be close to \$800k more. Advise [sic] received from a Councillor seems too [sic] align with this figure.*

*Further works have been done on the Norfolk St site, which one job alone was \$150k.*

*They passed a motion at the meeting in June to bring the bridge at Storeys Creek(Rossarden) forward despite it not being due to 2021 and despite it being around 6km from the Mayors house.*

**ALL THESE ISSUES ARE LIVE AND FLUID AND THE WHOLE COMMUNITY HAS THE RIGHT TO KNOW HOW THEIR MONEY IS BEING SPENT.**

*The modus operandi of the Councillors council has been to go to ground and not provide information.*

*I received a private message from a Councillor on the 2 May where this was discussed and my name specifically mentioned...*

*I (and each and every rate payer in the Community) have [a] right to information as to how monies are being spent.*

*Had no further works in these areas been carried out, then their argument and your query would have credence. That however is simply not the case.*

*Subsequent to the last email more funds have been spent in these areas that would provide a nail in the coffin of this Council to economic management.*

- 12 In December 2021, I sent a letter to Council expressing a preliminary view on this external review. This outlined that my initial assessment was that Mr McCullagh's application was not a repeat or vexatious request under s20 and should be assessed under the Act.
- 13 Council instructed David Morris of Simmons Wolfhagen to provide a submission in response to my preliminary view. This is summarised as follows:

*The Council respectfully disagrees with the preliminary view reached by the Ombudsman concerning the decision of the Council to reject consideration of the McCullagh application on the basis that the application was a vexatious application and could be rejected in reliance on the express discretion to do so afforded by s.20(b) of the Right to Information Act 2009...*

*Having regard to the plain and ordinary meaning of the term “vexatious”, the scheme of the RTI Act within which s.20(b) appears and the purpose of s.20(b), it is lawfully permissible to have regard not just to the face of the application itself (i.e. what information it seeks, the language used in the application etc.) but to surrounding circumstances placing the application in context (such as a course of conduct on the part of the applicant for disclosure) where relevant in determining whether or not an application is vexatious.*

*The “Guideline in Relation to Refusal of an Application for Assessed Disclosure Under the Right to Information Act 2009, s.20” published by the Ombudsman as Guideline 2/2010 (the **Guideline**) provides express and further support for the above approach. In identifying the factors to be considered under s.20(b), the Guideline expressly states:*

*...in considering whether an application is vexatious within the terms of s.20(b) all the surrounding circumstances should be taken into account (my emphasis added)...*

*It would be contrary to the proper application of fundamental principles of statutory interpretation to confine considerations of whether or not an application is vexatious to the face of the application or documentation which is a part of the RTI process only.*

*It follows...that a decision of the Ombudsman which fails to have regard to the material which the Council considered in forming the opinion that the making of the application was part of a course of conduct and therefore vexatious would be a decision infected by an error of law and reviewable as a procedurally unfair decision having failed to take into account relevant considerations.*

*It further follows from the above that a decision of the Ombudsman which relies (as the preliminary view expressed does) on a narrative which refers to policy considerations, asserted obligations of professionalism, and provision of an appropriate level of access to legal process such as to the RTI process even to the most difficult of individuals would be reviewable as one which is procedurally unfair for taking into account irrelevant considerations rather than applying the proper approach in accordance with the fundamental principles of statutory interpretation.*

*It is the position of the Council that:*

- (i) *It has approached a consideration of whether or not the application should be refused as vexatious in accordance with the proper approach and accordingly the opinion it formed is above reproach and ought not be disturbed on external review.*
- (ii) *Conversely, the Ombudsman's approach taken to justify the preliminary view is not the proper approach according to law, places misconceived and erroneous reliance on previous decisions of the Ombudsman, fails to apply and have regard to the Ombudsman's Guidelines and so consequently fails to take into account relevant considerations being the bundle of materials provided by the Council to the Ombudsman which the Council relied on to form the opinion that the application was vexatious.*
- (iii) *Furthermore, and perhaps most importantly, the Council takes issue with the implied criticism of it as failing to recognise and maintain obligations of professionalism and to ensure an appropriate level of access to even the most difficult of individuals. This is an unnecessary and disrespectful reliance on a narrative of policy considerations, disrespectful of the Council in circumstances where the Council has very clearly set out the detailed reasons behind the formation of an opinion that an application that it had received was vexatious. It has provided to the Ombudsman a significant amount of material that the Ombudsman has failed to even consider, rather confining consideration to the face of the application itself.*

*For all of the above reasons, the Council disputes the findings expressed in the preliminary view, does not accept the preliminary view and submits to the Ombudsman that he should start again and properly apply the law and in so doing, consider as relevant the material that the Council provided to him for the purposes of making a correct and preferable decision according to law.*

## **Analysis**

- 14 Council indicated that it relied on s20(a) and (b) in its refusal to assess Mr McCullagh's application, though focused on 20(b) and Mr McCullagh's allegedly vexatious conduct.
- 15 The Act gives members of the public the right to obtain information and it is expressly indicated that discretions in the Act are to be exercised to facilitate the provision of the maximum amount of official information. Accordingly, restrictions on the access to information and assessment of applications under the Act should only occur when truly necessary.

### *Section 20(a) – repeat request for information*

- 16 In relation to Items 1-4 of Mr McCullagh's request being a repeat request for information, these are either restricted to changes since his last enquiry or information outside his previous request, or Council could validly restrict its response to such information. I consider that a request is not a repeat request if it relates to the same type of information but for a different time period.
- 17 I am not satisfied that this is a repeat request which is able to be refused under s20(a). Council is to assess this part of Mr McCullagh's request under the Act, subject to my assessment of whether his application has been validly refused under s20(b).

### *Section 20(b) – vexatious application*

- 18 I have been clear in previous decisions (see particularly *Darrell Howlin and the Clarence City Council*<sup>1</sup> and *Lawrence Archer and the Dorset Council*<sup>2</sup>) that s20(b) of the Act requires the *application itself* to be a vexatious one and that other conduct between the applicant and the public authority is not relevant in the assessment of an application under the Act.
- 19 This is consistent with Guideline 2/2010 - *Guideline in Relation to Refusal of an Application for Assessed Disclosure under the Right to Information Act 2009*, s20, which emphasises that *in view of the objects of the Act, the opinion that an application is vexatious should not be lightly reached*.
- 20 Council has placed enormous weight on a bundle of documents which comprise correspondence from Mr McCullagh to Council and screenshots of posts Mr McCullagh has authored on Facebook which criticise Council. Mr Morris has submitted that I have made an error in law in not doing likewise and in preferring my own previously expressed reasoning in past decisions I have handed down under the Act.
- 21 I am entirely unpersuaded by these submissions and consider that I would fall into error if I placed such reliance on this information, particularly comments made on social media. I do not consider that Council has provided information which indicates that Mr McCullagh's application under the Act is vexatious. The actual request under s13 includes no extraneous information besides the

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<sup>1</sup> Issued in February 2021 and available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision).

<sup>2</sup> Issued in June 2021 and available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision).

information sought and could not be categorised as inappropriate or vexatious in itself. There has also been no suggestion from Council that Mr McCullagh has been making numerous or frequent applications for information under the Act.

- 22 The Mayor of Council, Ms Mary Knowles, imposed restrictions on Mr McCullagh's contact with Council shortly after his request for information was lodged. This was communicated in terms which included allegations that Mr McCullagh's correspondence to date has been *bullying, disrespectful and extremely offensive and, regardless of the issues you have attempted to raise, grossly exceeds what is acceptable*. Ms Bricknell's decision also references Mr McCullagh's alleged *campaign of harassment*, quotes Ms Knowles' letter and deems his application vexatious.
- 23 While I do not seek to make a judgement on the appropriateness or otherwise of interactions between the Council and Mr McCullagh outside of the Right to Information process, such comments place Mr McCullagh's letter requesting an internal review to Mr Jennings dated 22 June 2020 in context. Accordingly, the tone and counter-allegations do not appear to be indicative of him using the Right to Information process specifically as a means to abuse or bully individuals, but to respond to issues being contemporaneously raised by Council. Both parties to this dispute have used strong terms to describe the conduct of the other party.
- 24 Almost all public bodies deal with individuals who may display difficult behaviour, question their integrity and publicly criticise their actions or use of public money. Public bodies maintain obligations of professionalism and to ensure an appropriate level of access to legal processes (such as the Right to Information process) is provided, even to the most difficult of individuals. Refusal of access to information under s20 should not be used a punishment for an applicant's behaviour in other fora or used to suppress critical commentary of a public authority's actions in print, online or social media. When I made similar comments in my preliminary view letter to Council, its response characterised such comments as *disrespectful*, which is indicative of the elevated tone of its responses on this issue.
- 25 Council appears to have struggled to dispassionately assess Mr McCullagh's application and to separate its views on the appropriateness of his opinions regarding Council, particularly in relation to his questioning of the integrity of Mr Jennings and Ms Knowles, from this assessment. While I accept that this is somewhat understandable, due to the contemporaneous litigation and ongoing dispute with Mr McCullagh, the two matters need to be considered separately and unemotionally by Council. Any conflict of interest arising from the dispute must be appropriately managed, while still enabling individuals access to legal processes. To refuse to even assess an application under the Act is a significant barrier and it remains my view is that Council has not demonstrated that this is warranted in relation to this application.
- 26 Accordingly, I consider that Mr McCullagh's application should be assessed under the Act as it does not appear to be a vexatious *application*.

## **Preliminary Conclusion**

- 27 For the reasons given above, I determine that ss20(a) and (b) do not apply to Mr McCullagh's application. I direct Council to assess the information requested for disclosure in accordance with the provisions of the Act.

## **Conclusion**

- 28 As the above preliminary decision was adverse to Council, it was made available to Council on 6 June 2022 under s48(1)(a) to seek its input before finalising the decision.
- 29 Council advised on 23 June 2022 that it would not be making any submissions in response to the preliminary decision.
- 30 Accordingly, for the reasons set out above, I determine that ss20(a) and (b) do not apply to Mr McCullagh's application. I direct Council to assess the information requested for disclosure in accordance with the provisions of the Act.

**Dated:** 23 June 2022

**Richard Connock**  
**OMBUDSMAN**

## **ATTACHMENT I**

### ***Right to Information Act 2009 Section 20 – Repeat or vexatious applications***

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.

### **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 s20(b);
3. remains lacking in definition after negotiation entered into under s13(7) – see s20(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.

**Simon Allston**  
**Ombudsman**

Date of first issue of Guideline : 1 July 2010

# **OMBUDSMAN TASMANIA**

## **DECISION**

**Right to Information Act Review**

**Case Reference:** O1810-040

**Names of Parties:** Anna Porretta and the Department of Police, Fire and Emergency Management

**Draft reasons for decision:** s48(3)

**Provisions considered:** s30

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### **Background**

- 1 Mrs Anna Porretta is involved in the operation of the Ivory Lounge Bar (the Ivory), the premises of which are in Collins Street, Hobart. On 22 February 2018, an application was made to the Liquor and Gaming Branch of the Department of Treasury and Finance (Liquor and Gaming) for an ‘out-of-hours’ permit to increase the hours the Ivory could sell liquor, as these had been restricted to before midnight only.
- 2 Liquor and Gaming sought a submission from Tasmania Police to obtain its view on the application and this was provided by Inspector John Ward on 26 March 2018. Liquor and Gaming provided the Tasmania Police submission to Mrs Porretta, in which Tasmania Police ‘vehemently oppose’ any alteration to the current out-of-hours permit for the Ivory.
- 3 Inspector Ward’s letter included an Emergency Services Computer Aided Dispatch (ESCAD) table, containing data for each financial year incorporating the total number of incidents that occurred at Ivory Lounge Bar, an average of incidents per month and rankings within the Southern Tasmania district for that venue. A copy of the ESCAD table follows:

<b>Statistics Emergency Services Computer Aided Dispatch (ESCAD)</b>					
	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018
Total incidents	34	27	24	63	14
Average Per Month	2.8	2.3	2.0	5.3	1.7
Ranking within S/District	7	4	8	3	7

- 4 On 12 July 2018, Mrs Porretta made an application for assessed disclosure under s13 of the *Right to Information Act 2009* (the Act) to the Department of Police, Fire and Emergency Management (the Department) to seek further information about the ESCAD statistical data referred to in Inspector Ward's submission.
- 5 Specifically, she sought (in her words):
  - Item 1. *What and who are the names of the others in the ranking?*
  - Item 2. *How is the data formatted, ie. Before midnight, after midnight?*
  - Item 3. *Areas of the other rankings? and*
  - Item 4. *Is the information collated to specific area?*
- 6 On 2 August 2018, Sergeant Lee Taylor, a delegate for the Department under the Act, released a decision on the application. Sergeant Taylor found that the information located was exempt pursuant to s30(1)(e) as information relating to enforcement of the law.
- 7 The Department's responses to Mrs Porretta's four item questions were as follows:
  - Item 1. *The rankings are a listing of the licensed premises within the Southern Policing District of the state which includes Hobart and its outer suburbs. Licensed premises includes hotels, clubs and entertainment venues that sell/supply liquor. Exemption 30(1)(e) of the Act has been applied to part of this information including the names of those licenced premises.*
  - Item 2. *The data is manually entered by Tasmania Police officers attached to the Southern District Licensing Unit. The data is formatted under the headings of time, date, premises name, incident type, description of incident and outcome. Times recorded cover all hours.*
  - Item 3. *The area of rankings contained in the report between Tasmania Police and the Liquor and Gaming Branch, are from the Southern Policing District only.*
  - Item 4. *The information is from the Southern Policing District only.*
- 8 On 22 August 2018, Mrs Porretta requested an internal review of this decision and on 20 September 2018, Inspector Stuart Wilkinson, a delegated officer at the Department, released an internal review decision that reached the same conclusion as Sergeant Taylor's decision.
- 9 On 5 October 2018, Mrs Porretta requested an external review under s44 of the Act of the Department's decision by this office. Her application was accepted, given that she was in receipt of an internal review decision and her

request for external review had been made within 20 working days of her receiving it.

### **Issues for Determination**

- 10 I must determine whether the information is eligible for exemption under s30(1)(e) of the Act.
- 11 Section 30 is found in Division 1 of Part 3 of the Act and is therefore not subject to the public interest test. It is set out in full as an attachment to this decision.

### **Submissions**

- 12 Mrs Porretta strongly submits that the information should not be exempt pursuant to s30(1)(e), specifically contending that:
  - a. *Section 30(1)(e) of the act [sic] cannot be relied upon to refuse the information requested. The information sought was not gathered for “intelligence purposes”. The information sought is simply the record of attendances by Tasmania Police that have been converted into a statistical representation.*
  - b. *Contrary to the assertion that the requested information is “intelligence”, ranking information concerning Ivory has already been disseminated within the March 2018 Letter. If it was “intelligence” why was it then disseminated to the Liquor and Gaming Branch. Furthermore, no consent was sought from Ivory for the release of information.*
  - c. *Tasmania Police within the March 2018 Letter relied upon the rankings to support its opposition to Ivory’s application to extend its out of hours permit. In this context, it is inequitable for Tasmania Police to on the one hand rely upon the rankings, but then refuse Ivory access to the information sought to test the very position put forward by Tasmania Police. To take this position is a denial of natural justice.*
  - d. *The assertion that the information sought constitutes “intelligence” is made in a vacuum and is absent any context to justify this position. Absent any basis for the assertion that the information is “intelligence”, makes your ability to assess the merits of the Determination untenable. You cannot objectively assess the basis for the objection without any context for the Determination.*
- 13 Mrs Porretta confirmed her position on 31 August 2021, indicating that ‘all I want is the names of the other venues in the numerical ranking and I fail to see how that breaches section 30(1)’.
- 14 The Department’s submissions are limited to those contained in its decisions to refuse the release of the information pursuant to s30(1)(e). Specifically, its reasoning was as follows:

*The information assessed includes information gathered and created by officers of Tasmania Police for intelligence purposes that has been collated and entered onto an internal database.*

*This database has been utilised to complete reports prepared in the course of routine law enforcement investigations by Tasmania Police with the function of enforcing and regulation compliance with particular laws as part of the duties of a police officer and hence, an exemption pursuant to Section 30(1)(e) of the Act has been applied to some of the information.*

*Exemptions applied pursuant to Section 30 of the Act are not subject to the public interest test at Schedule 1[sic]. Notwithstanding that, I am satisfied that disclosure of information that exposes information gathered for intelligence purposes by Tasmania Police, in its business of law enforcement, would be contrary to the public interest.*

## **Analysis**

- 15 The information responsive to Mrs Porretta's application comprises two types of data.
- 16 The first is a spreadsheet of ESCAD data relating to Tasmania Police attendances at the Ivory between 2013 and 2018, containing a list of the date, time, reason for Tasmania Police attendance, description of incident and outcome for each event.
- 17 The second contains four ranking tables for licensed premises in the Southern Policing District for the financial years 2013-14, 2014-15, 2015-16 and 2016-17. These rankings are based on the ESCAD data for each venue, such as that in the spreadsheet for attendances at the Ivory.
- 18 The ESCAD platform was implemented by Tasmania Police in October 2017, Tasmania Fire Service in September 2018, and Ambulance Tasmania in June 2019.<sup>1</sup> Its operation is described as follows in the Tasmania Police Annual Report 2018-19:

*Multi-agency functionality is now operating across all three agencies. This provides efficiencies and enhanced public safety by providing greater information sharing. It also provides the ability to task and monitor resources at multi-agency incidents through inter-agency collaboration.*

## **Ranking tables**

- 19 Mrs Porretta has stated that she only wishes to obtain the names and rankings of other licensed premises in the second type of data responsive to her request, so I will only discuss this category of information. Regardless, I am satisfied that the release of the first type of data, information in the spreadsheet, would disclose information gathered, collated and created for

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<sup>1</sup> Tasmania Police Annual Report 2018-19, [www.police.tas.gov.au](http://www.police.tas.gov.au), accessed 9 November 2021.

intelligence purposes. Accordingly, it would not be required to be disclosed to Mrs Porretta in any event as it details allegations of suspected criminal behaviour and information collected for law enforcement purposes which is within the scope of s30.

- 20 The only information in these tables is the name of the licensed premises and the numerical ranking from 1-10 for all financial years except 2015-16, when the table contains data from 1-24 (as the Ivory ranked 24<sup>th</sup>).
- 21 Mrs Porretta and the Department dispute whether this comprises intelligence information.
- 22 Section 30(1)(e) provides that information is exempt information if its disclosure under the Act would, or would be reasonably likely to, disclose information gathered, collated or created for intelligence, including but not limited to databases of criminal intelligence, forensic testing or anonymous information from the public.
- 23 The word *intelligence* is not defined in the Act and therefore is to be given its ordinary meaning. Statutory words are intended to be read in the same way that words with ordinary meaning are read and in any event, the ordinary meaning is presumed. The High Court of Australia has recently held:

*The duty of courts is to give effect to the meaning of statutory words as intended by Parliament. In common with how all speech acts are understood, the meaning is that which a reasonable person would understand to have been intended by the words used in their context. One presumption, or inference based on common experience of legislative acts, is that when Parliament uses words with a common or ordinary meaning then the words are intended to bear that ordinary meaning. That presumption also reflects the expressed goal of parliamentary drafting for clarity and familiarity in order to ensure the transparency and intelligibility of statute law. That presumption can be further reinforced by another presumption, that words repeated in a statute are used with the same meaning.<sup>2</sup>*

- 24 The Macquarie Dictionary relevantly defines intelligence as: *knowledge of an event, circumstance, etc., received or imparted; news; information: military intelligence; intelligence relating to bushfire occurrences, or the gathering or distribution of information, especially secret or military information which might prove detrimental to an enemy.*<sup>3</sup>
- 25 As I have said, I consider that the data that informs the rankings in the tables is intelligence information but it is a separate question whether the high level overview information in the ranking tables is also intelligence.

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<sup>2</sup> *Mondelez Australia Pty Ltd v Autormotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Minister for Jobs and Industrial relations v Autormotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29 at para 69.

<sup>3</sup> Macquarie Dictionary, online edition, accessed 9 November 2021.

- 26 Mrs Porretta strongly objects to the characterisation of a ranking list as intelligence, given the lack of any substantive information other than the venue names and numerical ranking.
- 27 I do not consider, however, that the limited detail in the ranking tables removes them from the category of intelligence. The tables remain comprised of intelligence information, albeit in a highly summarised form, and are within the scope of s30(1)(e) and validly exempt.
- 28 Mrs Porretta also objected to the exemption of the ranking tables on the basis that this was inconsistent with the Department's dissemination of the information to Liquor and Gaming. She further objected that this occurred without her consent.
- 29 If the Commissioner for Licensing seeks information from the Department, he or she can do so without consent of others under s33(3A) and 34 of the *Liquor Licensing Act 1990*. These sections provide:

### **33. Consideration of application for liquor permit**

(3A) *The Commissioner may make such enquiries regarding an application for a liquor permit as the Commissioner considers necessary or expedient for a proper consideration of the application.*

### **34. Requirements for permits**

(1) *In considering an application for a liquor permit, the Commissioner must make a decision which, in his or her opinion, is in the best interests of the community.*

(2) *The Commissioner must not grant an out-of-hours permit in respect of licensed premises unless the licensee satisfies the Commissioner that the sale of liquor on those premises in accordance with the permit sought would not –*

*(a) cause undue annoyance or disturbance to –*

*(i) people living or working in the neighbourhood of the premises; or*

*(iv) customers or clients of any business in the neighbourhood of the premises; or*

*(ii) people conducting or attending religious services or attending a school in the neighbourhood of the premises; or*

*(b) cause the occurrence of disorderly conduct –*

*(i) in the premises; or*

*(ii) in the neighbourhood of the premises.*

- 30 While not relevant to my decision under the Act, I note that there is also a mechanism to appeal the imposition of conditions on a liquor permit or the refusal to give any approval in s211 of the *Liquor Licensing Act 1990*.
- 31 I do not consider that Mrs Porretta's objections show any inappropriate inconsistency by the Department in relation to this information. The Department can choose to disclose information which could be claimed to be exempt under the Act at any stage, in accordance with s12, but it is also entitled to rely on exemptions in the Act. That it has chosen to provide intelligence information to Liquor and Gaming in support of its objection to an out-of-hours permit application by the Ivory does not mean that this ceases to be intelligence information.

### **Errors and inconsistencies in data**

- 32 When intelligence information not able to be viewed or challenged by individuals to whom it relates is used, I consider it incumbent upon the Department to be particularly careful that it is portrayed accurately. There appear to be several errors and inconsistencies between the information provided to me and the data used in the objection to the Ivory's out-of-hours permit application.
- 33 Most notably, for the 2015-16 financial year Inspector Ward stated that there had been 24 incidents and the Ivory was ranked eighth in the Southern Policing District. There had actually been eight incidents and the Ivory was ranked 24<sup>th</sup>. There were also only 18 incidents listed for the Ivory in the 2013-14 financial year on the ESCAD spreadsheet, rather than 34, though it is less clear whether this impacted on the ranking of seventh in the Southern Policing District during that period.
- 34 I urge the Department to undertake more rigorous checking of data in future to ensure it is provided accurately.

### **Preliminary Conclusion**

- 35 For the reasons given above, I determine that the exemption of information pursuant to s30(1)(e) by the Department is affirmed.

### **Conclusion**

- 36 As the above preliminary decision was adverse to the Department, it was made available to the Department on 12 November 2021 under s48(1)(a) to seek its input before finalising the decision.
- 37 The Department advised on 14 December 2021 that it would not be making any submissions in response to the preliminary decision.
- 38 Accordingly, for the reasons given above, I determine that the exemption claimed pursuant to s30(1)(e) is affirmed.
- 39 I apologise to the parties for the inordinate amount of time taken to finalise this decision.

**Dated:** 14 December 2021

**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
  - (iii) the enforcement or proper administration of the law in a particular instance; or
  - (iv) the fair trial of a person; or
  - (v) the impartial adjudication of a particular case; or
- (a) 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
- (b) 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
- (c) endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person; or
- (d) 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.

# OMBUDSMAN TASMANIA

## DECISION

### Right to Information Act Review

Case Reference: O1907-118  
R2202-015

**Names of Parties:** Ari Zaetz and City of Hobart

**Reasons for decision:** 48(3)

**Provisions considered:** s37

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### Background

- 1 The City of Hobart (Council) undertook a tender process regarding the development of a pay-by-phone application for on street car parking (the parking app). Mr Ari Zaetz is a software developer and submitted a tender application but was unsuccessful. EasyPark ANZ Ptd Ltd (EasyPark) was awarded the contract and the parking app has been in use since 2018.
- 2 On 6 March 2019, Mr Zaetz lodged an application for assessed disclosure under the *Right to Information Act 2009* (the Act) with the then Hobart City Council, now City of Hobart, and paid the relevant fee. Mr Zaetz requested the following information:
  1. *Contract with EasyPark for pay-by-phone parking app services*
  2. *Procurement documents for the above contract.*
- 3 On 8 April 2019, Ms Libby Wilmhurst of Council, a delegate under the Act, released a decision to Mr Zaetz. The procurement documentation, comprising the Request for Tender released publicly during the tender process, was released in full to Mr Zaetz. Ms Wilmhurst claimed that the entire contract between Council and EasyPark (the Agreement) was *prima facie* exempt under s39 for the following reasons:
  1. *Pursuant to s39(1) of the Act, 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*
  2. *Pursuant to s39(2)(b) of the Act the disclosure of the information relates to trade secrets or other matters of a business, commercial or financial undertaking.<sup>1</sup>*

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<sup>1</sup> Ms Wilmhurst appears to have misunderstood s39(2), as this subsection lists information which cannot be exempt under s39(1) and specifically excludes information that *relates to trade secrets or other matters of a business, commercial or financial nature.*

- 4 Section 39 is in Division 2 of Part 3 of the Act and is therefore subject to the public interest test at s33. Accordingly, the matters in Schedule 1 must be considered in determining whether the release of the information would be contrary to the public interest. Ms Wilmhurst indicated that *it is considered that factors in favour of a finding that the information should be classified as being exempt carry more weight than those suggested it should not*. She stated that matters (h), (n), (s) and (w) of Schedule 1 were most persuasive in reaching this view. She determined that the entire Agreement was exempt under s39 and not to be released to Mr Zaetz.
- 5 On 9 April 2019, Mr Zaetz requested an internal review of the decision.
- 6 On 31 May 2019, Mr Nick Heath, the then General Manager of Council and its Principal Officer under the Act, wrote to Mr Zaetz informing him that third party consultation would need to take place under s37(3).
- 7 On 28 June 2019, Mr Heath released an internal review decision to Mr Zaetz. Mr Heath no longer relied on s39 and instead claimed that parts of the Agreement were exempt pursuant to s37 as information relating to the business affairs of a third party. He determined that the redacted portions would be likely to expose EasyPark to competitive disadvantage. Section 37 is also subject to the public interest test, and Mr Heath stated that he found matters (w), (m) and (n) in Schedule 1 particularly persuasive, concluding that the release of the identified parts of the Agreement would be contrary to the public interest.
- 8 On 17 July 2019, Mr Zaetz applied to my office for external review. His application was accepted on the basis that he was in receipt of an internal review decision and that his application had been made within 20 days of receiving this decision.

### **Issues for Determination**

- 9 I must determine whether the information is eligible for exemption under s37.
- 10 As s37 is contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33 and I must consider the matters in Schedule 1 when applying that test.
- 11 It is not necessary to determine whether the information is eligible for exemption under s39, as Council's original decision has been replaced by its internal review decision which relies on the more pertinent s37.

### **Relevant legislation**

- 12 I attach a copy of s37 to this decision at Attachment 1.
- 13 Copies of s33 and Schedule 1 of the Act are also attached.

## **Submissions**

- 14 Mr Zaetz did not provide specific submissions in support of his internal or external review requests.
- 15 Council also did not provide any submissions, beyond the reasoning of its internal review decision which is set out as follows:

*You will recall in my letter of 9 May 2019 I notified you that that section 37 of the Act was relevant to my assessment because the information you requested relates to the business affairs of a third party.*

*As a result of the consultation process set out in section 37 I decided to exempt those parts of the Contract that, if disclosed, would likely expose the third party to a competitive disadvantage (the “Exempt Information”). One of the reasons for this decision was because the disclosure of the Exempt Information would reveal terms that could be exploited by the competitors of the third party to diminish the commercial value of the services offered by that third party.*

*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 the Redacted Information. Some of the factors from Schedule 1 I found particularly persuasive are:*

- (i) “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” [matter (w)];
- (ii) “whether the disclosure would promote or harm the interests of an individual or group of individuals” [matter (m)]; and
- (iii) “whether the disclosure would prejudice the ability to obtain similar information in the future” [matter (n)].

## **Analysis**

- 16 Council has sought to exempt information in the Agreement pursuant to s37(1)(b). This section provides for the exemption of information that is related to the business affairs of a third party, when that information is acquired by a public authority from a person or organisation other than the person making the application for disclosure, if its disclosure would be likely to expose the third party to competitive disadvantage.
- 17 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...*

- 18 The Court further held that:

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

- 19 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.
- 20 I note here, that in the New South Wales Supreme Court decision of *Kaldas v Balbour*<sup>2</sup> 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.
- 21 Accordingly, the value of the *Forestry Tasmania v Ombudsman* case as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases ‘competitive disadvantage’ and ‘likely to expose’, all of which are instructive and with which I agree.
- 22 Council has not provided a schedule of information regarding the parts of the Agreement it has sought to exempt under s37, so I will analyse the Agreement using the headings and clause references in the document.

#### *EasyPark company details*

- 23 Council has sought to exempt the name of EasyPark throughout the Agreement and its Australian Company Number and business address in the listing of the parties to the Contract on page 1.
- 24 That Council has an agreement with EasyPark for the parking app is publicly known and EasyPark’s company details are freely available online. The release of this information will clearly not cause any competitive disadvantage to EasyPark and it is not exempt under s37 or any other part of the Act. EasyPark’s company details should be released in full to Mr Zaetz in all places that they occur throughout the Agreement.

<sup>2</sup> [2017] NSWCA 275 (24 October 2017)

*Date of Contract*

- 25 Council has sought to exempt the date of the Agreement on page 1. It is not in any way apparent how the release of this information could cause competitive disadvantage to EasyPark and I am not satisfied that it is exempt under s37. It is to be released to Mr Zaetz.

*Pay-by-Phone*

- 26 The parking app is referred to as Pay-by-Phone for parking (PbP Service) in the Agreement. This has been redacted irregularly by Council in the Agreement. It is not apparent why the release of this term would cause competitive disadvantage to EasyPark, as it openly operates a pay-by-phone parking app. It is not exempt under s37.

*Background*

- 27 At B in the Background section of the Agreement there is a three sentence description of the parking app and its functionality. While it contains information about EasyPark's business, it is a high-level summary and there is no information included which appears to be commercially sensitive or likely to result in any competitive disadvantage.
- 28 I am not satisfied that Council has discharged its onus under s47(4) to show why this information should not be disclosed. Accordingly, I determine it is not exempt under s37 and should be released to Mr Zaetz.

*Clause 2.4 - Customer Service*

- 29 Clause 2.4.2 describes EasyPark's customer service interface, which includes human agents, through its website and through the app. These are not remarkable or distinctive characteristics of EasyPark's business – they are the standard expectations of any consumer of a service in a contemporary setting. While uniqueness is not necessarily a requirement of competitive disadvantage, it is difficult to understand how such disadvantage could result following the release of this information. I am not satisfied that this information is exempt under s37.
- 30 Clauses 2.4.3, 2.4.4 and 2.4.5 set out more specific arrangements regarding customer service in general and the division of responsibility regarding issuing parking fines and cancelling/refunding fines. They have been redacted in full by Council.
- 31 App development is a competitive market and EasyPark has expanded from Sweden to across Europe and now Australia. Details of its product and operating arrangements could be used by its competitors to refine their product or offer a more attractive deal. I am satisfied that there is a genuine chance that competitive disadvantage could result from the disclosure of this information and determine that it is *prima facie* exempt under s37.

### *Signage*

- 32 Clauses 3.1, 3.3, and 3.4 are claimed to be exempt under s37, including the heading *Signage*.
- 33 Collectively, these sections set out the division of responsibility between the parties to the Agreement for the design, provision, installation and maintenance of signage relating to the parking app. These are practical and uncontroversial arrangements and it is unclear why any competitive disadvantage would result from the release of this information. I do not consider that Council has discharged its onus to show that this information is exempt under s37 and it should be released in full to Mr Zaetz.

### *EasyPark's Obligations*

- 34 Clause 4.3 provides that EasyPark will notify Council if the phone app malfunctions for any reason. The release of this would not expose it to competitive disadvantage and it should be released in full.
- 35 Clause 4.5 provides that Council can use EasyPark's branding when promoting its new meters. Given the EasyPark app is one of the primary benefits of moving to the new meter system, this is hardly surprising or a matter which is likely to expose EasyPark to competitive disadvantage. It should be released in full.
- 36 Clause 4.6 provides that EasyPark will share statistics it collects in relation to parking with Council, provided it does not breach its obligations under privacy laws or its own privacy policy. Again, this is not likely to expose EasyPark to competitive disadvantage and should be released in full.

### *Parking Operator's Obligations, Collaboration*

- 37 Clauses 5.1, 5.2, 5.6, 6.1, 6.3 and 6.4 contain specific operational details of how EasyPark and Council will work together under this Agreement. They have been partially or fully redacted by Council pursuant to s37.
- 38 While any competitive disadvantage resulting from the release of this information is unlikely to be major, I am satisfied that there is a genuine chance that it may result from the disclosure of detailed information about EasyPark's operations in the competitive app development market. The redacted information in these clauses is *prima facie* exempt under s37.

### *Payments and Service Fee*

- 39 Clause 7.1 sets out the cost payable for use of the parking app by Council and clause 7.6(a) sets out the cost for additional work which may be needed in future. I am satisfied that this information relates to matters which, if exposed, could cause competitive disadvantage to EasyPark, as the contract consideration is the most commercially sensitive information in the Agreement. Clause 7.6(e) is less sensitive but its release still has a genuine possibility of causing competitive disadvantage. All three sections are *prima*

*facie exempt pursuant to s37, subject to consideration of the public interest test.*

- 40 Clauses 7.3, 7.3.1, 7.3.2, 7.4, 7.5, 7.6(c), and 7.6(d) have been redacted to remove details of general payment terms. I am not satisfied that this general information, if revealed, would be likely expose EasyPark to competitive disadvantage. Council has not discharged its onus under s47(4) to show that this information is exempt pursuant to s37 and it is to be released in full to the applicant.

*Intellectual Property Rights*

- 41 Clause 8.2 provides that EasyPark owns the intellectual property in its own signs. This is uncontroversial and not a matter which would be likely expose EasyPark to competitive disadvantage. This information should be released in full.
- 42 Clause 8.3 relates to intellectual property rights to customer information collected. I consider that there is some likelihood that the release of this information might expose EasyPark to competitive disadvantage. This information is *prima facie* exempt under s37, subject to consideration of the public interest test.
- 43 Clause 8.4 provides that, while EasyPark retains the intellectual property in its images and signs, it gives Council permission to use them for the purposes of promoting the app and parking. This issue has been dealt with above in relation to Clause 4.5 and I remain of the view that this information would not be likely to expose EasyPark to competitive disadvantage. This information should be released in full.

*Term*

- 44 Clause 11 sets out the length the agreement shall remain in effect. I accept that the period of the contract, if known, might expose EasyPark to competitive disadvantage, due to the value of this information to competitors.
- 45 I am satisfied that the information redacted is *prima facie* exempt under 37, subject to consideration of the public interest test.

*Termination*

- 46 Clauses 12.3 and 12.4 set out timeframes and conditions regarding termination. For the same reasoning set out for clause 11, I consider it is likely that EasyPark might be exposed to competitive disadvantage if these specific details were revealed.
- 47 I am satisfied that the information redacted is *prima facie* exempt under 37, subject to consideration of the public interest test.

*Disputes*

- 48 The only information Council determined to be exempt in this clause is at 14.7 and relates to costs attendant on a contractual dispute. I accept that the

release of this information might be likely to expose EasyPark to competitive disadvantage and it is *prima facie* exempt under s37.

#### *General*

- 49 Clause 17.7 has been redacted in full and relates to assignment of contractual rights and obligations. This is a quite standard contractual clause and it is not apparent why any competitive disadvantage might result from its release. I am not satisfied that Council has discharged its onus under s47(4) to show why this information should not be disclosed, and it is to be released in full.
- 50 Clauses 17.12 and 17.13 relate to governing laws and jurisdiction of relevant courts and in both Council has redacted the words *State of Victoria*. It is not apparent why disclosure of the laws and jurisdiction applicable to the Agreement would be likely to expose EasyPark to competitive disadvantage. Council has not discharged its onus under s47(4) to show why this information should be exempt under s37 and it should be released in full.
- 51 Clause 17.14 has been redacted in full and provides that amounts payable under the agreement are Goods and Services Tax (GST) exclusive. Nothing in this clause reveals the nature of sums or figures that are to be or have been paid. It merely sets out that any figures or sums are GST exclusive. This is not information that is likely to expose EasyPark to competitive disadvantage and I am not satisfied it could be exempt under s37. It should be released in full.

#### *Interpretation*

- 52 The only redaction in this part is at clause 18(m). This is a redaction of the word *Victoria*. For the same reasons as for clauses 17.12 and 17.13, this information is not exempt under s37 and should be released in full.

#### *Signature Page*

- 53 Council has applied redactions to the names and signatures of two directors of EasyPark who signed the Agreement on its behalf.
- 54 I am not satisfied that the release of the names and signatures of the two directors is information which would expose EasyPark to competitive disadvantage and Council has advanced no argument to explain this redaction. The information is not exempt under s37 and should be released in full to the applicant. The names of the directors can be searched on the public record, in any event.

#### *Public Interest Test*

- 55 As s37 is contained in Division 2 of the Act, I must now consider whether the information I have found to be *prima facie* exempt above is exempt from release following consideration of the public interest test at s33 and the matters specified in Schedule 1.
- 56 Council determined that the release of the parts of the Agreement it redacted would reveal terms that could be exploited by the competitors of the third party to diminish the commercial value of the services offered by that third party. It

considered matters (w), (m) and (n) in Schedule 1 to be particularly persuasive in reaching its conclusion that it would be contrary to the public interest to release the redacted information.

- 57 I do not disagree that these matters are relevant and agree that (w) and (n) weigh against disclosure. Matter (w) relates to 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 this will always be relevant in relation to s37. This is of varying weight in relation to the specific information in question, as the commercial sensitivity of the information is also variable, but is a significant factor here. This is a commercial agreement in a highly competitive and rapidly expanding market, with technological innovation progressing apace.
- 58 I consider that matter (n), whether *the disclosure would prejudice the ability to obtain similar information in the future*, weighs only slightly against disclosure, as I am not persuaded that the release of the information would significantly prejudice such an ability. A company choosing to tender for a contract to provide services to a government body agrees to be subject to the Act and would be aware that contractual information could be released. I do not consider it likely that many companies would no longer submit a tender or decline to provide necessary information for the finalisation of a government contract, in order to prevent the details of that contract being disclosed.
- 59 Matter (m), whether *the disclosure would promote or harm the interests of an individual or group of individuals*, is applicable but I do not find it persuasive in relation to the non-disclosure of this information. The release of this information is likely to promote the interests of the applicant, as he particularly seeks it in order to better understand his lack of success in tendering for this contract. The interests of EasyPark are better considered in relation to matter (w) or (x), whether *the information is information related to the business affairs of a person which is generally available to the competitors of that person*, rather than in relation to (m). I consider (m) to weigh in favour of disclosure, while (w) and (x) weigh against.
- 60 While Council indicated that it had considered all the factors in Schedule 1, it did not discuss any factors weighing in favour of disclosure or appear to consider these of significance. This is not appropriate, as the pro-disclosure focus of the Act means that such factors should always be considered and given weight. Matter (a), *the general public need for government information to be accessible*, is always relevant and I consider that it could have been given greater weight in this public interest assessment. Council appears to have prioritised EasyPark's desire for the contract to be confidential over the importance of transparency in relation to providing information about government contracts. This is a contract for public parking services and it is important that the public is able to obtain such information.
- 61 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 for the same reasons I have set out in relation to (a). I

have given all three significant weight, in line with previous decisions I have made in relation to contracts between private companies and government<sup>3</sup>, as I consider that openness in relation to the terms of such contracts is of high public interest and consistent with the object of the Act.

- 62 The information I have found to be *prima facie* exempt is primarily of genuine but low likelihood of causing competitive disadvantage, if refused, and I do not consider that the balance of public interest factors favours this information being exempt pursuant to s37. Accordingly, clauses 2.4.3, 2.4.4, 2.4.5, 5.1, 5.2, 5.6, 6.1, 6.3, 6.4, 7.6(e), 8.3, 12.4 and 14.7 are not exempt and should be released in full to Mr Zaetz.
- 63 There is some information, however, which is genuinely commercially sensitive and is appropriate to exempt in order to prevent prejudice to the competitive position of EasyPark. I am satisfied that this information is appropriately exempt pursuant to s37. This is clause 7.1 (but only the words between *provided* and *for*), clause 7.6(a), clause 11 (but only the time period repeated four times) and 12.3 (but only the words between *other Party* and *prior*).

### **Preliminary Conclusion**

- 64 For the reasons given above, I determine that the exemptions claimed by Council pursuant to s37 are varied. The Agreement is to be released in full, except for the information set out above in clauses 7.1, 7.6(a), 11 and 12.3.

### **Conclusion**

- 65 As the above preliminary decision was adverse to Council, it was made available to Council on 4 October 2022 under s48(1)(a) to seek its input before finalising the decision.
- 66 Council advised on 31 October 2022 that it would not be making any submissions in response to the preliminary decision.
- 67 Accordingly, for the reasons given above, I determine that the exemptions claimed by Council pursuant to s37 are varied. The Agreement is to be released in full, except for the information set out above in clauses 7.1, 7.6(a), 11 and 12.3.
- 68 I apologise to the parties for the inordinate delay in finalising this matter. **Dated:** 31 October 2022

**Richard Connock**  
**OMBUDSMAN**

<sup>3</sup> See *Blue Derby Pods Ride Pty Ltd and Department of Natural Resources and Environment* (June 2022), *Cassy O'Connor and Department of Natural Resources and Environment* (14 April 2022) and *Elaine Anderson and Director of Inland Fisheries* (April 2021) available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision)

## **ATTACHMENT I – Relevant legislation**

### **Section 37 – Information relating to business affairs of third party**

- (1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party" ) and
  - - (a) the information relates to trade secrets; or
    - (b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.
- (2) If –
  - (a) an application is made for information under this Act; and
  - (b) the information was provided to a public authority or Minister by a third party; and
  - (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of substantial concern to the third party –

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

    - (d) notify the third party that the public authority or Minister has received an application for the information; and
    - (e) state the nature of the information applied for; and
    - (f) request that, within 15 working days from the date of the notice, the third party provide the third party's view as to whether the information should be provided.
- (3) If a public authority or Minister, after receipt of a third party's view referred to in subsection (2)(f), decides to disclose the information, the public authority or Minister must, by notice in writing given to the third party, notify the third party of the decision.
- (4) A notice under subsection (3) is to –
  - (a) state the nature of the information to be provided; and
  - (b) if the decision was made on behalf of a public authority, state the name and designation of the person who made the decision; and
  - (c) inform the third party of –
    - (i) its right to apply for a review of the decision; and

- (ii) the authority to which the application for review can be made; and
  - (iii) the time within which the application must be made.
- (5) A public authority or Minister must not provide the information referred to in a notice given to a third party under subsection (3) –
- (a) until 10 working days have elapsed after the date of notification of the third party; or
  - (b) if during those 10 working days the third party applies for a review of the decision under section 43, until that review determines that the information should be provided; or
  - (c) until 20 working days after notification of an adverse decision under section 43; or
  - (d) if during those 20 working days the person applies for a review of the decision under section 44, until that review determines that the information should be provided.

### **33. Public interest test**

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

### **SCHEDULE I - 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.

**Names of Parties:** B, Department of Justice, the Integrity Commission

**Draft reasons for decision:** s48(3)

**Provisions considered:** s6

## **Background**

1. B made an application for assessed disclosure of information pursuant to the Right to Information Act 2009 to the Department of Justice on 3 September 2020. In that application, B sought information pertaining to declared conflicts of interest by Dr Tom Baxter, the Principal Officer, Right to Information in this Office, and Mr Micheal Easton, the Chief Executive Officer of the Integrity Commission.
2. By email of 11 September 2020, the Department's Deputy Secretary, Corporate, Strategy and Policy, Ms Amanda Russell, advised B that she had been delegated to respond to his request on behalf of the Integrity Commission. In that email, Ms Russell also advised that she would make a decision on an application by B to have the fee waived pursuant to s16(2) the following week.
3. No decision had been made on the waiver by 17 September 2020, and B sought an update in this regard by email sent that day. Later on the same day, B sent another email to Ms Russell advising that he had paid the fee in order to avoid further delay. This email crossed with one from Ms Russell advising that she had agreed to waive the fee.
4. The payment of the fee and the decision on waiver were both made on 17 September, and the application was therefore accepted on that date. The fee was ultimately refunded.
5. Because the Department does not hold that information responsive to B's application, pursuant to s14 of the Act on 4 September 2020 it transferred the application, insofar as it relates to Dr Baxter to me<sup>1</sup>, and insofar as it relates to Mr Easton, to the Integrity Commission, despite the fact that at that time, the

<sup>1</sup> A decision on the request so far as it related to Dr Baxter was given by this Office to B on 2 October 2020.

fee had not been paid and no decision had been made to waive it. The fact that neither of these events had occurred, however, did not preclude the Department from dealing with the application.

6. No decision was provided to B by Ms Russell in the time prescribed by the Act, and on 20 October 2020, B sought external review by my Office on the basis of a deemed refusal pursuant to s45(1)(f).
7. The information in relation to Mr Easton that B seeks is information about:
  1. all conflicts of interest declared by him from engagement date to the date of B's application for assessed disclosure;
  2. all conflicts of interest declared during his recruitment process;
  3. information pertaining to any actions by the Integrity Commission to elicit information from him regarding conflicts of interest such as declaration forms or similar;
  4. all information on how the Integrity Commission is managing any declared conflict of interest of his; and
  5. whether he has been unable to perform any of his duties due to conflicts of interest and if so, details of the conflict declared and how the Integrity Commission managed the conflict of interest.
8. Given that the application in relation to Mr Easton has been transferred to the Integrity Commission, references to the Department in items 3, 4 and 5 have been removed and substituted with references to the Commission.

### **Issues for Determination**

9. By virtue of s6(1)(d) of the Act, the Integrity Commission is an excluded body, and the Act does not apply to information in its possession unless the information relates to its administration. The question for determination then, is whether the information B seeks relates to matters of administration or whether it relates to operational matters. If the latter, then the Act does not apply to it.

### **Relevant legislation**

10. The only provision of the Act which falls for consideration is s6(1)(d), which relevantly, is in the following terms:

*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:*

...

(d) the Integrity Commission;

## **Analysis**

11. For the reasons which follow, I am of the view that the information B seeks goes to the performance of the Commission's statutory functions rather than to matters of administration and he is therefore not entitled to it.
12. In coming to this conclusion, I have had regard to the decision of the High Court in *Kline v Official Secretary to the Governor General*<sup>2</sup>, where the Commonwealth equivalent of the Act, which is expressed in substantially the same terms, was considered.
13. In that case, the Court upheld the decision of the Full Court of the Federal Court under appeal, which had drawn a distinction between "substantive powers and functions" and the "apparatus" supporting the exercise of those substantive powers and functions. The word "administrative" in that case was held to have been used in the primary sense of "pertaining to, or dealing with, the conduct or management of affairs". In my view, the same applies to the word "administration" in this case.
14. The Court further held:

*The relevant affairs, or "matters", to which each [of the equivalent provisions of the Commonwealth legislation] refers, are distinct from, but incidental to, the exercise or performance of substantive powers or functions in the sense of providing logistical support (or infrastructure or physical necessities or resources or platform) for the exercise or performance of those substantive powers or functions to be able to occur.*

*The distinction sought to be drawn by the appellant between documents which "relate to administrative tasks ... to support or assist the exercise of ... powers or the [performance] of ... functions", on the one hand, and documents which answer that description but which would "disclose the decision-making process involved in the exercise of those powers or*

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<sup>2</sup>[2013] HCA 52

*performance of those functions in a particular matter or context", on the other, is too fine to be sustained. The true distinction is more robust and more practical.*

*Matters which do not relate to the provision of logistical support do not become "administrative" merely because they are in some way preparatory to an exercise of a substantive power or to the performance of a substantive function.<sup>3</sup>*

15. I am of the view that the information B seeks is related to the substantive powers and functions of the Commission, not its administration. Conflicts of interest do not exist in the abstract or in a vacuum, but only arise in the context of matters to be considered or decided, in this case, amongst other things, the management of complaints under the *Integrity Commission Act 2009*. These are operational matters rather than administrative. In addition, the raising of potential conflicts of interest and their management is operational; it is a preparatory step to the exercise of a substantive power and not a logistical support for it.

## **Conclusion**

16. For the reasons given above, I determine that the information B seeks does not relate to the administration of the Integrity Commission and the Act does not therefore apply to it. It follows that he is not entitled to it.

**Dated:** 25 March 2021

**Richard Connock  
OMBUDSMAN**

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<sup>3</sup> As per Gageler J at paragraphs 74 to 76.

# OMBUDSMAN TASMANIA

## DECISION

**Right to Information Act Review**

**Case Reference:** R2202-118

**Names of Parties:** Blue Derby Pods Ride Pty Ltd and the Department of Natural Resources and Environment Tasmania

**Reasons for decision:** s48(3)

**Provisions considered:** s37, s39

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### Background

1. Blue Derby Pods Ride Pty Ltd (Blue Derby) operates commercial guided biking and walking tours based from accommodation pods in Derby, Tasmania. It operates in the Derby Regional Reserve, the Blue Tiers Regional Reserve and the Crown land between the Derby Regional Reserve and Blue Tiers Regional Reserve.
2. Development on public land in Tasmania, particularly in national parks and reserves, has been controversial. Specific concerns around whether the expression of interest and approval process regarding such development is sufficiently robust and transparent have been raised by environmental groups.
3. On 31 January 2020, the primary applicant made an application to the former Department of Primary Industries, Parks, Water and the Environment, now the Department of Natural Resources and Environment Tasmania (the Department), under the *Right to Information Act 2009* (the Act) seeking a copy of every lease granted under the Parks' Expressions of Interest Program since 2014.
4. On 14 February 2020, the Department consulted with a number of third parties pursuant to section 37(2) of the Act. One of those third parties, Blue Derby, had entered into a *Lease and Business Licence Agreement* (the Agreement) with the Honourable Matthew Groom MP<sup>1</sup> on 22 December 2015 in order to use a designated area of public land for its business venture.
5. Blue Derby responded to the Department on 6 March 2020 expressing its concerns about the disclosure of the information in the Agreement on the grounds that it would both reveal trade secrets and substantially harm the company's competitive position. It provided reasons for its concerns, which will be outlined in the Submissions section below.
6. On 17 March 2020, Ms Alison Scandrett of the Department, a delegate under the Act, issued a decision to the primary applicant. When considering the

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<sup>1</sup> Who was then the responsible minister for the administration of the *National Parks and Reserves Management Act 2002* and the *Crown Lands Act 1976*.

Agreement, the Department found some design information relating to the business affairs of Blue Derby to be exempt pursuant to s37. The exempt information was *on part of one page, and all of one page*, which meant the remaining pages of the Agreement would be disclosed to the primary applicant.

7. Also on 17 March 2020, Ms Scandrett gave notice to Blue Derby of the Department's decision to release some information, provided it with a copy of the information it was intending to release and highlighted the parts that would be redacted as exempt information. Blue Derby applied for internal review pursuant to s43(2) of the Act on 20 March 2020 and Ms Samantha Wilson of the Department, a delegate under the Act, released a decision on 21 April 2020.
8. The internal review decision stated the Department had *decided that the information on which the appellant was consulted is to be released in accordance with the original decision* for the following reasons:
  - it was not satisfied that the Agreement (excluding the exempt section that had been redacted) related to trade secrets nor that it would be likely to expose Blue Derby to competitive disadvantage;
  - the design information relating to the business affairs of Blue Derby, which included an architectural schematic site design, had already been excluded under s37(1);
  - the remaining information did not qualify for exemption under s37(1); and
  - section 39(1) could not be relied on given there was nothing in the Agreement that expressly indicated it was obtained in confidence.
9. On 19 May 2020, Blue Derby applied to my office for external review pursuant to section 44 of the Act. A request for priority was made by the primary applicant on 8 March 2022 and I agreed to expedite the finalisation of this matter on 9 March 2022.

### **Issues for Determination**

10. I must determine whether the Agreement, in whole or in part, is eligible for exemption under ss37 and 39 or any other relevant section of the Act.
11. As ss37 and 39 are contained in Division 2 of Part 3 of the Act, my assessment is made subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under this section, I must then determine whether it is contrary to the public interest to disclose it by having regard to, at least, the matters in Schedule 1.

### **Relevant legislation**

12. I attach a copy of ss37 and 39 to this decision at Attachment 1.
13. Copies of s33 and Schedule 1 of the Act are also attached.

## **Submissions**

### **Blue Derby**

14. The submissions from Blue Derby are all contained in its initial letter to the Department in response to its third party consultation, dated 6 March 2020. Overall and at the outset it included the following:

*The disclosure of information enclosed within the attached ‘Lease and Business Licence Agreement’ (our Agreement) is indeed of substantial concern to Blue Derby Pods Ride Pty Ltd. Blue Derby Pods Ride Pty Ltd believes that the disclosure of information within our Agreement would both reveal trade secrets and substantially harm the company’s competitive position.*

15. It then outlined its “reasons for this view” under separate headings. Below are the key extracts from each heading:

#### ***Unique Product Offering/Intellectual Property***

*... Our Agreement is a result of the evolution of our unique product offering and details the intricate mechanics of our business operation and structure, which are considered to be our intellectual property.*

*More specific examples within this document include our architectural schematic site design. Our infrastructure is a completely unique architectural one-off design which is part of our business’s unique selling proposition. These designs are the property of Blue Derby Pods Ride Pty Ltd, having been commissioned by our company, and remain the intellectual property of Philp Lighton Architects Pty Ltd.*

*For the reasons outlined above, if our Agreement were to become public, the information contained within would without doubt significantly benefit our current and future competitors.*

#### ***In Good Faith***

*It should be understood that our Agreement was entered into in the good faith that it would not become publicly available. At the time of entering the agreement, Parks and Wildlife Service Tasmania did not inform us that the information would ever be made available to a third party without our explicit consent, in fact, we were assured this document would be kept private and confidential between the signing parties.*

*It should also be understood that the negotiations of our Agreement took more than 12 months to complete. To have known that the information contained within our Agreement, which is the result of many lengthy and numerous discussions, could end up in the hands of the public through a decision made by Parks and Wildlife Service Tasmania to release it, would have undoubtable [sic] changed our position on*

*negotiating the terms and our willingness to freely share our trade secrets and intellectual property with DPIPWE staff.*

### **Competitive Advantage**

*In the hands of a competitor, our Agreement would provide a significant advantage to any competition in this newly developing market. We have a deep understanding of this point, because we did not have access to a document such as this at the time of developing our project and negotiating our Agreement.*

*The advantage here is considered twofold at minimum.*

*Firstly, having a Lease and Business Licence Agreement for a competitor company who operates in a market you are trying to enter would be an invaluable and unfair advantage in creating a competition business. Knowing, for example, how the business is structured, what terms can be expected, and what overheads are likely to be involved, is a distinct advantage to a second-to-market business, which has not have the same challenges and negotiations as the owner of the original agreement, let alone the costs born [sic] in getting to the point of creating the agreement.*

*Secondly, our Agreement contains many references to items such as the terms and timeframes relating to reinstating Blue Derby Pods Ride Pty Ltd's unique product offering after a natural disaster. This would leave our business open to competition from unfairly advantaged third parties who wish to set up a directly competitive business to our offering and leverage the market we have worked to develop, as a result having [sic] inside knowledge of our Agreement.*

### **Rent Figures**

*Lastly, our rent figures are of course commercial in confidence. We unequivocally oppose the release of this information within our Agreement. Our main concern here is that if they were to be released, it would be impossible for sufficient context to be given to the recipient to inform them of economic conditions at the time of negotiation, the brand equity or lack thereof of the area, the risks associated with the launch of a new product in an undeveloped area, at the time of negotiation. Release of these figures without the critically relevant information could easily result in damage to Blue Derby Pods Ride's brand and social licence. These are two things we've poured great resources into and have worked exceptionally hard to build, with the help of Parks and Wildlife Service Tasmania.*

### **The Department**

16. In the Department's internal review of 21 April 2020, Ms Wilson provided the following reasoning to support her decision to release the information in accordance with the original decision:

*I agree with Alison Scandrett's decision of 17 March 2020 that most of the information on which the appellant was consulted pursuant to section 37 ('Information relating to business affairs of third party') is not exempt information.*

...

*I am satisfied by the nature of the information that, if disclosed, it would reveal information related to business affairs acquired by the Department from an organisation other than the applicant, namely a third party in Blue Derby Pods Ride Pty Ltd.*

*For information to be exempt pursuant to section 37(!), I must however also be satisfied that the information relates to trade secrets, or that disclosure of the information would be likely to expose Blue Derby Pods Ride Pty Ltd to competitive disadvantage. I am not satisfied that the information at issue (excluding that already determined to be exempt) meets either requirement.*

17. Ms Wilson then considered the Tasmanian Supreme Court decision, *Forestry Tasmania v Ombudsman* [2010] TASSC 39 and noted the following extracts from that decision:

*'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.... primarily the provisions are concerned with the potential impact on the undertaking or agency acting as a competitor in the market...'.*

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

18. Ms Wilson noted the Court interpreted the meaning of 'likely' to be 'a real or not remote chance of possibility, rather than more probable than not'. She then stated, *I am of the view that the disclosure of the information at issue is unlikely to expose Blue Derby Pods Ride Pty Ltd to competitive disadvantage. Neither is it, in my view, information that relates to trade secrets.* She qualified this statement by further noting that the design information relating to the business affairs of Blue Derby was among that identified as being intended to be withheld from the application pursuant to section 37(!) and that the application of that exemption to that information was not in contention.
19. Ms Wilson concluded by saying, *that information aside, in my view, the remainder of the information does not qualify for exemption pursuant to section 37(!).* At that point Ms Wilson said that although she is not required to apply the public interest test pursuant to section 33 of the Act, if she were to apply it, *it would be subject to a high threshold in terms of its application, there being a strong public interest in the release of information pertaining to developments in publicly-owned national parks and other reserved land.*

20. Given Blue Derby argued that the Agreement was entered into in the good faith that it would not become publicly available, Ms Wilson considered the application of section 39 but ultimately found it did not apply. In this regard, she made the following comments:

*As there is nothing in the lease which explicitly indicates that it was prepared and executed on the understanding of both parties that the information contained therein was given and received in confidence, in my view, the first requirement of the exemption under section 39(1) ('Information obtained in confidence') also cannot be met in the circumstances. The lease itself does not attempt to enforce any form of confidentiality. The only use of the word "confidential" in the lease is in regard to negotiations exchanged in relation to the resolution of dispute or difference (clause 22.3) and in relation to disclosure (clause 24.15), with any party able, without the permission of the other party, to release all or any part of the lease agreement.*

## **Analysis**

21. At the outset it is important to note that although Blue Derby asserted in its original submissions that the whole Agreement should be exempt, the Department in its internal review decision only agreed that two parts should be exempt. These were:

- subsections (a) to (j) of section A2.2 *Design Requirements* at page 48 (*Design Requirements*); and
- *Attachment A: Plan of Leased Area*, which is referred to by Blue Derby and the Department as an architectural schematic site design (*Architectural Design*).

22. Blue Derby also raised particular concerns about the disclosure of the rent figures in Clause 5 of the Agreement, though these figures were proposed to be released by the Department.

23. I will first conduct my analysis in relation to the bulk of the Agreement, primarily comprised of generic contractual terms. I will then explore the more specific and contentious sections, with my analysis predominantly relating to s37, given this was the main section relied upon and discussed by both the Department and Blue Derby. I will, however, also consider s39 in relation to the Architectural Design given it fits more appropriately within this section.

## **Section 37 – Information relating to business affairs of third party**

24. 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 (in this case Blue Derby) 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.

25. I refer to, and agree with, Ms Wilson's discussion of competitive disadvantage in *Forestry Tasmania v Ombudsman*<sup>2</sup>, outlined at paragraphs 17 and 18 above, though I note that in the New South Wales Supreme Court decision of *Kaldas v Balbour*<sup>3</sup> 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.
26. Accordingly, the value of the *Forestry Tasmania v Ombudsman* case as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases 'competitive disadvantage' and 'likely to expose', all of which are instructive and with which I agree.

*Agreement as a whole (excluding the Design Requirements, rent figures and Architectural Design)*

27. As outlined above, aside from the Design Requirements and Architectural Design, the Department did not find anything else in the Agreement that constituted information relating to the business affairs of Blue Derby, and which also either related to trade secrets or would be likely to expose them to competitive disadvantage. After examining the Agreement, I have formed the same view.
28. Although Blue Derby has asserted that *the disclosure of information within [the] Agreement would both reveal trade secrets and substantially harm the company's competitive position*, I cannot identify anything in the general terms of the Agreement that would result in this occurring. The Agreement contains standard clauses found in most leases and business licence agreements and why the harm apprehended by Blue Derby would occur following their release is not apparent. I note that there are several agreements of a similar nature to the Blue Derby Agreement on the Department's online Right to Information Disclosure Log,<sup>4</sup> in which analogous general contractual terms are disclosed in full. In particular, I note a lease and business licence between *The Honourable Elise Nicole Archer MP (Minister) and Wild Drake Pty Ltd (Operator)*<sup>5</sup> (Wild Drake Lease) dated 19 January 2018 with very similar, often identical, terms to the current Agreement, was released in full apart from a small amount of personal information. The Disclosure Log also contains further leases with similar terms released in the same manner.<sup>6</sup> These are therefore readily available to any

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<sup>2</sup> [2010] TASSC 39

<sup>3</sup> [2017] NSWCA 275 (24 October 2017)

<sup>4</sup> See [www.nre.tas.gov.au/about-the-department/governance-policies-and-legislation/rti-disclosure-log](http://www.nre.tas.gov.au/about-the-department/governance-policies-and-legislation/rti-disclosure-log)

<sup>5</sup> See RTI 044 - 2017-18 at Note 4: <https://nre.tas.gov.au/Documents/RTI%20044%20-%202017%20-%2018.pdf>

<sup>6</sup> See RTI 057, Leases – Coles Bay, <https://nre.tas.gov.au/Documents/RTI 057 - 2020-21.pdf> and RTI 040 2017-18, Salmon Ponds, <https://nre.tas.gov.au/Documents/RTI%20040%20-%202017%20-%2018.pdf>.

person and there is no competitive disadvantage which could flow from the disclosure of material already in the public domain.

29. Although the Agreement refers to *the development and operation of a commercial accommodation facility* (Recitals, page 1) and *the use of the Licensed Areas for the operation of a [sic] commercial guided biking tours and walking tours* (under the definition of *Licensed Activities*, page 5), this is information that is already available, given the business is currently operational and has similar information published on its website.
30. I accept and appreciate the statements made by Blue Derby that it has invested significant time and energy into its business, working hard *to create a truly Tasmanian luxury adventure mountain bike experience from scratch*. However, I do not accept its assertion that the Agreement itself *details the intricate mechanics of [its] business operation and structure*. Aside from the brief description outlined above, I cannot see anything else in the Agreement that details the *intricate mechanics* of the business. There is a short description in clause A2.2 *Design Requirements* before the redacted section (subsections (a) to (j)) which refers to *pre-fabricated suspended accommodation pods and a central hub building to comprise the Development* but, again, this does not provide insight into the *intricate mechanics* of the business and it is information which is largely publicly available on Blue Derby's website.
31. In accordance with s47(5) of the Act, when an external party seeks review of a decision by a public authority to disclose the business information of that external party, that party has the onus to show that there are grounds to establish that the information should not be disclosed. I am not satisfied that Blue Derby has done so in relation to the Agreement as a whole and it is not otherwise apparent how any of this information could reveal trade secrets or expose it to competitive disadvantage.
32. Given the above I am also unable to see how the Agreement *would provide significant advantage to any competition in this newly developing market*, which was another concern raised by Blue Derby in its submissions. Although I accept it *did not have access to a document such as this at the time of developing [its] project and negotiating [its] agreement*, I cannot see how a competitor company operating in the same market would be at an *invaluable and unfair advantage in creating a competition business* by having access to Blue Derby's agreement. The Agreement does not go into detail regarding the structure of the business and as noted above, although it *would provide a competitor with information relating to what terms can be expected*, most of the terms are generic and found in similar agreements, which are readily available to the public on the Department's website.
33. Similarly, I do not accept that information relating to the *terms and timeframes relating to reinstating Blue Derby Pods Ride Pty Ltd's unique product offering after a natural disaster* provides *inside knowledge to unfairly advantaged third parties* given again, this is fairly standard information that would not in itself provide a commercial advantage to a competitor.

34. For all of these reasons, I am not satisfied that there is anything in the Agreement as a whole which is exempt under section 37.

#### *Design Requirements*

35. These are the list of requirements contained in section A2.2 *Design Requirements* in Schedule A of the Agreement (page 48). The section outlines the design principles and requirements the development must meet, such as being sensitive to the surrounding environment, embodying sustainability principles, ensuring compliance with the Building Code of Australia and the *Tasmanian Plumbing Code 2006*, as well as requirements relating to bushfire prone areas, minimising bird strikes and safe and proper storage of fuel.
36. Although the Department found this section to be exempt on the basis that it is *design information which relates to the business affairs of Blue Derby Pods Ride Pty Ltd*, in my view the section contains generic design requirements that would be likely to apply to other businesses seeking to undertake similar ventures with a similar public authority, rather than specific information relating to the business affairs of Blue Derby. I cannot see anything in that section that warrants an exemption under section 37.
37. I note that the Wild Drake Lease mentioned above and found in the Department's Disclosure Log has almost identical provisions, also called *Design Requirements*, and found in section A2.2 of Schedule A (page 44 of the Wild Drake Lease). It provides a brief outline of the accommodation structure and in fact significantly more detailed information relating to the proposed business venture than the information provided in the Blue Derby agreement. It has almost identical clauses, including sensitivity to the surrounding environment, embodying sustainability principles and ensuring compliance with relevant codes, which supports my view that these are standard clauses likely to be found in most Departmental leases of this nature.
38. Although Blue Derby has argued the Agreement *details the intricate mechanics of [their] business operation and structure*, for the reasons outlined above I am not satisfied that this is the case in relation to the Design Requirements.
39. Consequently, for the same reasons applied to the Agreement as a whole, I determine that this information is not exempt under s37.

#### *Rent figures*

40. These are the figures contained in clause 5 *Rent for Leased Area* at pages 14 to 15 of the Agreement. There are several figures outlined, which vary according to the period of time after the commencement of the Agreement.
41. Blue Derby has strongly argued that the rent figures in the Agreement should not be released given they are of course *commercial in confidence* and that their release could easily result in damage to Blue Derby Pods Ride's brand and social licence given the lack of context provided. They also raised what overheads are likely to be involved as a general issue.

42. The Department did not specifically address the rent figures but included them in the *remainder of the information*, which it found did not qualify for exemption under s37.
43. I am satisfied that releasing the rent figures may be likely to expose Blue Derby to competitive disadvantage. Such information is usually confidential in commercial agreements and competing tourism or accommodation providers, not operating on public land, are not required to release such information.
44. Accordingly, I am satisfied that the rent figures are *prima facie* exempt under s37.

*The public interest test*

45. I apply the public interest test solely in relation to the rent figures, as this is the only part of the Agreement I find to be *prima facie* exempt under s37.
46. On internal review Ms Wilson found it was not necessary for her to apply and determine the public interest test, given her finding that the information at issue did not meet the requirements for exemption under s37. However, she did state that *if such a test were applied, it would be subject to a high threshold in terms of its application, there being a strong public interest in the release of information pertaining to developments in publicly-owned national parks and other reserved land.*
47. I agree with Ms Wilson's general comment and note this aligns with matter (a) in Schedule 1 of the Act, *the general public need for government information to be accessible*. In this respect it is important to note that if businesses wish to enter into commercial agreements with a public authority such as the Department, there is an expectation that those agreements will be open and transparent and the information will most likely be made publicly available, in accordance with the objects of the Act.
48. I consider matters (b), (d), (f) and (g) are relevant considering the significant public interest concerns about appropriate management of commercial activities in national parks and reserves and the debate over the adequacy of current approval processes. I also consider matter (n) to be relevant in terms of prejudicing the ability to obtain similar information in the future.
49. As I noted in my recent decision of *Cassy O'Connor MP and the Department of Natural Resources and Environment Tasmania*,<sup>7</sup> however:

*... the effective cost of doing business in a national park or reserve, or applying to conduct such commercial activities, is public scrutiny. There is also no other method of conducting activities lawfully in a national park or reserve than to go through this process and be subject to the Act, so I do not consider that there is a significant reduction likely in the ability to obtain such information in the future.*

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<sup>7</sup> April 2022, available to [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions).

50. Matters (s), (w) and (x), which relate to potential harm to business interests and competitive position, are of course also relevant. While proponents should not expect that the entire lease and licence agreement would be exempt on this basis, it may be appropriate to exempt parts containing information which could genuinely harm their business interests and competitive position and is not generally available to their competitors.
51. Rent costs are not generally available to competing businesses or customers of the business and there are plausible scenarios in which the release of this information could cause harm to Blue Derby's position or business interests. The weight of these factors is somewhat reduced, however, as it is generally known that rent would be charged and the harm resulting from the disclosure of the exact amount is unlikely to be of major significance.
52. After balancing all of these considerations, I am of the view that it is not contrary to the public interest to disclose the rent figures. Blue Derby chose to conduct its business on public land and increased scrutiny is a natural consequence of such a decision. Similar leases disclosed under the Act have released applicable rent figures in full and Blue Derby has not discharged its onus under s47(5) to show why disclosure would not be appropriate in this instance.
53. For these reasons, I determine that the rent figures are not exempt under s37 and may be released in full.

#### **Section 39 – Information obtained in confidence**

54. For information to be exempt under this section, I must be satisfied that it is information that has been communicated in confidence to the Department and that –
  - (1) (a) *the information would be exempt information if it were generated by a public authority or Minister; or*  
*(b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.*
55. As I indicated earlier, while the Department relied upon s37 to exemption information, I consider that s39 is more relevant in relation to the Architectural Design contained in Attachment A: *Plan of Leased Area* of the Agreement. It is of a technical nature and appears to outline the physical layout of the accommodation pods and associated buildings. The design also includes GPS coordinates and therefore provides the exact location of Blue Derby's business operations.
56. The Department examined s39 in relation to the agreement as a whole and did not specifically address the Architectural Design, which it had already determined to be exempt under s37. It found that s39 did not apply, given there was nothing in the Agreement that expressly stated it was communicated

in confidence. It noted the Disclosure clause of the Agreement (section 24.15), which provides:

*Despite any confidentiality or intellectual property right subsisting in this Agreement, a party may publish all or any of this Agreement without reference to another party.*

57. Blue Derby argued in its submissions that the Architectural Design is its property and the intellectual property of Philp Lighton Architects Pty Ltd, as it commissioned that firm for the design.
58. Based on its submissions, I am satisfied that Blue Derby communicated this information in confidence to the Department and it intended not to publicise the exact location of its business operations or the Architectural Design.
59. I am also satisfied that the disclosure of this design would be reasonably likely to impair the ability of the Department to obtain similar information in the future. Privately commissioned architectural designs remain the intellectual property of the relevant architect and the routine publication of such documents is likely to raise concern. The end result may well be that businesses may be reluctant to share relevant information, given the potential infringement on intellectual property rights.
60. Accordingly, I am satisfied that the Architectural Design is *prima facie* exempt under section 39(1)(b).

*The public interest test*

61. I consider matters (a), (b), (d), (f) and (g) to be relevant in this instance. I will not repeat my analysis of the pro-disclosure factors I set out in relation to s37 above, but consider that the same considerations apply and weigh in favour of release.
62. Different considerations exist in relation to the factors against release, however, which are (n), (s), (w) and (x). I have already discussed the matters which would prejudice the ability to obtain such information in the future in determining that the Architectural Design was *prima facie* exempt and consider that these weigh significantly against release.
63. Of additional significance is the fact that the Architectural Design provides the exact location of Blue Derby's business venture by way of its geographical coordinates, yet this information is not publicly available on their website. Although analogous geographical coordinates were released in the Wild Drake Lease (contained in section A2.2(b)), Blue Derby is marketed in a particular way in order to promote exclusivity and appears to be attempting to create a sense of mystery in relation to its exact location. It is consequently possible that the disclosure of the geographical coordinates to the general public could cause harm to the business or the financial interests of Blue Derby.
64. Similarly to the rent figures, however, it is not a secret that Blue Derby has a business location and that this is within the Derby Regional Reserve. The

release of the exact location is unlikely to have a major negative impact of the business, despite its previous non-publication of this information.

65. Balancing the public interest considerations outlined above, I consider that it is not contrary to the public interest to release the Architectural Design and it is not exempt under s39.
66. However, due to the intellectual property considerations, I consider that the Architectural Design should be made available to the original applicant by giving them a reasonable opportunity to inspect it under s18(1)(a), rather than being provided with a copy.

### **Preliminary Conclusion**

67. For the reasons given above, I determine the following:

- Exemptions claimed pursuant to s37 are not made out; and
- Exemptions claimed pursuant to s39 are varied.

### **Conclusion**

68. As the above preliminary decision was adverse to the Department, it was made available to the Department on 7 June 2022 under s48(1)(a) to seek its input before finalising the decision.
69. The Department advised on 27 June 2022 that it would not be making any submissions in response to the preliminary decision.
70. I also provided the above preliminary decision to Blue Derby for its input on 28 June 2022, pursuant to s48(1)(b).
71. Blue Derby advised on 30 June 2022 that it would not be making any submissions in response to the preliminary decision.
72. Accordingly, for the reasons given above, I determine the following:
  - Exemptions claimed pursuant to s37 are not made out; and
  - Exemptions claimed pursuant to s39 are varied.
73. I apologise to the parties for the considerable delay in finalising this decision.

**Dated:** 30 June 2022

**Richard Connock**  
**OMBUDSMAN**

## **Attachment I**

### **Relevant Legislation**

#### **Section 37 – Information relating to business affairs of third party**

- (1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party") and –
  - (a) the information relates to trade secrets; or
  - (b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.
- (2) If –
  - (a) an application is made for information under this Act; and
  - (b) the information was provided to a public authority or Minister by a third party; and
  - (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of substantial concern to the third party –
    - (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.

### **Section 39 – Information obtained in confidence**

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

### **33. Public interest test**

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

## **SCHEDULE 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:** O1809-153

**Names of Parties:** C and Department of Primary Industries, Parks, Water and Environment

**Reasons for decision:** 48(3)

**Provisions considered:** s36, s37

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### Background

- I The Department of Primary Industries, Parks, Water and Environment (the Department) is responsible for access to and use of the Arthur-Pieman Conservation area and Future Potential Production Forest land (FPPF land) within the Tasmanian Wilderness World Heritage Area. FPPF land is Crown land that is proposed to be reserved<sup>1</sup>.
- I An application to the Department is required for commercial filming activity in conservation areas or FPPF land, either by accessing the land in person or filming by using drones; known as remotely piloted aircraft (RPA) or unmanned aerial vehicles (UAV).
- 2 On 21 May 2018, C made an application to the Department for assessed disclosure under the *Right to Information Act 2009* (the Act) concerning these types of filming applications. This followed a previous application in March 2018, which was refused pursuant to s19(1)(a) of the Act due to the Department considering that it would be a substantial and unreasonable diversion of its resources to respond to the request due to the broad geographical area originally included. C refined the scope and in this application he sought:
  1. All commercial filming agreements applied for and approved by DPIPWE/Parks and Wildlife Service from 01/01/2013 to the date of this application. Point 1 request is restricted geographically to the Arthur Pieman Conservation Area.
  2. All commercial filming agreements applied for and approved between 25/09/2014 to present for FPPF land lots 5 and 14.

<sup>1</sup> [www.dpipwe.tas.gov.au/about-the-department/reservation-of-future-potential-production-forest-land](http://www.dpipwe.tas.gov.au/about-the-department/reservation-of-future-potential-production-forest-land), accessed 11 November 2021.

3. All applications for UAV/RPA use in either FPPF land lots 5 and 14 including the specific written authority for such activities from the Parks and Wildlife Service from 25/09/2014 to 20/03/2018.
  4. All applications for UAV/RPA use in Parks and Reserves including the specific written authority for such activities from the Parks and Wildlife Service from 01/01/2013 to 20/03/2018. Point 4 request is restricted geographically to the Arthur Pieman Conservation Area.
- 3 On 19 June 2018, Ms Katrina Oakley, a delegated officer for the Department, informed C that because some of the information he sought was information relating to the business affairs of third parties it was necessary for her to consult the third parties as required by s37(2).
- 4 A decision was made on 3 September 2018 by Dr John Whittington, then Departmental Secretary and Principal Officer under the Act. It states that 133 pages of information was located responsive to C's request. 39 pages were released to C, with some information redacted pursuant to s36 due to it containing the personal information of a person other than the applicant. The information redacted was the names, email addresses, telephone numbers and signatures of commercial filming applicants. Additionally, some of the addresses of commercial filming applicants and the names, signatures and contact details of some Department staff were redacted under s36.
- 5 The remaining 94 pages were not released pursuant to s36, due to further consultation under s36(3) occurring with third parties whose personal information appeared in these pages. The Department also indicated that it had decided to disclose information after receiving input from the third parties and would do so after 10 working days if a review was not requested.
- 6 On 25 September 2018, the 94 pages were released to C with some information redacted pursuant to s36. The same types of information were redacted as for the original 39 pages, though some company names and Australian Business Numbers (ABNs) were also redacted.
- 7 On 26 September 2018, C contacted the Department to raise concerns that some attachments to commercial filming agreements found to be responsive to his request were not included in the information released. He also raised concerns about the redaction of ABN and company name information pursuant to s36, contending that this is available to the public and should be released.
- 8 On 28 August 2018, C had emailed the Tasmanian Premier and his office with questions regarding the company Patagonia Incorporated and the charity the Bob Brown Foundation Incorporated. C asked:
  - .... Could you please advise the amount paid by Patagonia or did they receive a fee waiver?
  - ...Has Parks and Wildlife/DPIPWE ever issued authority to the Bob Brown Foundation for the use of drones in the State's reserve system?...

- *...if no permission to film in the reserve system had been given by the Government, will the government pursue action against the BBF [Bob Brown Foundation]?*
  - *...What is the current penalty for unauthorised commercial filming including drone/helicopter filming in the Tasmanian reserve system?...*
- 9 On 27 September 2018, the Premier responded to C's, providing him with the following information:
- *On the two separate occasions Patagonia filmed in PWS reserves, the standard fee of \$440 (including GST) was paid.*
  - *The PWS has provided filming approval and authority to use a drone on two separate occasions.*
  - *Approval was sought and given for filming in the reserves, therefore there is no cause for action against the Bob Brown Foundation.*
  - *The current penalty for unauthorised commercial filming on reserved land is 10 penalty points (\$1,630). The maximum penalty for unauthorised landing of aircraft on reserved land is 20 penalty points (\$3,260).*
- 10 On 27 September 2018 C forwarded the Premier's email to Ms Roxana Jones, one of the Department's delegates under the Act, and asked her to confirm that the Department did not receive an application for filming approval from the Bob Brown Foundation. Ms Jones advised that she could not confirm that.
- 11 On 2 October 2018, C applied for external review under s45(1)(a) of the Act and his application was accepted that day as being within jurisdiction.
- 12 On 6 November 2018, Ms Jones emailed C to let him know that more information responsive to his request had been located and a third party consultation process was underway. She did not specify if this was pursuant to s36 or s37.
- 13 Later that day, C's email reply to Ms Jones sought clarification of whether a decision had been made as to whether the release of the material under consideration would be of substantial concern to the relevant third parties before seeking to consult.
- 14 Ms Oakley replied to C's email on 7 November 2018 with brief advice that:
- ...the attachments are undergoing third party consultation, and a separate decision will be sent on that information to you in due course. No further information will be released in relation to the decision which is on external review with the Ombudsman's office. The RTI Unit will not enter into further correspondence with you on the matter.*

- 15 On 22 November 2018, the Department released a further decision to C regarding the additional information located, a further 14 pages.
- 16 The additional information consisted of attachments to the commercial filming agreements released to C on 3 September 2018 and 25 September 2018. The attachments referred to applications on pages 16, 37, 67, 92, 102 and 110 of the information previously released.
- 17 That day, Ms Jones released four pages in full (attachment pages 1, 3, 6 and 7) to C but determined that the information on the remaining ten pages was exempt in part under s36. She notified C that consultation pursuant to s36(3) of the Act had occurred and this information would be released with redactions in 10 working days if no request for review was received from the relevant third parties.
- 18 On 10 December 2018, a further six pages (attachment pages 2, 4, 5, 12, 13 and 14) were released by Ms Jones to C with redactions of personal information of persons other than the applicant claimed to be exempt under s36. Ms Jones advised that *one party has requested an internal review of my decision on their information and so pages 8 to 11 have been removed pending the result of that review*.
- 19 On 25 March 2021, I determined that these pages should be released in the manner proposed by the Department, with some personal information redacted under s36 (see Z, C and the Department of Primary Industries, Parks, Water and Environment<sup>2</sup> (Z & C)). That information is excluded from this external review but the decision is relevant.

### **Issues for Determination**

- 20 I must determine whether the information redacted by the Department is eligible for exemption under s36 of the Act.
- 21 As s36 is contained in Division 2 of Part 3, it is subject to the public interest test in s.33. This means that, should I determine that the information is prima facie exempt under that section, I am then required to determine whether it would be contrary to the public interest to release it having regard to, at least, the matters contained in Schedule 1.

### **Relevant legislation**

- 22 The Department relies on s36 to exempt from release some of the information responsive to C's request. A copy of that section is attached to this decision. Copies of s33 and Schedule 1 and 2 are also attached.
- 23 Section 37 was also referenced, so a copy of that provision is also attached to this decision.

<sup>2</sup>O1901-130 at [www.ombudsman.tas.gov.au/\\_data/assets/pdf\\_file/0005/613607/O1901-130-Decision-Deidentified.pdf](http://www.ombudsman.tas.gov.au/_data/assets/pdf_file/0005/613607/O1901-130-Decision-Deidentified.pdf)

## **Submissions**

- 24 On 6-7 November 2018, C raised concerns with the Department regarding its consultation under s37 and redaction of company information which is on the public record. C specifically stated:

*S37 third-party consultation, from my understanding, consultation with third parties under S37 of the Act is not automatically triggered by an RTI application; rather, the Minister or Principal Officer must **decide** that the information requested, if disclosed would be of substantial concern to the third party (S37 (2) (c). Once this decision is made, and the substantial concern limb is met then and only then is third-party consultation required under S37.*

...

*The requirement for the Minister or Principal Officer to have decided that the disclosure of information “may be reasonably expected to be of substantial concern to the third party” is reflected ... in the [Ombudsman’s] RTI Manual at Section 7.3 where it states;*

*The limitation about consultation with the third party, that consultation **is only required** where 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 (emphasis added [by C])*

*Vice versa, if the Principal Officer formed the view that the level of concern was not substantial, it would appear that there would be no need to consult under this section.*

*In the Department’s letter of 19/6/2018, it stated;*

*I am writing to advise you that it has been necessary for me to consult one or more third parties under section 37 of the Right to Information Act 2009.*

*Following the Ombudsman’s guidelines, any statement that it was “necessary ” to consult under S37 would have required a decision to have been made beforehand as to whether that the information requested would be reasonably expected to be of “substantial concern” to the third parties. According to the decision letter of 03/09/2018, fifteen third parties were consulted pursuant to S37(2). If applying the Ombudsman’s guidelines to this matter, then prior to the third party consultation occurring, the Principal Officer must have formed an opinion in each of the 15 cases that the information sought, if released would be of substantial concern to the third party. Did this occur? Given what was released in the*

*decision, there is nothing that I can see which would meet any bar of “substantial” concern, hence my question.*

*What I am asking for is confirmation from the Department that the Principal Officer did, in fact, reach this conclusion in each case prior to consultation. Can you please confirm this?*

*Regarding the redacted business information such as an ABN or organisation name, I am asking the Department to release this information as it is clearly in the public domain, and is not personal information. As stated in my email of 26/9/2018, the decision document table claims that the only information that was withheld/redacted was personal information under S36 of the Act. Nowhere in that table is a reference to any S37 exemptions, yet [t]he applications on page 92-!00, !0!-!09 and !!7-!25 of the released information would appear to have business information redacted and withheld which would be an exemption under S37.*

- 25 On 10 December 2018, C repeated his concerns to this office as follows:

*I am concerned at how DPIPWE are redacting information that would be clearly on the public record – after all, these applications are for Commercial Filming. While the applications may have been submitted by an individual, they have to be on behalf of the company conducting the commercial filming. For example, on page !2 of the attached, it states that “The project will be jointly supported by the XXX and the XXX”. [XXX indicates redacted material] I would suggest that these refer to an organisation or a business. Similarly, the first sentence of the email on page !4 of the attached would appear to redact non-personal information. The email header can obviously remove the name of the person sending it but not the email information after the “@” symbol unless it can identify the individual.*

- 26 On 22 January 2019, C sent a further email to this office in the following terms:

*With respect to the Department redacting information in their decisions, I have concerns that they have not complied with the Act in this regard. When the original RTI response was released, there was no evidence that the Bob Brown Foundation had applied for or received any permission to film in the areas in question. When I asked DPIPWE to confirm that the [sic] there had been no such application/approval by that organisation for the areas concerned I was advised that no, the [sic] could not confirm that, which indicated to me that they had received an application, but the details had been redacted for some reason.*

*The Premier confirmed to me in writing that the Bob Brown Foundation did receive filming approval from DPIPWE on two occasions, so I was perplexed that the RTI process did not result in these applications/approvals being identified let alone released...*

- 27 On 1 May 2021, C confirmed that an accurate summary of his concerns leading to his external review request was that:
- a. *ABN and company name information has been redacted, which he believed should be released;*
  - b. *It is not clear whether DPIPWE redacted this information pursuant to s36 or s37; and*
  - c. *There was insufficiency of searching by DPIPWE, as no applications by the Bob Brown Foundation were released, when he believed these should have been within scope due to written confirmation from the Tasmanian Premier that commercial filming by that organisation had been approved on two occasions by DPIPWE.*
- 28 On 1 June 2021, C also submitted that his primary concerns were *about redacted business names, ABNs and the fact that the Premier advised that the BBF [Bob Brown Foundation] approvals and that their record keeping system is having a direct impact on freedom of information in Tasmania.*
- 29 The Department has not made additional submissions beyond its decisions on C's application. These are discussed in the following analysis.

## **Analysis**

### **Section 36**

- 30 For information to be exempt under s36 it must be information that, if released, would disclose the personal information of a person other than the person making an application under s13.
- 31 Personal information is defined in s5 as *any information or opinion in any recorded format about an individual whose identity is apparent or is reasonably ascertainable from the information or opinion and who is alive, or has not been dead for more than 25 years.*
- 32 The majority of information sought to be exempted by the Department pursuant to s36 is clearly personal information and *prima facie* exempt. It consists of names, signatures, addresses, telephone numbers and email addresses relating to individuals. Some addresses were released (often Post Office boxes), but these appear to have been released with the consent of the relevant third parties and are likely to be business addresses.
- 33 Consistent with my previous decision in the related matter of *Z and C*<sup>3</sup>, I am satisfied that the Department's redaction of this information for individuals who are not Department employees is appropriate and not contrary to the public interest. I consider that the release of the information would harm the interests of an individual (factor (m) in Schedule 1) without providing any

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<sup>3</sup> O1901-130 at [www.ombudsman.tas.gov.au/\\_data/assets/pdf\\_file/0005/613607/O1901-130-Decision-Deidentified.pdf](http://www.ombudsman.tas.gov.au/_data/assets/pdf_file/0005/613607/O1901-130-Decision-Deidentified.pdf).

additional benefit in relation to government accountability or providing context to decisions.

- 34 This is also consistent with the Department's analysis, with Dr Whittington deciding that:

*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 follow what is in most cases the normal practice of this Department in dealing with personal information, which is to redact the information.*

- 35 In light of the above, I determine that the names, signatures, addresses, telephone numbers and email addresses redacted by the Department relating to third party individuals are exempt pursuant to s36 and not to be released to C.
- 36 The other information the Department exempted under s36 falls into two categories: company or charity information (entity names and ABNs); and personal information of Department employees.

*Personal information of Department employees*

- 37 Turning first to the personal information of the Department's employees, I repeat the position recently stated in my decision of *Camille Bianchi and the Department of Health* (November 2021):

*in the past it has been a regular and consistent practice of public authorities to exempt the names, titles, and contact details of public servants. There was often very little actual consideration given to the purpose of the Act and why this information should be exempt.*

*The Australian Information Commission has held that:*

*It is not unreasonable to release personal information such as names, work email addresses, positions or titles, work contact details and decisions or opinions because this information appears in documents because of the person's usual duties or responsibilities.*

*It would be unreasonable to release personal details such as dates and places of birth and personal mobile telephone numbers.<sup>4</sup>*

*The Commissioner has also held that agencies should not start from the position that an officer's classification will determine whether it*

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<sup>4</sup> Hunt and Australian Federal Police [2013] AICmr 66 (23 August 2013), at [72]-[74].

*would be unreasonable to disclose their name.<sup>5</sup> This includes in signatures.<sup>6</sup>*

*It has also been the long standing practice of this office not to support the arbitrary exemption of staff details of this nature unless there is some particular or extenuating circumstance.*

- 38 The Department has inconsistently redacted the names and work telephone numbers of its staff, with some staff details provided and others claimed to be exempt pursuant to s36. All signatures were redacted.
- 39 Given the Department has not provided any specific reasons for its decision not to release the personal information of some staff members, I do not consider that the Department has discharged its onus to show why this information should not be released. The relevant State Service officers appear to be undertaking their routine duties as contact people for the Department or approvers of applications and there is no apparent justification for the exemption of this information.
- 40 Accordingly, I determine that all Department staff work contact details, names, signatures, and titles in the information are not exempt under s36 and are to be released to C.

#### *Company and charity information*

- 41 The Department has again inconsistently applied s36 to company and charity information (entity names and ABNs), with most released unredacted but some removed. The Department has not explained the reason for why it considered that it was not contrary to the public interest to release information in some instances but that it was validly exempt in other cases.
- 42 I agree with C that public registered entity names and ABNs do not have the inherent characteristics of the type of information usually exempted under s36. It is difficult to see why the release of this information would harm the interests of any individual, as it is freely available online. If the entity name reveals the name of an individual (i.e. Jane Doe Pty Ltd) this was a conscious choice by that individual to thus name their company or charity and publicise their identity.
- 43 I consider that the public interest in being able to find out which corporate entities were approved to undertake commercial filming in publicly owned parks and reserves (factors (a), (d) and (g) in Schedule 1 are relevant) is strong. This outweighs the minimal potential impact on the interests of an individual by the release of the name or ABN of a corporate entity undertaking commercial activities, which may make their identity reasonably ascertainable.
- 44 I also consider the justification for exemption is even lower due to the Tasmanian Premier already having advised C that approval for commercial

<sup>5</sup> Maurice Blackburn Lawyers and Department of Immigration and Border Protection [2015] AICmr 85 (18 December 2015).

<sup>6</sup> J'N' and Commonwealth Ombudsman [2016] AICmr 62 (19 September 2016).

filming was granted on two occasions to the Bob Brown Foundation. That the information confirming these approvals was then redacted in the information released to him by the Department under the Act does not seem justifiable. It has also led to C having unneeded concerns about the Department's record keeping or sufficiency of searching for relevant information due to the obscuration of these approvals.

- 45 I determine that the names of entities applying for commercial filming approvals and their ABNs are not exempt pursuant to s36 and should be released to C. This information for release includes the names of entities which are not the direct applicant for filming but have brought about that application, i.e. 'this application is on behalf of X' or 'this venture is jointly supported by X and Y.'

### Section 37

- 46 The Department in its decision dated 3 September 2018 indicated that it had consulted with fifteen third parties pursuant to s37(2), regarding the potential of the disclosure of their filming applications to expose them to competitive disadvantage.
- 47 The Department does not again refer to s37 after this first decision, but did indicate that it was required to withhold relevant information for 10 working days to permit an appeal to be lodged by a third party consulted. It appears that no third party which expressed a view as to whether the information should be released lodged such an appeal.
- 48 C repeatedly raised concerns with the Department about its interpretation and application of s37. This appears, however, to have been primarily a misunderstanding, as s37 was not used to exempt any of the information or for later consultation. I note that Ms Jones' email to C of 6 November 2018 merely stated that consultation was occurring and did not specify under which section of the Act, exacerbating this confusion. I urge the Department to in future provide greater clarity as to which provisions or exemptions are being utilised in its correspondence and if requested by an applicant.
- 49 In relation to C's concerns that consultation under s37(2) was not justifiable, I consider it open to the Department to have decided that this information may be reasonably expected to be of substantial concern to a third party. While it would be equally open to it to have considered the threshold was not reached, there are realistic scenarios in which the exposure of commercial filming activities might cause competitive disadvantage.

### Preliminary Conclusion

- 50 For the reasons given above, I determine that exemptions claimed pursuant to s36 are varied.

## **Conclusion**

- 51 As the above preliminary decision was adverse to the Department, it was made available to the Department on 22 November 2021 under s48(1)(a) to seek its input before finalising the decision.
- 52 The Department advised on 9 December 2021 that it would not be making any submissions in response to the preliminary decision.
- 53 Accordingly, for the reasons given above, I determine that the exemptions claimed pursuant to s36 are varied.
- 54 I apologise to the parties for the inordinate amount of time taken to finalise this decision.

**Dated:** 13 December 2021

**Richard Connock**  
**OMBUDSMAN**

## **Attachment I**

### **Relevant Legislation**

#### **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 –
    - (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.
  - (1) 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
  - (iv) 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**

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

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

Sections 30(4) and 33(3)

- I. The following matters are irrelevant when assessing if disclosure of particular information would be contrary to the public interest:
  - (a) the seniority of the person who is involved in preparing the document or who is the subject of the document;
  - (b) that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information;
  - (c) that disclosure would cause a loss of confidence in the government;
  - (d) that disclosure might cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

**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.

# OMBUDSMAN TASMANIA

## DECISION

**Right to Information Act Review**

**Case Reference:** O2006-113

**Names of Parties:** Camille Bianchi and the Department of Health

**Reasons for decision:** s48(3)

**Provisions considered:** s9, s12, s30, s35, s36, s39

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### **Background**

- 1 Ms Camille Bianchi is a freelance journalist. She became aware of an incident at the Launceston General Hospital (LGH) involving alleged inappropriate actions and misconduct of a nurse, Mr James Griffin, employed at the LGH, which she has been investigating.
- 2 On 1 April 2020, Ms Bianchi submitted a request for information to the Department of Health (the Department) to assist in the preparation of an article. The request sought:
  - *Records including files, emails and meeting notes in relation to reports of misconduct and inappropriate behaviour by James Griffin, a paediatric nurse of ward 4K at Launceston General Hospital. For the period 2000-2019 (Mr Griffin's time at the Launceston General Hospital).*
  - *Record of staff complaint logs against Mr Griffin. For the period 2010-2019.*
  - *Email correspondence to nursing staff from hospital superiors relating to Mr Griffin's time as a patient in hospital. For the period 2019 (between 1 October and 1 November).*
  - *Records and emails related to staff training and counselling on ward 4K in relation to reporting sexual assault or predatory behaviour. For the period 2019-20 (between 1 August and 31 January).*
- 3 Under s15(1) of the Right to Information Act 2009 (the Act), the Department was required to provide Ms Bianchi with a decision on her application within 20 working days. On 29 June 2020, the Department still had not released a decision to Ms Bianchi and I accepted her request for external review under s46(1) of the Act on the basis of a deemed refusal. The Department indicated to me that the delay had resulted from the diversion of resources to the COVID-19 pandemic response.

- 4 On 22 July 2020, the Department released its decision to Ms Bianchi. The decision was made by Mr Ross Smith, acting Secretary of the Department and therefore its principal officer. The Department found 104 pages of information responsive to the request and produced a schedule of documents.
- 5 All 104 pages were claimed to be exempt in full, with the Department deciding that it would be contrary to the public interest to release the information. This was on the basis that the information was:
  - internal deliberative information and therefore exempt under s35 of the Act;
  - personal information and therefore exempt under s36; or
  - information obtained in confidence and therefore exempt under s39.
- 6 As a decision had been released, Ms Bianchi's application for an external review based on a deemed refusal was extended to a full external review of the Department's decision in accordance with s46(2).
- 7 The relevant application fee had been paid after Ms Bianchi's request for fee waiver as a journalist<sup>1</sup> was denied by the Department.
- 8 A Commission of Inquiry has been called by the Tasmanian government to investigate the management of historical allegations of child sexual abuse, particularly in the matter of deceased former nurse James Geoffrey Griffin. In the circumstances, I decided to prioritise Ms Bianchi's external review request to ensure it is completed while the Commission of Inquiry is ongoing.

### **Issues for Determination**

- 9 I must determine whether the information is eligible for exemption under ss35, 36, 39 or any other relevant section of the Act.
- 10 As ss35, 36 and 39 are contained in Division 2 of Part 3, my assessment is subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under these sections, I am then required to determine whether it would be contrary to the public interest to release it having regard to, at least, the matters contained in Schedule 1.

### **Relevant legislation**

- 11 As noted, the Department relies on s35, s36, and s39 in its decision to exempt information. I attach copies of these sections to this decision at Attachment 1.
- 12 Copies of s33 and Schedule 1 are also attached.

### **Submissions**

- 13 Ms Bianchi rejects the appropriateness of the exemptions relied on by the Department, claiming there is a stronger public interest in releasing the

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<sup>1</sup> Section 16(2)(ba).

information. Ms Bianchi expressed her belief that ‘the more information available to the public at this time, the more faith they will have in the public service and vital institutions like the hospital.’ She asserts that her investigation has shown long term failings in the management of child sexual offenders at the LGH and beyond and that she considers ‘the public release of this information to be crucial in identifying issues that potentially put people at ongoing risk.’

- 14 She further submits that:

*Mr Griffin’s victims from their stay in hospital over the 20 years he practiced, (and they were believed to be numerous in the criminal investigation process before it was halted with his death) will not receive adequate support, information or validation until it is formally established complaints were made on the LGH children’s ward during his tenure.*

- 15 The Department’s submissions are limited to its decision to refuse the release of information based on the exemptions it applied.

## **Analysis**

### **Section 35 – Internal deliberative information**

- 16 The Department has not specified whether it relies on a particular subsection of s35, and nor has it provided specific reasons for its decision despite articulating a comprehensive explanation of the meaning of s35.
- 17 The most relevant comments, which would appear to limit the application of the exemption to ss35(1)(a) and (b), are:

*A collection of emails between officers of a public authority form a record of consultation for adopting a position for moving towards a determined outcome. The email exchanges consist of giving advice and exchanging views. Included is factual information but my view [is] this forms an integral part of the deliberation. The information comprises a record of consultation and exchange of views and opinions is sufficient to meet the requirement of s35(1).*

- 18 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,<sup>2</sup> or
  - a record of consultations or deliberations between officers of public authorities.<sup>3</sup>
- 19 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.

<sup>2</sup> Section 35(1)(a).

<sup>3</sup> Section 35(1)(b).

- 20 The outlined exemption above does not apply to the following:
- purely factual information<sup>4</sup>;
  - a final decision, order or ruling given in the exercise of an adjudicative function<sup>5</sup>; or
  - information that is older than 10 years.<sup>6</sup>
- 21 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)*<sup>7</sup> 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.
- 22 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'.<sup>8</sup>
- 23 The Department has claimed exemption pursuant to s35 in relation to the information contained on pages 1-2, 6, 7, 10-11, 12, 24-26, 40-87, 91, 93-97, and 101-104.

Pages 1-2

- 24 The information is hand written notes by an unknown author. These notes appear to have been created over a period of time and have been used to record incidents of concern regarding Mr Griffin.
- 25 There are no identifying markers on the notes, they are hand written on blank paper. The Department provides no information in its reasons as to the author of the notes, and the schedule of documents merely describes them as 'summary notes'.
- 26 Accordingly, I cannot be satisfied this is information prepared by an officer of a public authority as required by s35(1)(a). As such I cannot uphold an exemption and, subject to any other exemption I might find applicable to it, the information is to be released to Ms Bianchi.

Page 6

- 27 This is a typed statement from Mr Griffin, in response to a Safety Learning and Reporting System (SLRS) report relating to an incident on 26 August 2017. I am satisfied that this document was created by a public officer and that it contains opinion and advice about an incident that happened. There are

<sup>4</sup> Section 35(2).

<sup>5</sup> Section 35(3).

<sup>6</sup> Section 35(4).

<sup>7</sup> *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at 14.

<sup>8</sup> *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.

elements that are likely to be factual, but I am of the view they are not so severable to be considered ‘purely factual’. Mr Griffin’s account is given at the request of the Nurse Unit Manager and forms part of an internal deliberative process around whether disciplinary action should be taken in response to the incident.

- 28 I am of the view the statement is prime facie exempt under s35, subject to consideration of the public interest test.

*Page 7*

- 29 This is an email from a Nurse Unit Manager at the Tasmanian Health Service (THS) to Mr Griffin and a person within the HR department. It is a covering email to formal correspondence sent to Mr Griffin regarding the SLRS report of 28 August 2017. The Department has not claimed that the letter itself is exempt under s35, so it is unclear why it has done so in relation to the covering email which contains a brief summary of the contents of the letter.
- 30 In the absence of further explanation from the Department as to this inconsistency, I am not satisfied that it has discharged its onus under s47(4) of the Act to show why this email should not be released. Accordingly, it is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

*Pages 10-11*

- 31 This is an attachment to a letter to Mr Griffin regarding the SLRS report of 28 August 2017 containing the allegations from a work colleague named in the letter.
- 32 I am satisfied that this document was created by a public officer and that it contains opinion and advice about an incident that happened. It is not clear, however, that it was prepared in the course of, or for the purpose of, deliberative processes of the Department. The allegations were made to trigger a review process through the SLRS but are not, of themselves, part of a deliberative process.
- 33 In the absence of further explanation from the Department as to why the document should be exempt under s35, I am again not satisfied that it has discharged its onus under s47(4) of the Act to show why this information should not be released. Accordingly, it is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

*Page 12*

- 34 This is a covering email from Dr Peter Renshaw at the THS enclosing a notification to the Australian Health Practitioner Regulation Agency (AHPRA). The claim for exemption under s35 fails because its contents do not consist of opinion, advice or a recommendation. As such, I am of the view that the Department must have intended to claim exemption for it under s35(1)(b) on the basis that it is a record of consultations or deliberations between officers of public authorities.

- 35 For the requirements of s35(1)(b) to be met, AHPRA must be a public authority for the purposes of this Act, but this is not the case.
- 36 The Act is law only in Tasmania and AHPRA is not a Tasmanian public authority. Further, AHPRA is established under the *Health Practitioner Regulation National Law Act 2009* (Qld). This national law is given effect in Tasmania by virtue of the *Health Practitioner Regulation National Law (Tasmania) Act 2010*, which commenced on 1 July 2010. Section 7 of that Act specifically excludes the operation of the *Right to Information Act 2009* to this Act or any instruments made under it.
- 37 Accordingly, AHPRA is not a public authority for the purposes of the Act.
- 38 The email is not exempt under s35 and is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

Pages 24-26

- 39 This is an internal Minute to the Secretary of the Department. It is signed and represents a decision under Employment Direction 4<sup>9</sup> by the Secretary and contains information under the following headings:
  - Purpose;
  - Summary of key issues;
  - Analysis of issues;
  - Financial considerations;
  - Attachments;
  - Recommendations, and
  - Clearances.
- 40 With the exception of the information under *Financial considerations* and *Clearances*, I accept that the information on these pages has been prepared by officers of a public authority and largely relates to opinion, advice, or recommendation. There is some factual information included, but it is not so severable from the deliberative material to be considered 'purely factual'.
- 41 I am satisfied s35 prime facie applies to the headings purpose, summary of key issues, analysis of issue, attachments, and recommendations subject to the public interest test.
- 42 The information under *Financial considerations* and *Clearances* is not exempt under s35 and is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

Page 40

- 43 This is an email from a Tasmania Police officer to a doctor at the THS. Both are officers of public authorities, and the email consists of consultation

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<sup>9</sup> The Procedure for Suspension of State Service Employees With or Without Pay

between these officers regarding whether further action should be taken in relation to the handling of Mr Griffin's matter. There is some factual information provided, but I am of the view it is not so severable from the exempt information to be considered 'purely factual'.

- 44 I am satisfied this email is prime facie exempt under s35, subject to consideration of the public interest test.

Pages 41-42

- 45 This is a chain consisting of three emails between officers of a public authority.
- 46 The first one is from a nurse to the Nurse Unit Manager. The subject line is 'incident report' and the email proper contains details of an alleged incident at the LGH. I am satisfied it contains opinion and advice about this incident. There are elements that are likely to be factual, but I am of the view they are not so severable to be considered 'purely factual'. It states that it has been provided at the request of the Nurse Unit Manager and appears to form part of an internal deliberative process around the action to be taken in response to the incident.
- 47 I am of the view the first email is prime facie exempt under s35, subject to consideration of the public interest test.
- 48 The second email is a response to the first by the Nurse Unit Manager. It is a statement to the effect that the reporting nurse can access the Employee Assistance Program if she wanted to talk to someone about the stress caused to her by the incident. This is not opinion, advice, or recommendation, nor was it given or made in the course of the THS deliberative process. The email is therefore not exempt and is to be released to Ms Bianchi, subject to any other exemption I may find applicable.
- 49 The final email is from the same Nurse Unit Manager to the Nursing Director and Human Resources (HR) regarding the handling of the incident report. It consists of information prepared by officers of a public authority, and it contains opinion and advice, but also some factual information. The factual information, however, is not so severable from the exempt information to be considered 'purely factual'.
- 50 I am satisfied the third email is prime facie exempt under s35 subject to a consideration of the public interest test.

Pages 43-44

- 51 This is an email chain consisting of two emails. The first email is the one referred to above under pages 41-42. For the same reasons applied there, it is prime facie exempt under s35, subject to a consideration of the public interest test.
- 52 The last email in this chain is from a HR consultant to a doctor at THS consisting of two paragraphs. The first indicates that the nurse's allegation is attached to the email.

- 53 The second paragraph contains a recommendation regarding the allegation. This meets the requirements of s35(1)(a) and is prime facie exempt, subject to a consideration of the public interest test.

Page 45

- 54 This is an email from HR to Mr Griffin. It is a covering email to attached correspondence which outlines the definitive position taken by the Department to suspend him from duties pending an investigation.
- 55 Not only does this not satisfy any of the elements of s35(1)(a) or (b), it is not part of a deliberative process, but rather conveys a concluded decision. In those circumstances, it is not exempt under s35 and is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

Pages 46-48

- 56 This is an email chain consisting of five emails.
- 57 The first is the same one set out above from page 40. It is prime facie exempt under s35 pending consideration of the public interest test.
- 58 The second email merely forwards that email from the doctor to HR. It is clearly not exempt and is to be released to Ms Bianchi, subject to any other applicable exemption I may find.
- 59 The third, fourth and fifth emails are between three HR staff at the Department discussing the management of Mr Griffin's matter and the progress of disciplinary proceedings. They contain recommendations and opinion, and are prime facie exempt under s35 pending consideration of the public interest test.

Pages 49-50

- 60 This is a two page email from HR to Mr Griffin. It merely provides information to Mr Griffin about the Employee Assistance Program and attaches a relevant flyer. It is advisory rather than deliberative. It is therefore not exempt under s35 and is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

Page 51

- 61 This is an email from Mr Griffin to HR tendering his resignation. It does not meet the requirements of (a) or (b) under s35 and it certainly was not part of any deliberative processes of the THS. It is therefore not exempt under s35 and is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

Page 52

- 62 This is an email between THS staff advising that Mr Griffin is no longer registered. It quite obviously fails to meet the requirements of s35 and is not

exempt. It is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

Pages 53-56

- 63 This is an email chain consisting of five emails.
- 64 The first email is the one in which Mr Griffin tendered his resignation as referred to above. The remaining emails pass back and forth between Mr Griffin and HR confirming details such as dates, addresses, and the return of hospital property such as access and identification cards etc.
- 65 The information on these pages does not meet the requirements of s35 and is not exempt. It is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

Pages 57-61

- 66 This consists of two documents, a 'THS Employee Exit Form' and a copy of the email from Mr Griffin tendering his resignation. The two forms do not contain opinion, advice, or a recommendation, nor are they part of any consultation between officers of public authorities in relation to any deliberative process.
- 67 It seems unlikely that THS has actually considered this information against the requirements of the Act. It is not exempt under s35 and it is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

Pages 62-63

- 68 This is an internal Minute to the Secretary, very similar to that on pages 24-26.
- 69 For the same reasons as above, the information under the headings *Purpose*, *Summary of Key Issues*, *Attachments* and *Recommendation(s)* is prime facie exempt under s35 subject to a consideration of the public interest test.
- 70 The information under the heading *Clearances*, and all the remaining information is not exempt and is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

Pages 64-65

- 71 This is an email chain of two emails. The first is from a Nurse Unit Manager at the LGH to what appears to be a range of other nurses, outlining that a former colleague had passed away. The email then offers contact details for support services should any staff be affected. It finishes with a reminder about patient confidentiality.
- 72 This email does not meet the requirements of s35(1).
- 73 The second email is merely a forwarding of the first email with the words 'FYI' as the only content.
- 74 Neither of these emails are exempt under s35 and are to be released to Ms Bianchi, subject to any other exemption I may find applicable.

**Pages 66-67**

- 75 This is an email chain consisting of two emails.
- 76 The first email is from the Australian Nursing and Midwifery Federation (ANMF), which is not a public authority and the author, at least under their ANMF email address, is therefore not an officer of a public authority. It therefore does not meet the requirements of paragraphs (a), (b) and (c) of s35(1). The email is plainly not exempt under s35 and it is to be released to Ms Bianchi, subject to any other exemption I may find applicable.
- 77 The second email is from the THS in reply to the first email from the ANMF. As this second email was sent in reply to a meeting proposal originating from the ANMF, an organisation (not a public authority) external to the THS, I do not consider that it falls within the s35(1) exemption, not being opinion, advice or recommendation relating to the deliberative processes of the THS. Having been sent externally to the ANMF, it represents the communication of a definitive view of the THS, not its internal deliberative processes.
- 78 This information is not exempt under s35 and is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

**Pages 68-70**

- 79 This is an email chain consisting of six emails.
- 80 The first email is the same email discussed above on pages 41-42 with the subject line ‘incident report’. For the same reasons as set out above, it is prime facie exempt under s35 subject to a consideration of the public interest test.
- 81 The second email was also dealt with above at pages 41-42 and is to be released to Ms Bianchi, subject to any other exemption I may find applicable.
- 82 The third email was also dealt with above at pages 41-42 and for the same reasons set out above, it is prime facie exempt under s35 subject to a consideration of the public interest test.
- 83 The fourth email is from HR to the Nurse Unit Manager of Ward 4K at the LGH discussing the handling of the allegation against Mr Griffin and the consultation with Tasmania Police. For the same reasons as the previous emails, it is prime facie exempt under s35 subject to a consideration of the public interest test.
- 84 The fifth and sixth emails acknowledge the others and forward them to management. They do not contain significant additional information and do not meet the requirements of s35(1). These emails are to be released to Ms Bianchi, subject to any other exemption I may find applicable.

**Page 71**

- 85 This is a letter generated by the Executive Director and sent externally to the ANMF. It is unclear why the Department has claimed the exemption for internal deliberative to a finalised letter which has gone to an external

organisation. It is clearly not exempt under s35 and it is to be released to Mr Bianchi, subject to any other applicable exemption I may find.

Pages 72-74

- 86 This is an email chain consisting of four emails.
- 87 The first email is from a senior manager to other THS staff regarding a meeting to be held with Ward 4K staff discussing options for communications and training strategies. The senior manager is clearly articulating opinion, advice, and recommendation. There are some facts included, but I am satisfied they are not so severable to be considered purely factual.
- 88 I determine the first email is prime facie exempt under s35 subject to a consideration of the public interest test.
- 89 This also applies to the second and third emails. The second is a follow up to the first sent by the senior manager and the third is a response from another senior manager.
- 90 For the same reasons set out above in relation to the first email, the second and third emails are also prime facie exempt under s35 subject to a consideration of the public interest test.
- 91 The fourth email merely forwards others with no substance in the body of the email. While this will be of little value to Ms Bianchi, it does not qualify for exemption under s35 and is to be released to her.

Pages 75-77

- 92 This is a three page table that records the minutes of a meeting held between THS and ANMF staff. The table has four primary columns:
  - Topic (although not written in the table);
  - Discussion;
  - Action; and
  - Action officer.
- 93 The 'Discussion' column clearly outlines a range of opinions and other views held by other staff as reported by those in attendance as well as their own views.
- 94 While the meeting was between internal and external stakeholders, it is clear that the nature of the information recorded is deliberative, and intended to be used by THS in its ongoing management of the matter. I am satisfied that the information in the column 'Discussion' is prime facie exempt under s35 subject to a consideration of the public interest test.
- 95 The remaining columns and sections do not meet the requirements for exemption under s35(1). This information is not exempt under s35 and is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

Pages 78-80

- 96 This is an email chain consisting of four emails passing between a nurse from Ward 4K and the Nursing Director. They address concerns that staff complaints remained unanswered.
- 97 While I am satisfied that all four emails contain opinion and advice and have been prepared by officers of a public authority, they do not appear to be part of a deliberative process undertaken by the Department.
- 98 In the absence of further explanation from the Department as to why the document should be exempt under s35, I am not satisfied that it has discharged its onus under s47(4) of the Act to show why this information should not be released. Accordingly, it is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

Page 8!

- 99 This is an email from an external consultant to several THS staff. Quite clearly it is not exempt as the author of the information is not an officer of a public authority, and it is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

Pages 82-83

- 100 This is the same email as page 81 with a response saying thank you and then a forward of that chain with no written material. This too is not exempt under s35 and is to be released to Ms Bianchi.

Pages 84-85

- 101 This is an email chain consisting of three emails.
- 102 The first is yet again the same email as set out on page 81 and it is not exempt.
- 103 The remaining two emails relate to a deliberative process in that they discuss the timing of when and how to get the consultant from the first email in to conduct training. Even if s35 applied to these emails, the information is so benign that it is difficult to see why it would be contrary to the public interest to release these documents.
- 104 As I do not consider that the Department has discharged its onus to show that this information should not be released, I determine pages 84-85 are not exempt under s35 and are to be released to Ms Bianchi, subject to any other exemption I may find applicable.

Pages 86-87

- 105 This is a duplication of the emails on pages 82-83. They are not exempt and are to be released to Ms Bianchi.

Page 9!

- 106 This is an email chain consisting of two emails.

I07 The first is from an external consultant setting out the training program to be provided, its costs and potential dates for it to be delivered. On the plain words of s35 it is clearly not exempt material and no further explanation has been provided by the Department as to why it should not be released. The second email internally forwards the first seeking support to proceed.

I08 The Department has again not discharged its onus to justify the exemption of this information under s35 and is to be released to Ms Bianchi.

Pages 93-94

I09 This is largely a repeat of the emails on page 91 with the addition of a comment expressing support for the training. For the reasons referred to above, this is not exempt under s35 and is to be released to Ms Bianchi.

Page 95

I10 This is called a file note on the schedule of documents but appears to be a plain typed invitation. It sets out the training to be provided and invites people to attend. It is not opinion, advice, or recommendation, nor was it prepared in the course of any deliberative process. There is nothing on this page that would meet any of the requirements for exemption under s35 and the Department has offered no explanation as to why it has relied on it. The document is to be released to Ms Bianchi.

Pages 96-97

I11 This is an email chain consisting of four emails. The first is from an external email address but appears to be from a THS staff member providing feedback on the training provided. It does not appear to be for the purpose of any deliberative process of the Department but an unsolicited comment on the training.

I12 The Department has provided no additional explanation to justify the exemption of this email, so I am not satisfied that it has discharged its onus to show why it should not be released. Accordingly, it should be released to Ms Bianchi, subject to any other exemption I may find applicable.

I13 The second email is a draft response to the first email that has been edited directly by the respondent of the third email. The third email describes the intent of the changes made in the second email.

I14 The second and third emails meet the requirements of s35(1)(a) and are clearly related to the deliberative processes of the THS, as they are comments and edits in the process of finalising a response to the first email. I am satisfied the second and third emails are prime facie exempt under s35 subject to consideration of the public interest test.

I15 The fourth email is a thank you message with no other content, it is not exempt under s35 and is to be released to Ms Bianchi.

I16 This is an email chain consisting of an original email from a photocopier that has scanned the attachment. The second email is a statement of attendance at the training. The remaining pages from 102-104 are the attendance ‘sign-in’ sheets relating to the training and a covering email listing numbers of attendees.

I17 This appears to be purely factual information and does not meet any of the requirements of s35. It is to be released to Ms Bianchi, subject to any other exemption I may find applicable.

*Section 33 – Public interest test*

I18 I now turn to the assessment of whether the disclosure of the documents I have identified above as being prime facie exempt under s35 should in fact be released, following the application of the public interest.

I19 As indicated earlier, a Commission of Inquiry has been called by the Tasmanian Government due to its assessment that public concern around the potential mismanagement of matters regarding Mr Griffin was so serious as to warrant the highest level of inquiry. Tasmania Police also undertook its own review and issued a public Outcomes Report on 26 February 2021, committing to being as open and transparent as possible regarding the management of concerns raised about Mr Griffin.

I20 One of the objects of the Act is to improve democratic government in Tasmania by, amongst other things, increasing the accountability of the executive to the people of Tasmania. It is clear that there is a high level of public concern about this issue and whether the Department acted appropriately in addressing it. I find that the following public interest factors in Schedule 1 are of particular weight in the circumstances of this matter:

- (a) The general public need for government information to be accessible;
- (c) That the disclosure would inform a person about the reasons for a decision;
- (d) That the disclosure would provide contextual information to aid in the understanding of government decisions;
- (f) That the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation; and
- (g) That the disclosure would enhance scrutiny of government administrative processes.

I21 Despite the strong public interest considerations favouring release, there are also legitimate factors in favour of exemption. Allegations made against Mr Griffin were never formally proven and were denied by him, and there are valid procedural fairness concerns in releasing documents regarding disputed

allegations and unfinalised disciplinary and criminal proceedings. This has the potential to hinder equity and the fair treatment of persons in their dealings with government (Schedule 1, 1(h)) and to harm the administration of justice, including affording procedural fairness and the enforcement of the law (j). It would also harm the interests of an individual, Mr Griffin, for this information to be released (m).

- I22 The weight of these factors is reduced, however, due to the extensive publicity already given to the allegations against Mr Griffin and his death, which means that there are no ongoing disciplinary or criminal proceedings to be prejudiced by any disclosure. The harm to Mr Griffin's reputation or interests by any disclosure considered in this application would accordingly be low, as the damage has already been done.
- I23 There is also a significant factor in relation to the substantial adverse effect on the management by a public authority of the public authority's staff (p). This relates both to the uncompleted disciplinary proceedings against Mr Griffin and the release of potentially exempt information relating to other Departmental staff who raised concerns directly or through the ANMF. I also recognise that s35 intends for internal deliberative processes to be kept internal, when appropriate, as they do not represent a final decision by a public authority but the working processes to come to that decision.
- I24 This was a difficult balance to strike. I have found that s35 does not exempt the information in the majority of instances claimed by the Department, but the information I have found to be prime facie exempt is genuinely internal deliberative information.
- I25 Due to the unusual nature of this high profile matter and the significant scrutiny being justifiably applied to the Departmental response to concerns about Mr Griffin, I consider that the public interest in disclosure outweighs the factors against in some instances. I accordingly determine that the following information is not exempt under s35 and should be released to Ms Bianchi, subject to any other applicable exemption I may find:
- Mr Griffin's statement at page 6;
  - the Minute to the Secretary at pages 24-25;
  - the allegations and response at pages 41-42;
  - the Minute to the Secretary at pages 62-63;
  - the further allegation and response at pages 68-70; and
  - the ANMF meeting notes at pages 75-77.
- I26 I do not consider that the public interest favours the release of the documents at page 40, pages 46-48, pages 72-74 and pages 96-97. I determine that this is exempt information and it would be contrary to the public interest to release it.

### **Section 36 – Personal information**

127 For information to be exempt under this section I must be satisfied that its release would reveal the identity of a person other than Ms Bianchi, or that the information would lead to that person's identity being reasonably ascertainable.

128 I will not address each individual application of s36 by the THS; these can be largely broken down into five categories, which I will deal with as classes of information, and relate to the personal information of:

- Mr Griffin, as the primary subject of investigation;
- THS staff raising concerns about Mr Griffin;
- THS staff in their usual professional capacity;
- External professional parties – consultants and union representatives; and
- Patients or members of the public.

129 There is also personal information in documents which the Department has not sought to exempt under s36, rather applying other exemptions under ss35 or 39. I consider that my findings regarding the following categories should be applied to all information to be released, regardless of whether the Department initially sought to rely on s36, to ensure any redaction is consistent.

#### *Mr Griffin*

130 A Commission of Inquiry has been called specifically naming Mr Griffin and he has also been named in the media, by Tasmania Police and in parliament on a number of occasions. A Record of Investigation of Death (Without Inquest) was published by the Coroner on 18 May 2020 providing significant detail of the allegations against him, the child sexual abuse charges laid against him by Tasmania Police in September and October 2019 and a finding that he died by suicide motivated by these charges on 18 October 2019. As the Department correctly notes in its decision, however, this does not preclude an assessment as to whether the information should be released, as the definition of personal information contained in s3 of the Act refers to information about a person who is alive or who has not been dead for 25 years.

131 Because of the significant exposure to date of Mr Griffin's name and employment details, I am of the view that the public interest justification for not releasing documents identifying Mr Griffin is limited. The primary public interest factor against the disclosure of personal information is usually that it will harm the interests of the person to whom it relates: item (m) in Schedule 1. In this case, however, the wide publication to date of similar allegations and material means that further harm is unlikely to occur.

132 There is also a legitimate concern as to whether the release of Mr Griffin's personal information would harm the administration of justice, particularly regarding procedural fairness (j) or have a substantial adverse effect on the

management or performance assessment by a public authority of the public authority's staff (p) as a result of the disputed allegations and unfinished disciplinary proceedings against Mr Griffin. I again consider that the unusual circumstances of this matter mean that these factors are of lesser weight than might ordinarily be the case. That allegations were made against Mr Griffin is broadly known and there may be a greater adverse effect on staff confidence in performance management processes if information regarding how concerns against Mr Griffin were managed is not released, given some perceptions of mismanagement.

I33 In all the circumstances, I consider that factors such as (a) the need for government information to be accessible, (b) the contribution to debate on a matter of public interest, and (g) the enhancement of scrutiny of government administrative processes outweigh the factors against release.

I34 I do not consider that the publication of Mr Griffin's former address, telephone number or his date of birth is appropriate, but determine that his name and other personal information may be disclosed unredacted in any documents which are otherwise to be released to Ms Bianchi.

#### *THS Staff raising concerns about Mr Griffin*

I35 Ms Bianchi has refined the scope of her request and does not wish to obtain the names or other personal information of THS staff raising concerns about Mr Griffin, and it is therefore not necessary for me to make a determination about whether this information should be exempt under s36. Accordingly, the names, email addresses and any other identifying information of THS staff making allegations against Mr Griffin at pages 10-11 and 42 of the documents (and any other references in the information to be disclosed) are to be redacted by agreement between the parties.

#### *Other THS Staff*

I36 In the past it has been a regular and consistent practice of public authorities to exempt the names, titles, and contact details of public servants. There was often very little actual consideration given to the purpose of the Act and why this information should be exempt.

I37 The Australian Information Commission has held that:

*It is not unreasonable to release personal information such as names, work email addresses, positions or titles, work contact details and decisions or opinions because this information appears in documents because of the person's usual duties or responsibilities.*

*It would be unreasonable to release personal details such as dates and places of birth and personal mobile telephone numbers.<sup>10</sup>*

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<sup>10</sup> Hunt and Australian Federal Police [2013] AICmr 66 (23 August 2013), at [72]-[74].

I38 The Commissioner has also held that agencies should not start from the position that an officer's classification will determine whether it would be unreasonable to disclose their name.<sup>11</sup> This includes in signatures.<sup>12</sup>

I39 It has also been the long standing practice of this office not to support the arbitrary exemption of staff details of this nature unless there is some particular or extenuating circumstance.

I40 Given the THS has not provided any specific reasons for its decision not to release any personal information of any staff member, I do not consider that the Department has discharged its onus to show why this information should not be released.

I41 I determine that THS staff work contact details, names, signatures, and titles are not exempt under s36 and are to be released to Ms Bianchi. This does not extend to dates of birth, personal email addresses, or home addresses.

#### *External Parties*

I42 The information contains the personal information of external parties, primarily consultants and union representatives, including their names, position titles, professional contact details, and workplace addresses.

I43 While this does constitute personal information under s36, no reason has been advanced by the Department as to why it is in the public interest to exempt this information. The external parties are acting in their professional capacity to offer training and represent members, and it is not apparent why any disclosure would be of concern to them or contrary to the public interest. My office contacted the ANMF Branch Secretary who authored the union correspondence relevant to Ms Bianchi's request, and she raised no objection to the release of information containing her personal information. I do not consider that the Department has discharged its onus to show why this information should not be released.

I44 I determine that the personal information related to external parties is not exempt under s36 and is to be released to Ms Bianchi.

#### *Patients and Members of the Public*

I45 The names of patients and members of the public identified in various documents is clearly personal information, the release of which may be of concern to those individuals. I do not consider that there is any public interest justification for releasing this information, often relating as it does to vulnerable people, to balance against the significant harm to their interests which might result from its release. Ms Bianchi has confirmed that it was not intended that her request extend to this information. Accordingly, the personal information of patients or members of the public is to be redacted in any information otherwise to be released to Ms Bianchi.

<sup>11</sup> Maurice Blackburn Lawyers and Department of Immigration and Border Protection [2015] AICmr 85 (18 December 2015).

<sup>12</sup> J'N' and Commonwealth Ombudsman [2016] AICmr 62 (19 September 2016).

### **Section 39 – Information obtained in confidence**

146 For information to be exempt under this section, I must be satisfied that it is information that has been communicated in confidence to the Department and that –

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

147 Information on pages 13-23, 40, 45, 46-48, 49-50, 68-70, 72-74, 92, 98-99 and 100 is claimed to be exempt on this basis.

*Pages 13-23*

148 Despite the Department giving a comprehensive interpretation of what s39 means, it would not appear to have any application to the information at issue. These pages are a mandatory notification form that belongs to AHPRA. It has been filled out by a doctor at the THS and submitted to AHPRA.

149 It has not, therefore, been communicated to a public authority, rather it was communicated from a public authority.<sup>13</sup> Section 39 protects information which is received by a public authority in confidence and not that which is generated by it. Additionally, it is a mandatory notification made pursuant to a legal obligation to report such matters to AHPRA. That being the case, its disclosure would not be reasonably likely to impair the Department's ability to obtain similar information in the future.

150 I determine pages 13-23 are not exempt under s39 and are to be released to Ms Bianchi, subject to any other applicable exemption detailed above.

*Page 40*

151 This is an email between two public authorities; the Department and Tasmania Police. It has been discussed above in the context of s35, which is clearly relevant, but it is unclear why the Department also seeks to exempt it pursuant to s39. Section 39 relates to information received by public authorities from external sources and is not a general exemption for all information of a confidential nature. As no additional information has been provided by the Department to support the exemption, I do not consider that it has discharged its onus to show why this information should not be released or why s39 is relevant. In any event, I have already found the email to be exempt under s35, so it is not to be released to Ms Bianchi.

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<sup>13</sup> It has already been noted in paragraphs 34 to 37 above, that AHPRA is not a public authority for the purposes of the Act.

*Page 45*

152 This, again, is an internal email being sent to an external party. It has not been communicated in confidence to a public authority. It simply does not meet the requirements of s39(1), it is not exempt and is to be released to Ms Bianchi.

*Pages 46-48*

153 This appears to be the email mentioned above regarding page 40. My decision above on that email stands.

*Pages 49-50*

154 This is again internal correspondence and for the same reasons referred to above in relation to the information on page 45, it is not exempt under s39 and is to be released to Ms Bianchi.

*Pages 68-70*

155 This is an internal email chain and I can see no basis upon which it could be exempt under s39. It appears the Department has again incorrectly relied on s39 as a general protection for confidential information rather than properly confining itself to the wording of the Act. The information is not exempt under s39 and is to be released to Ms Bianchi.

*Pages 72-74*

156 These are internal emails and, again, I am unsure why exemption has been claimed under s39. In the absence of further reasons for decision by the Department, I do not consider that the onus to show why this information should not be released has been discharged. Section 39 does not apply, but again, I have already determined that pages 72-74 contain information that is exempt under s35 and they are not to be released to Ms Bianchi.

*Page 92*

157 This is a brief overview of details regarding a training program to be provided to THS staff from external consultants engaged by the THS. There is no marking or any obvious indication in the document to suggest that there is anything about it which is sensitive or confidential.

158 With no reasons for the claim of exemption provided by the Department, and given the comparatively benign nature of the information, there is nothing to suggest that this information was communicated in confidence.

159 Even were I of the view that it was, the requirement of s39(1)(b) that its release would be likely to impair the ability of the Department to obtain similar information in the future is not met. That a professional training consultancy would refuse to provide services to the Department because it released a program outline does not seem likely, and the Department has provided nothing to indicate why this would be the case.

160 I determine the information on page 92 is not exempt under s39 and is to be released to Ms Bianchi.

*Pages 98-99*

161 This is a two page letter from a lawyer, submitted to the Minister for Health on behalf of an unnamed client who is employed at the Department. It raises concerns about an alleged failure by the Department to support potential victims of Mr Griffin and staff upon whom Mr Griffin's conduct had had an impact, and seeks to have those concerns investigated and addressed.

162 The Department claimed that this information was communicated in confidence and its release would be likely to impair its ability to obtain similar information in future, and therefore exempt. As part of my external review process, my office contacted the author of the letter to gain his view. He would not object to the release of the correspondence and its disclosure would not impair his willingness to make representations on behalf of clients in future, or that this would be contrary to the public interest. Of importance was that his client's identity remains confidential. This was satisfied as the client had not been named in the letter, and by virtue of that, disclosure would not compromise this confidentiality.

163 The lawyer's support for the release of the information, confirms me in the view that the Department has not discharged its onus to show that this information is exempt under s39; it provided no specific reasons as to why the release of the information would impair its ability to obtain similar information in the future, or why it was contrary to the public interest to release the correspondence. It is therefore not exempt under s39 and is to be released to Ms Bianchi.

*Page 100*

164 This is a reply to the lawyer from the Minister for Health. It is therefore, not information communicated to a public authority or Minister, in confidence or otherwise, and it is not exempt pursuant to s39. In any event, as I have determined that the lawyer's letter does not contain information communicated in confidence, the release of the response would not divulge anything confidential. The Department has not provided any additional reasons to justify the application of the s39 exemption to the subject information, and no other exemption would seem to apply to it either. Accordingly, it is not exempt and is to be released to Ms Bianchi.

**Additional documents**

165 In my review of the Department's decision, it appeared that a document had been omitted, which was explicitly referred to in the information found to be responsive to the application. My office directed the Department to provide this document, an email from the ANMF Branch Secretary to the Department, to which the letter at page 71 responds and in relation to which the meeting minuted at pages 75-77 was called. On 24 February 2021, Mr Mick Casey, a

Departmental officer, advised that ‘all information relating to this matter had been collated and provided’ and that ‘the email you refer [to] is at page 66 of the information provided [on] 23 July 2020.’

166 This did not appear correct and a further document, another letter from the ANMF Branch Secretary, was identified as also being potentially omitted. This letter was referred to in correspondence at page 89, which commences ‘I write in response to your correspondence of 12 December 2019’, but was not identified by the Department as responsive to the request. My office again requested an explanation and provision of these documents from the Department on 24 February 2021 but received no response.

167 The failure to produce this information or properly respond to my office’s requests for an explanation as to why the information is not in the possession of the Department is inexplicable and disappointing. I am concerned with the sufficiency of the search conducted by the Department for all information responsive to Ms Bianchi’s request due to failure to properly respond to requests regarding these documents.

### **Preliminary Conclusion**

168 For the reasons set out above, I determine the following:

- Exemptions claimed pursuant to s35 are varied;
- Exemptions claimed pursuant to s36 are varied; and
- Exemptions claimed pursuant to s39 are not made out and the information to which the Department sought to apply that exemption is to be released to Ms Bianchi.

### **Submissions to the Preliminary Conclusion**

169 On 14 May 2021 the Secretary of the Department, Kathrine Morgan-Wicks, responded to my preliminary decision.

#### *COVID-19 delays*

170 The Department repeated its previous indication regarding the initial delay which caused Ms Bianchi to seek an external review under s45(1)(f) of the Act, that this was caused by the diversion of a significant proportion of the Department’s resources to assist with the Tasmanian Government’s response to COVID-19. It did acknowledge, however, that the Department ‘could have communicated with Ms Bianchi more effectively regarding the progress of her application.’

#### *Additional documents*

171 In relation to the additional documents referred to at paragraphs 165-167, the Department stated that it ‘has made additional further investigations and, as a result, has located additional documents that may fall within scope of Ms Bianchi’s request.’ Ms Morgan-Wicks stated:

*I acknowledge that the Agency's processes for locating documentation have not been satisfactory in this case and I have instructed that further information and training be conducted to improve our response in this regard, including training for management positions across our health services on record keeping and requirements for conduct records in our new HRIS [Human Resources Information System] implementation.*

- 172 At the time of writing this covering letter, the Secretary noted that the extra information located was in the process of being assessed under the Act and the expectation was that this would take approximately 10 working days. The Department's decision was proposed to be provided directly to Ms Bianchi, with a copy provided to my office. My office had previously been advised by Ms Megan Hutton of the Department that approximately 50 pages of additional information responsive to Ms Bianchi's original request had been located, including the two missing letters.
- 173 My office was advised on 4 November 2021, following enquiries from my Principal Officer, that a decision had been made on 30 June 2021 on the additional information and provided to Ms Bianchi. A further external review request has not been received from Ms Bianchi in relation to this decision, so I will not further discuss the additional information located by the Department.

*Revised reasons for decision*

- 174 Ms Morgan-Wicks also provided a document entitled *Revised Reasons for Decision*. She advised that Department has:

*taken the opportunity to re-examine and assess the documents included in response to Ms Bianchi's original application and referred to in your draft review decision. This process has produced different findings to the findings set out in the RTI Officer's original decision of 20 July 2020...*

- 175 The revised decision made the following general submissions in response to my preliminary decision.
- 176 The Department accepted my proposed determinations in relation to the exemption under s36 of identifying information of THS staff members who had made allegations against Mr Griffin, patients and members of the public. It also accepted the proposed release of Mr Griffin's name and personal information, other than his former address, telephone number or date of birth, in unredacted form in any documentation released to Ms Bianchi.
- 177 The Department now seeks to exempt staff details, including names, position titles, work emails, work phone numbers and other information that could identify individual staff members in the documentation under s30(1)(d). Exemption under this section requires that the disclosure would, or would be reasonably likely to, endanger the life or physical, emotional or psychological

safety of a person, or increase the likelihood of harassment or discrimination of a person.

178 The Department asserts that:

*THS staff members who worked alongside Mr Griffin, including those named in the documentation, have been significantly affected by the allegations made about Mr Griffin's behaviour and his death and the subsequent publicity that has been applied to Mr Griffin and to his former workplace.*

*Matters associated with Mr Griffin have, reportedly, occasioned significant workplace stress and anxiety. Staff have reported feeling guilt associated with not having identified Mr Griffin's alleged offending behaviour and this has been compounded and, conceivably, complicated by the grief that some staff members have felt following the death of their long-term colleague.*

*Media reporting associated with Mr Griffin has referred to his alleged offending as widespread, and a major focus of much of the reporting has been on who knew what and when.<sup>14</sup> Launceston is a small community and staff have expressed concern and distress about being publicly identified as a former colleague of Mr Griffin in light of these media reports.*

*While Ms Bianchi's podcast "The Nurse" uses pseudonyms there are some staff who feel they have been both identified and defamed in relation to their role in the handling of Mr Griffin's matter. Other staff have reported being approached in public by people wishing to discuss Mr Griffin. Such staff report feeling distressed by this behaviour.*

*In my view, releasing the details of staff who worked closely with or had managerial responsibility for Mr Griffin would both endanger the emotional and psychological safety of the people named in the documents and increase the likelihood of harassment.*

179 The revised decision also made specific comment on particular documents, to which I will refer in the further analysis section below.

## **Further Analysis**

### *Personal information of staff - ss30 and 36*

180 As set out above, the Department made submissions as to the application of s30(1)(d) to all staff names, position titles, work emails, work phone numbers and other information that could identify individual staff members in the documentation. Its submissions were somewhat inconsistent, however, as they referred to the likely impact on 'staff who worked closely with or had

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<sup>14</sup> See, for example, <https://www.abc.net.au/news/2020-12-08/nurse-james-geoffrey-griffin-what-we-know/12953076> (accessed 30 May 2021).

managerial responsibility for Mr Griffin' and did not explain why this impact would also occur to other staff named in the documentation.

- 181 I do not accept that s30 is applicable in relation to staff who had no close connection to Mr Griffin, primarily HR personnel and senior management. The Department has not discharged its onus under s47(4) to show that the disclosure of the names of all THS staff would, or would be reasonably likely to, endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person.
- 182 Public servants have a public role and duties, which brings with it the potential to be publicly identified. Service to the public is not intended to be shrouded in secrecy and publication of documents showing them performing their regular duties should not be reasonably likely to endanger their safety or invite harassment or discrimination, even in a high profile matter. There is a fine line between protecting public servants from distressingly intense scrutiny and limiting their accountability to the people of Tasmania which comes from transparency of administrative action. To exempt the names and work contact details of all THS staff would not be appropriate and, in keeping with the settled Australian practice outlined in paragraphs 136-141 above<sup>15</sup>, the names of THS staff not closely connected to Mr Griffin are to be unredacted in documents released to Ms Bianchi.
- 183 I accept that staff who worked closely with Mr Griffin are subject to different considerations. It has already been agreed that the names and work contact details of staff who raised concerns about Mr Griffin will be redacted under s36 and I accept that the potential to harm the interests of other Ward 4K staff is real. While I am not completely satisfied that the Department has provided sufficient explanation as to why the release of *this particular information* would, or would be reasonably likely to, endanger the emotional and psychological safety or increase the likelihood of harassment of such staff under s30, this is largely moot as I consider this information exempt under s36. Other than one manager, references to other staff who worked closely with Mr Griffin are very minimal in the information proposed to be released. However, I am satisfied that the release of the names and work contact details of Ward 4K staff would be contrary to the public interest, as these would add little to the ability to understand and scrutinise the documents and administrative action but could cause detriment to the individuals.
- 184 I do not consider that position titles are exempt or should be redacted, however, as these aid comprehension and understanding without specifically identifying individuals. I accept that in some instances this could lead persons with knowledge of Ward 4K to be able to ascertain the identity of some staff members through their position title, but consider that the release of this

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<sup>15</sup> See also my past decisions of Bryan Green MP and Department of Treasury and Finance, and Rebecca White MP and the Minister for Resources, Minister for Building and Construction, Guy Barnett MP at <https://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions>.

information is not contrary to the public interest as they are undertaking the duties they are employed to do and are not being publicly named.

### Section 35

185 The Department revisited its decision and accepted my proposed orders in relation to the majority of the documents to which it had originally applied exemptions under s35 and s39. I thank the Department for undertaking a genuine review of exemptions applied and revising its position in many instances due to significant errors in its original decision.

186 I will only discuss the documents to which the Department did not agree with my proposed determinations.

187 The Department strongly objected to the release of the following documents but noted and accepted that insufficient information was provided in its original decision to properly show why the Department did not consider it was appropriate to release these documents:

- Mr Griffin's response to a SLRS complaint against him at page 6;
- The SLRS complaint at pages 10-11;
- The reporting and discussion of a further allegation at pages 41-44 and 68-69;
- The 'Action' and 'Discussion' columns of the minutes of an ANMF and THS meeting at pages 75-77; and
- Emails regarding concerns from THS staff about 'unanswered complaints' at pages 78-80.

188 It provided a detailed rationale for exemption in relation to Mr Griffin's statement at page 6, which it then said applied for all of these documents. The Department stated that:

*As was noted in Mr Smith's decision, there is a difference between the public interest in disclosure and matters that are of interest to members of the public generally. The fact that a portion of the public is interested in a certain activity will not necessarily mean that the disclosure of information relating to the activity will be in the public interest. Rather, the public interest test requires a balancing of the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper workings of governments and its agencies.*

*While I note your view that the weight of factors against release is reduced due to the extensive publicity that has been given to Mr Griffin and to the allegations made against him, I do not agree with your conclusions.*

*This document relates to internal deliberative processes related to Mr Griffin's employment with the Tasmanian Health Service. While this*

*may be of interest to listeners of Ms Bianchi's podcast "The Nurse" and to others with an association or interest in Ward 4K at the Launceston General Hospital, it is not information that the general public at large needs to know nor is it information that will, in and of itself, contribute to debate or inform any person about the reasons for government decisions or processes.*

*It is true that Mr Griffin is deceased and so cannot defend himself in relation to the claims that have been made against him. I do not agree with your view that this diminishes the weight that should be given to part (j) of Schedule 1, or that the risk of harm to Mr Griffin's reputation is of any relevance to this factor. Conversely, there is significant risk of harm to the interests of Mr Griffin's family, friends, and other associates by virtue of the increased publicity that would be brought to his matter should the document be released.*

*The Tasmanian Health Service staff who worked alongside Mr Griffin have been significantly and negatively affected by the publicity that has been applied to Mr Griffin's matter. While the views of Mr Griffin's former partners, children, friends, and other associates are not known to me it is feasible that further publicity with Mr Griffin's matter will harm or further harm their interests.*

*This document relates to normal management of staff. It records internal and confidential matters concerning Mr Griffin's employment. Release of the document is likely to cause distress amongst other employees and affect their management and may discourage staff from reporting or recording incidents that occur in the course of their employment due to concern about their disclosure via future Right to Information processes. Specifically, the release may harm the interests of individuals within the meaning of factor (m), may prejudice the ability to obtain similar information into the future within the meaning of factor (n), prejudice the effectiveness of assessments conducted by or for the Agency into the future within the meaning of factor (o) and may have an adverse impact on the management or performance assessment by the Agency of the Agency's staff within the meaning of factor (p). Factor (q) may also be relevant.*

*In my view, the weight that ought to be given to these matters outweighs any other factors that might be considered to apply.*

- 189 I do not agree with the Department's weighting of public interest factors and consider that its comments that this 'is not information that the general public at large needs to know' are at odds with the calling of a Commission of Inquiry into the Tasmanian Government's responses to allegations of child sexual abuse in institutional contexts specifically naming Mr Griffin. I consider that the release of such information will contribute to debate on a matter of public interest, and enhance scrutiny of government processes, as the adequacy of the

Department's response to concerns raised about Mr Griffin is difficult for the public to assess without information about the substance of those concerns.

- 190 While the Department's consideration of the interests of its staff and Mr Griffin's associates is understandable, I am concerned that it does not appear to have considered the interests of the victims of Mr Griffin's alleged offending while he was in its employ and the concerns of LGH patients and the general public about the adequacy of management of concerns by the Department as highly. As I have previously stated in my 4 March 2021 decision of *X, Y and Tasmania Police*<sup>16</sup>, I consider that the public interest in protecting the interests of alleged sexual abusers of children is lower than that of the victims of such abuse. In contrast, the Department does not once mention or appear to consider the victims of Mr Griffin's alleged offending or the valid community concern and desire for accountability from the Department, given that abuse is alleged to have occurred against vulnerable child patients receiving care in a public hospital over an extended period.
- 191 Similarly, I do not accept that the negative impact of publicity on the Department's staff should be given significant weight when considered against the objects of the Act to increase the accountability of the executive to the people of Tasmania and that they have a right to information. That the release of information may bring publicity and scrutiny of government action is the intention of the Act and, while the potential negative consequences of this for some THS staff are regrettable, it would stymie the effective operation of the Act if only information likely to generate little publicity was released. I have also found that the names of all THS staff closely connected to Mr Griffin are exempt under s36, which further reduces the weight of this factor.
- 192 I consider that the Department raised more persuasive arguments in relation to the potential prejudice to the ability to obtain similar information in future, in relation to internal staff complaints about potential misconduct of other staff and the response to such complaints during disciplinary action against these employees.
- 193 The Department indicated I had failed to consider factors (n), (o) and (q) in my original decision. While I do not consider that (o) or (q) require detailed analysis, I accept that further consideration of whether disclosure would prejudice the ability to obtain similar information in the future is appropriate.
- 194 I had considered that the circumstances surrounding Mr Griffin are so unusual that the disclosure of his response to employment allegations put to him was justified, despite this usually being contrary to the public interest (see my analysis at paragraphs 118-126 above). However, I accept that such a disclosure in a high profile matter could generate an undesirable cooling effect on participation by employees in disciplinary proceedings against them. Despite my pains to indicate that the release is due to the exceptional circumstances of

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<sup>16</sup> See [www.ombudsman.tas.gov.au/\\_data/assets/pdf\\_file/0006/605481/O1901-107-Final-Decision-X,-Y-and-Tasmania-Police.pdf](http://www.ombudsman.tas.gov.au/_data/assets/pdf_file/0006/605481/O1901-107-Final-Decision-X,-Y-and-Tasmania-Police.pdf), para 25.

this matter, there may be a reluctance for employees to cooperate and provide statements in disciplinary proceedings against them. In recognition of the potential issues this could cause in future matters, I consider that the release of Mr Griffin's response at page 6 to the concerns raised against him is contrary to the public interest.

195 I do not consider the same applies to internal complaints made against Mr Griffin or concerns raised about the alleged lack of response to these complaints by management. The release is proposed in a manner which does not identify the complainants. Public servants have obligations to report safety concerns and operate ethically when at work, completing SLRS reports or AHPRA notifications when safety or misconduct issues arise. Senior staff have an obligation to respond appropriately to concerns raised and investigate complaints about misconduct. I do not think that there is a reasonable likelihood of a similar cooling effect on internal complaints about misconduct being made or investigated by the release of these allegations.

196 It is not my view that it is automatic that complaint information which leads to disciplinary action against employees or internal deliberations regarding that complaint information should be released under the Act. This is a highly unusual situation, of exceptional public interest, and the balance of public interest factors favours release in this instance. It would require another exceptional set of circumstances for me to propose release of unproven complaint details against an employee under the Act in a future application, but the key function of the public interest test is to allow for nuanced decisions in unique situations rather than blanket rules.

197 Accordingly, I maintain my view that the SLRS complaint at pages 10-11, the reporting and discussion of a further allegation at pages 41-44 and 68-69, The 'Action' and 'Discussion' columns of the minutes of an ANMF and THS meeting at pages 75-77 and the emails regarding concerns from THS staff about 'unanswered complaints' at pages 78-80 are not exempt and should be released to Ms Bianchi. This release is subject to the redaction of personal information as determined above.

#### *AHPRA documents*

198 Pages 12-23 are a covering email and a mandatory notification of potential notifiable conduct to AHPRA regarding Mr Griffin. The Department originally sought to exempt these under s35 and I determined that this exemption was not applicable due to AHPRA not being a public authority under the Act, as discussed in the preliminary decision.

199 The Department now invites me to consider these documents out of scope of Ms Bianchi's request, as they were prepared for the purpose of complying the legislation which excludes the operation of the Act and could be sought under the *Freedom of Information Act 1982* (Cth). It also states that, pursuant to s9 of the Act, a person is not entitled to such documents as they could be inspected by the public in accordance with another Act.

200 I do not agree that s9 is applicable, as this primarily relates to situations such as the ability to inspect the electoral roll under s38 of the *Electoral Act 2004* or the entitlement to access any information on the public record under s36 of the *Land Titles Act 1980*. I consider that this information can be treated analogously with information excluded under s6, which is in the possession of a person whose services are provided for the purposes of assisting a public authority which is not subject to the Act. The information was created for the purposes of compliance with mandatory requirements under the Health Practitioner Regulation National Law (Tasmania) and provided to AHPRA for its investigation. It is accordingly not *information in the possession of a public authority* and out of scope of the Act. However, it is within the scope of the Commonwealth Freedom of Information Act, under which Ms Bianchi could apply for this information if she chose.

201 I determine that the Act does not apply to pages 12-23 and they are not required to be released to Ms Bianchi.

#### *Employment Directions*

202 In relation to pages 29-39, the Department accepted that the copies of Employment Directions 4 and 6 were not exempt under s36. It invited me to find that Ms Bianchi was not entitled to these under s9 as they may be inspected by State Service employees in accordance with regulation 4 of the *State Service Regulations 2021*. I do not agree that s9 is most appropriate, as Ms Bianchi is not a State Service employee, but agree that the Employment Directions are not required to be provided under s12(3)(c)(i) as they are otherwise available on the Department of Premier and Cabinet website.<sup>17</sup>

#### *Section 30(!)(b)*

203 In relation to the fourth email in the chain at page 68, the Department now proposes to rely on s30(1)(b) to exempt this information. It contends:

*The fourth email in the email chain identifies a complainant and suggests how allegations made in relation to Mr Griffin will be handled. It also puts forward possible avenues for further investigation. In my view, release of the fourth email 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 and administration of the law within the meaning of section 30 of the Right to Information Act.*

204 The Act is clear in s3 that it is the intention of Parliament that ‘discretions conferred in this Act be exercised so as to facilitate and promote...the provision of the maximum amount of official information.’ Accordingly, exemptions which are not subject to the public interest test should only be applied when necessary. Ms Bianchi has already agreed that she does not seek the name or personal information of the complainant and I do not accept that

<sup>17</sup> See [www.dpac.tas.gov.au/divisions/ssmo/employment\\_directions](http://www.dpac.tas.gov.au/divisions/ssmo/employment_directions).

revealing that concerns were reported by an unidentified Department employee would, or would be reasonably likely to, disclose the identity of a confidential source of information. My conclusion in my preliminary decision stands in relation to this email.

#### *Consultation*

205 The Department invited me to defer my final decision to allow it to undertake consultation with consultants and the ANMF around the release of their personal information. I did so and the Department advised that none of these external parties objected to the release of the information. While this is appropriate, I note that it is unfortunate that the Department did not undertake this consultation when Ms Bianchi's application was originally made, as this caused significant unnecessary delay to Ms Bianchi receiving this information.

#### *Out of scope*

206 The Department originally identified pages 98-104 as being responsive to Ms Bianchi's request, but now states that they are outside its scope due to being created after the end of the request's date range - 31 January 2020. I accept that the Department is entitled not to release the information for this reason, but invite it to consider disclosing it to Ms Bianchi in any case in accordance with s12(1).

#### **Conclusion**

207 For the reasons set out above, I determine the following:

- Exemptions claimed pursuant to s30 are not made out;
- Exemptions claimed pursuant to s35 are varied;
- Exemptions claimed pursuant to s36 are varied; and
- Exemptions claimed pursuant to s39 are not made out.

208 Accordingly, pages:

- 1-5, 7-11, 24-28, 41-45, 49-71, 75-87, and 91-95 are to be released to Ms Bianchi, subject to the redaction of personal information found to be exempt under s36;
- Pages 29-39 are publicly available, so are not required to be released to Ms Bianchi pursuant to s12(3(c)(i); and
- Pages 12-23 and 98-104 are out of scope of Ms Bianchi's request, so are not required to be released.

**Dated:** 4 November 2021

**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.

## **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.

# **OMBUDSMAN TASMANIA**

## **DECISION**

**Right to Information  
Act Review**

**Case Reference:** O1903-130  
R2202-021

**Names of Parties:** Cassy O'Connor MP and the Department of Natural Resources and Environment Tasmania

**Reasons for decision:** s48(3)

**Provisions considered:** s37, s39

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### **Background**

- 1 Reserve Activity Assessments (RAA) appraise the environmental, social and economic impact of activities proposed to occur on land managed by the Parks and Wildlife Service (PWS), at the Department of Natural Resources and Environment Tasmania (the Department).
- 2 The first part of the RAA process is also known as a checklist; an initial assessment which gauges whether a full RAA is required.
- 3 Development and commercial activities in national parks and reserves are contentious in Tasmania, with particular concerns from environmental groups as to whether the approval processes for such activities are sufficiently robust and transparent.
- 4 On 10 May 2018, Ms Cassy O'Connor MP, Leader of the Tasmanian Greens, made an application to the Department under the *Right to Information Act 2009* (the Act) seeking *a copy of any Reserve Activity Assessment relating to Ian Johnstone's South Coast Track proposal*. On 23 May 2018, Ms O'Connor extended her application to include:

*Copies of the Reserve Activity Assessment (RAA) for the following proposed developments within Tasmania's public reserve estate, including the Tasmanian Wilderness World Heritage Area:*

- *the South East Cape walk* [another name for the South Coast Track]
  - *Maydena Bike Park*
  - *Halls Island/Lake Malbena*
  - *Helicopter Landing Sites* [regarding Rotolift Aviation]
  - *Cradle Base Camp Experience*.
- 5 On 22 March 2019, the applicant still had not received a decision and applied for external review due to the failure of the Department to address her

application within the required time frames under the Act. Her application was accepted pursuant to s45(1)(f) of the Act on the same day. My delegate, Mr Mike Cain, directed the Department to issue a decision before 29 March 2019.

6 On 3 April 2019, Ms Katrina Oakley of the Department, a delegate under the Act, issued a decision to Ms O'Connor. Ms Oakley noted that 218 pages were found to be responsive to the request but decided all of the information was exempt and not to be released. The decision set out that:

- there were no RAAs regarding the South East Cape walk, Cradle Base Camp and Helicopter Landing Sites, with initial RAA checklists only having been completed. These were exempted in full pursuant to ss36, 37 and 39 of the Act;
- there were completed RAAs for Halls Island and Maydena Bike Park;
- the Halls Island RAA had previously been released in full, so this was not assessed and it was declined to be provided, relying on s9 of the Act, as it was otherwise available;
- the Maydena Bike Park RAA was exempted in full pursuant to ss36, 37 and 39 of the Act;
- staff names, addresses, email addresses, phone numbers, signatures, titles all of which were claimed to be exempt under 36;
- section 37 was relied upon in relation to the Maydena Bike Park RAA following consultation with bike track developers. They made submissions indicating that if the RAA was released, their competitors *would have access to our confidential policies and procedures and specific information about our future development of the site and gives [sic] our competitors unreasonable market advantage*;
- section 39 was relied upon as the information had been submitted in confidence and the Department claimed that *it is possible that future proponents may not wish to provide confidential information for proposals if there is the risk that DPIPWE is compelled through the RTI process to release similar information in the future*;
- consideration of the public interest test resulted in a finding by the Department that matter (a) was in favour of release but that matters (h), (m), and (n) were against release and on balance it was concluded that disclosure would be contrary to the public interest.

7 On 11 April 2019, Ms O'Connor requested that her matter be extended to a full external review pursuant to s46(2).

8 In her letter of that date Ms O'Connor requested that the Halls Island/Lake Malbena RAA no longer be part of her external review request, as that information was publicly available. She maintained her request for information regarding the Maydena Bike Park RAA and the other proposals.

- 9 On 15 April 2019, Mr Mike Cain of this office directed the Department to conduct an internal review, pursuant to s47(1)(f) of the Act.
- 10 On 10 May 2019, Ms Samantha Wilson of the Department, another delegated officer under the Act, released an internal review decision to the applicant. She determined that:
  - Information relating to Helicopter Landing Sites, the South East Cape Walk and Cradle Base camp did not constitute RAAs but initial checklists used to determine whether an RAA would be required. Accordingly, the 34 pages of checklist information were outside the scope of the request;
  - The Maydena Bike Park RAA was claimed to be exempt in full under s39, as:
    - There was a shared understanding of confidentiality between the parties; and
    - if the information were released, it would impair the Department's ability to obtain similar, detailed information about proposals in the future; and
  - Section 36 would no longer be relied upon and no information was claimed to be exempt under this provision; and
  - While she did not base her decision on this section, she also considered that s37 would apply for the reasons explained in the original decision.
- 11 On 25 January 2022, Ms O'Connor advised that she no longer sought information regarding the RAA checklists and wished to limit her external review to the Maydena Bike Park RAA.

### **Issues for Determination**

- 12 I must determine whether the information is eligible for exemption under ss37 or 39.
- 13 As ss37 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 this section, I must then determine whether it is contrary to the public interest to disclose it. In doing so, I must have regard to (at least) the factors listed in Schedule 1 of the Act.

### **Relevant legislation**

- 14 The Department has relied upon s39 (and s37 in the alternative) in its decision to exempt information. I attach a copy of these sections to this decision at Attachment 1.
- 15 Copies of s33 and Schedule 1 of the Act are also attached.

## **Submissions**

### *The Department*

- 16 In the Department's internal review, Ms Wilson provided the following reasoning to support her decision to exempt the Maydena Bike Park RAA in full under s39(1), as information obtained in confidence. She referred to the Queensland Information Commissioner's decision in *Re "B" and Brisbane North Regional Health Authority*<sup>1</sup> and the Victorian Supreme Court decision of *Ryder v Booth*<sup>2</sup> to draw the following conclusions:

*While the expectation of confidentiality is not explicitly stated in the RAA documentation, I consider that a shared understanding that the information would be kept confidential may be implied. The nature of the information, the purpose for which the information was provided and the circumstances in which it was provided are, in my view, all factors in support of the fact the information was communicated in confidence for the purposes of the assessment process.*

*Similar to a tender process, it is reasonable to expect that information contained in preliminary proposals will be kept confidential. I consider therefore that in all the circumstances it is reasonable for the proponent to have formed an expectation that the information contained in the RAA would be kept confidential.*

*I am of the view that disclosure of the information would be reasonably likely to impair the ability of the Department to obtain similar information in future. Taking account of the fact that provision of the information at issue was in confidence, I consider that some diminution in the quality or quantity of information that would be given in the future may be a result that could reasonably be expected to follow from disclosure. The information at issue includes details of an inherently confidential nature with respect to the proponent. It reveals specific construction methodologies and practices of the proponent, and is of a character not expected to be in the public domain. Further, disclosure of the information would potentially be detrimental to the competitive position of the proponent, disclosing proprietary information including confidential policies and procedures.*

*...*

*I consider it reasonably likely that proponents may reconsider providing similar information to the Department in the future if they are aware that the information may be disclosed to a third party. In my view, the likely effect of disclosure in this instance, is reasonably based and the evidence outlined is sufficient to indicate a reasonable*

<sup>1</sup>(1994) 1 QAR 279, at para 152

<sup>2</sup>[1985] VR 869, King J at p 883 and Gray J at p 878

*apprehension that the ability of the Department to obtain similar information in the future would be impaired.*

- 17 Addressing public interest test concerns contained in Schedule I of the Act, Ms Wilson considered Schedule I matter (a) weighed in favour of disclosure and matters (h), (n) and (s) weighed in favour of exemption. Further detail regarding this assessment is below under Analysis. She ultimately concluded that it was contrary to the public interest to disclose the information, stating:

*Whilst there is a general public interest in government information being accessible, the information in question was communicated in confidence. It is evident from an analysis of all the relevant circumstances that there was a mutual understanding as to preserving the confidentiality of the information.*

- 18 Ms Wilson also maintained s37 exemptions for the same reasons explained in the Department's original decision of 3 April 2019 by Ms Oakley. In relation to s37, Ms Oakley supported the third party submissions, saying:

*...If this information was released, the third party was concerned there would be a real commercial disadvantage due to the fact that “the information concerns specific construction methodologies and practices that are valuable intellectual property.” Additionally, the proponent’s competitors would have “access to our confidential policies and procedures” and “...specific information about our future development of the site [and the release of information]...gives our competitors unreasonable market advantage” and would damage “a staged marketing plan”. I agree with this submission...*

#### *Ms O'Connor*

- 19 Ms O'Connor made three submissions to this office and these are noted at each point below:

- 11 April 2019 - *These documents are eventually made public as part of a Development Application, and as such it is patently absurd that the notion of these documents being made public would deter proponents from lodging them.*

*We further note that these RAAs relate to government owned land, and as such the government has complete discretion over whether or not they would chose to accept another expression of interest that utilised similar proposal characteristics.*

*Further to this, the progress that these proposals have already made through the process would make it very difficult for any other initiated proposal to undercut them.*

*We further argue that if a proponent would be unwilling to lodge a proposal for a development on public land if it requires transparency, then so be it. We contend that if a proposed use of public land will only*

*be considered if details are kept secret, it is strongly in the public interest for these details to be made public.*

- 15 December 2021 - *There is no justification, in our view, for NRET to withhold these documents. These developments are on public land and provide proponents with exclusive use, so there is no commercial-in-confidence argument.*
- 25 January 2022 - *On principle we don't believe there's any argument for RAAs on public land not to be public.*

## **Analysis**

### **Section 39 – Information obtained in confidence**

- 20 For information to be exempt under this section, I must be satisfied that it is information that has been communicated in confidence to the Department and that –
- (a) *the information would be exempt information if it were generated by a public authority or Minister; or*
  - (b) *the disclosure of the information would be reasonably likely to impair the ability of the Department to obtain similar information in the future.*
- 21 The Department applied the exemption under this section to the whole of the Maydena Mountain Bike Park RAA, comprising 184 pages in total. Within the RAA, there are four discrete reports. These are the:
- PWS Reserve Activity Assessment – Level 2 to 4 authorised by Shane Breen on 6 July 2017;
  - Natural Values Report for Maydena Bike Park, Maydena undertaken by Enviro Dynamics Pty Ltd. Enviro Dynamics was engaged to undertake this natural values assessment on behalf of the proponent of the Maydena Bike Park, Mr Simon French of Dirt Art Pty Ltd. The report includes appendices of the:
    - Plant species list for Maydena bike park;
    - Maydena Bike Park Trails Map; and
    - Natural Values Atlas Report.
  - Construction Environmental Management Plan (CEMP) Report (May 2017) by Luke Chiu of Dirt Art, approved by Mr French; and
  - Aboriginal Heritage Tasmania Desktop Assessment completed by Emily Smith of Aboriginal Heritage Tasmania at the Department.

Pages 1-37

- 22 This is the completed PWS RAA form – Level 2 to 4, signed off by the Regional Manager, Mr Shane Breen, on 6 July 2017. It includes extensive information

from Mr French about of the proposed development in the Styx River Regional Reserve and North Styx Conservation Area in the Activity Summary. The remainder of the form is completed by PWS reviewing the concept and assessing the scope, impact and management plan regarding the proposed activity. It then makes a final determination approving the activity with conditions.

- 23 The Department acknowledges that there are no markings indicating the document is confidential but maintains that confidentiality is implied due to the shared understanding between the parties that it would be kept in confidence. It compares it to a tender process and states that it is reasonable that preliminary proposals are kept confidential.
- 24 I accept that Mr French provided information in relation to the proposed Maydena Bike Park in confidence, given his submissions to that effect and the Department's position opposing its release.
- 25 I do not accept the Department's position, however, that it is clear that the disclosure of the information would be reasonably likely to impair the ability of the public authority to obtain similar information in future under s39(1)(b).
- 26 The RAA process relates to activities being undertaken in public spaces, within national parks and reserves. Proponents would be aware that such activities could never be kept confidential, if the activity is approved. I do not agree with the Department that greater transparency is likely to reduce applications to undertake commercial activities on PWS managed land. Being subject to the Act and reduced confidentiality is effectively the price of doing business in national parks and reserves, which are protected public spaces.
- 27 This view is strengthened by the Department's previous release of RAA checklists and full assessments following previous assessments of applications under the Act, which are available on its online disclosure log.<sup>3</sup> Such disclosures do not appear to have impacted on the ability of the Department to subsequently obtain similar information.
- 28 I understand the analogy the Department has drawn in relation to a tender process, and different considerations may factor in relation to an unsuccessful RAA. However, this matter relates to a successful application and it is not apparent why disclosure of a successful RAA would impair the ability to obtain such information in future.
- 29 In relation to concerns that RAAs may contain less detailed information, or that disclosure would cause applicants to be less candid regarding business information, it is not clear why the exemption of commercially sensitive information under s37 in relevant parts of an application would not resolve this concern.
- 30 Accordingly, I am not satisfied that the Department has discharged its onus under s47(4) to show that this information should not be disclosed and should

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<sup>3</sup> [www.nre.tas.gov.au/about-the-department/governance-policies-and-legislation/rti-disclosure-log](http://www.nre.tas.gov.au/about-the-department/governance-policies-and-legislation/rti-disclosure-log)

be exempt under s39. It is not apparent why the information included in the PWA RAA form Level 2 to 4 would not be able to be obtained from proponents in future, as it relates to an approved proposal to be undertaken on public land and the information contained within it is not of a commercially sensitive nature (or could be selectively redacted under s37, if required). In this instance, the vast majority is in the public domain already, as the proposal has gone ahead and the Maydena Bike Park has been operating since 2018.

- 31 The only part which might be commercially sensitive is the Economic Assessment of Options table at 4.4(1) on page 24, which contains dollar figures regarding capital and operating costs. However, the Department's decisions only express concerns, raised by Mr French, about *specific construction methodologies and confidential policies and procedures*, as well as providing competitors with *specific information about future development of the site which could damage a staged marketing plan*. No detail regarding likely competitive disadvantage is raised regarding these figures.
- 32 Consequently, given this lack of detail, I again do not consider that the Department has discharged its onus to show why this economic information should be exempt under ss37 or 39.

*Pages 38 to 109*

- 33 This is a report drafted by Enviro Dynamics, a third party consultant engaged to undertake a natural values assessment on behalf of the proponent. The report acknowledges that the assessment forms part of the RAA process and appends 11 separate attachments, including reports on plant species, Natural Values, threatened flora and fauna, weeds, geoconservation sites, reserves and known biosecurity risks.
- 34 I am satisfied that this package of information was communicated in confidence by the consultant to the Department and that the information in this document would fall within s39(1)(a). This is because, had the report been generated by another officer of the Department, it would be *prima facie* exempt under s35(1)(a). However, the Department specifically relied upon the application of s39(1)(b).
- 35 In considering the exemption preventing the information from release as a whole, I do not consider that the Department has discharged its onus to show that s39(1)(b) would apply. That the disclosure would be reasonably likely to impair the ability of a public authority to obtain similar information in future is not apparent and I am not persuaded that this is the case. I am confident that a private business paid to perform an assessment is highly unlikely to decline to provide services if their contract with the public authority or final report may be released under the Act and this is consistent with previous decisions of this office<sup>4</sup>.

<sup>4</sup> See particularly *Simon Cameron and Department of Natural Resources and Environment Tasmania* (January 2022) available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions) at para 142

- 36 The information in the report is factual and relates to natural values in the relevant area. It only provides high level detail about the proposed works and does not include any apparent commercially sensitive information. As with the PWS RAA form Level 2 to 4, I determine that this is not exempt under s39 and can be released in full to Ms O'Connor.

*Pages 110 to 182*

- 37 This report is the Construction Environmental Management Plan (CEMP). It was provided to the Department by Mr French for Dirt Art in May 2017.
- 38 For the same reasons as relate to the Activity Summary provided by Mr French in the PWS RAA form Level 2 to 4, I am satisfied that this information was communicated in confidence to the Department.
- 39 Given this is a mandatory plan to proceed with this type of activity, I am not persuaded that disclosure would significantly impair the ability of a public authority to obtain similar information in future. Accordingly, I consider that the Department has not discharged its onus to show that this information is exempt under s39(1)(b).
- 40 I do accept that Mr French has raised legitimate concerns about information which may cause competitive disadvantage regarding methods of track construction. The alternative exemption proposed of s37 is more appropriate to address these concerns and I will review further in my analysis of that section below.

*Pages 183 to 184*

- 41 This is an Aboriginal Heritage Desktop Assessment undertaken by Emily Smith of Aboriginal Heritage Tasmania at the Department and provided to PVVS, also part of the Department. It notes that the area has a low probability of Aboriginal heritage being present and, accordingly, no further investigation is needed or objection is made to the project proceeding.
- 42 I do not consider that s39 applies to this information. It was not communicated in confidence to the Department, as it was generated by it, and it does not reveal information communicated in confidence by the proponent of the Maydena Bike Park. The assessment is very brief and contains no information about the project beyond the words 'proposed Mountain Bike Park at Maydena.'
- 43 This document is not exempt under s39 and should be released to the applicant.

### **Section 37**

- 44 Section 37 provides for the exemption of information that is related to the business affairs of a third party, when that information is acquired by a public authority from a person or organisation other than the person making the application for disclosure, if either:

- the information relates to trade secrets; or
  - its disclosure would be likely to expose the third party to competitive disadvantage.
- 45 The Department on internal review relied upon s37 in the alternative to s39, using the reasoning provided by Ms Oakley in the original decision dated 3 April 2019. Ms Oakley supported the third party submissions from Mr French and listed possible consequences of the release of information as including:
- there would be a real commercial disadvantage due to the fact that “*the information concerns specific construction methodologies and practices that are valuable intellectual property.*”;
  - the proponent’s competitors would have “*access to our confidential policies and procedures*”;
  - the disclosure of “*...specific information about our future development of the site [and]...gives our competitors unreasonable market advantage*” and which would damage “*a staged marketing plan*”.
- 46 In relation to likely competitive disadvantage, when considering the equivalent provision under the now repealed *Freedom of Information Act 1991*, the Supreme Court of Tasmania in *Forestry Tasmania v Ombudsman [2010] TASSC 39*, held that:
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...*
- 47 The Court further held that:
59. *...The application of the correct approach involves an assessment of the facts, and findings as to likely exposure to the relevant disadvantage...*
- 48 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.
- 49 I note here, that in the New South Wales Supreme Court decision of *Kaldas v Balbour*<sup>5</sup> it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts in New South Wales. I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to s33 of the *Ombudsman Act 1978* and that I am also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.

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<sup>5</sup> [2017] NSWCA 275 (24 October 2017)

- 50 Accordingly, the value of the *Forestry Tasmania v Ombudsman* case as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases ‘competitive disadvantage’ and ‘likely to expose’, all of which are instructive and with which I agree.
- 51 The Department seeks to exempt the entire RAA under s37, but I do not consider this justifiable and it has not discharged its onus to show why this would be appropriate. Discretions under the Act are to be exercised so as to facilitate the release of the maximum amount of official information<sup>6</sup> and it is clear that a significant amount of this information does not expose Dirt Art to competitive disadvantage.
- 52 It is only the CEMP report at pages 110 to 182, over which Dirt Art appears to be concerned regarding the potential revelation to its competitors of information regarding its construction methods and confidential policies and procedures.
- 53 Of this document, only pages 121 to 136 provide detail around actual construction methods and pages 151 to 182 outline policies and procedures.
- 54 I am satisfied that the information about construction methods is *prima facie* exempt under 37. I am not satisfied that there appear to be any trade secrets in the information, as the methods are not described in minute detail or appear to contain unique processes, but accept that there is a real chance of competitive disadvantage to Dirt Art if its competitors in the mountain biking industry obtained this information. Pages 121 to 136 are *prima facie* exempt under s37, subject to the consideration of the public interest test.
- 55 I am not so satisfied regarding the policies and procedures at pages 151 to 182. I cannot ascertain why the disclosure of this information would be likely to cause competitive disadvantage, as it merely outlines how Dirt Art and its staff would respond to various risks such as ground water contamination, fire or disturbance to Aboriginal cultural heritage during construction. The policies and procedures are in summary form and primarily relate to abiding with legal requirements for actions within a reserve area. The Department has not discharged its onus to show why s37 should prevent the disclosure of this information. Accordingly, I determine that it is not exempt from release under s37 and should be provided to Ms O’Connor.

*The public interest test*

- 56 Addressing the public interest test concerns found in Schedule 1 of the Act, Ms Oakley found that matter (a) weighed in favour of disclosure and matters (h), (m) and (n) weighed in favour of exemption. She stated that the Department:

*In relation to RAAs, does not routinely disclose information to the wider public when it processes and analyses proposals. For their own reasons, the people who submit RAAs may be prepared to make all or*

<sup>6</sup> See s3 – Object of Act in the Right to Information Act 2009.

*parts of the resulting documentation public. But it would create uncertainty if, when the other parties have not decided to make details of their personal dealings with government public, the Government should do so in response to applications under the Act.*

*In terms of matter (h), this means that those parties that happen to be of interest to an applicant under the Act will be treated unfairly in comparison with others. A level playing field suggests that such information should either be generally available, or (subject to decisions by the parties themselves) generally confidential.*

*In terms of matter (m), this means the person submitting the proposal, and the surrounding circumstances, could affect the interests of “an individual or group of individuals.”*

*In terms of matter (n), there may be public benefit in providing RAA information for various purposes, subject always to appropriate conditions. As a matter of principle, it seems to me that, absent a general understanding that the relevant documentation is liable to be disclosed, the risk of disclosure may prejudice the Government’s ability to obtain confidential information concerning future proposals if the risk exists that this information could be released under this RTI statutory process.*

- 57 Ms Oakley also acknowledged that factor (a) – the general public need for government information to be accessible – is the overriding consideration under the Act and has a heavy weight, with which I agree. I also consider that factors (b) and (f) are relevant and of significant weight considering the significant public interest concerns about appropriate management of commercial activities in national parks and reserves and the debate over the adequacy of current approval processes.
- 58 However, as I have determined that the majority of the RAA should be released, the weight of these factors when only considering part of the RAA containing track construction methods is reduced. Specific details about track construction are not likely to add significantly to public debate around development on PWS managed land or the Department’s assessment and approval process.
- 59 I am not persuaded by the arguments that disclosure of public information under the Act would lead to unfair treatment of some parties over others or that assurances of confidentiality the Department has made should override the rights to information provided in the Act. All parties are subject to the Act and appropriate disclosure of government information following an application for assessed disclosure does not create any unfairness.
- 60 As I stated earlier, the effective cost of doing business in a national park or reserve, or applying to conduct such commercial activities, is public scrutiny. There is also no other method of conducting activities lawfully in a national park or reserve than to go through this process and be subject to the Act, so I

do not consider that there is a significant reduction likely in the ability to obtain such information in the future.

- 61 I accept there is some chance of proponents self-selecting out of the process due to fear of disclosure of their proposal under the Act, however, so consider that this is a factor which weighs slightly against disclosure.
- 62 The primary factors warranting consideration, which were not mentioned by the Department, are (s), (w) and (x). While proponents should not expect that their entire application would be exempt on this basis, it may be appropriate to exempt parts containing information which could genuinely harm their business interests and competitive position and is not generally available to their competitors.
- 63 Pages 121 to 136 (inclusive) of the information contain details of track construction, including specific methodologies and processes which Dirt Art has submitted are not general knowledge and would be of advantage to its competitors. I accept that these factors weigh heavily against release.
- 64 This is a difficult balance to strike but overall I consider that it would be contrary to the public interest to disclose the information relating to track construction methodology. The information would not add significantly to government accountability or public debate but might cause major disadvantage to the business interests of Dirt Art.
- 65 Accordingly, I determine that pages 121 to 136 inclusive are exempt under s37 and not to be released to Ms O'Connor.

### **Preliminary Conclusion**

- 66 For the reasons given above, I determine the following:

- Exemptions claimed pursuant to s39 are not made out; and
- Exemptions claimed pursuant to s37 are varied.

### **Response to the Preliminary Conclusion**

- 67 The above preliminary decision was made available to the Department on 17 February 2022 under s48(1)(a) of the Act, to seek its input before finalising the decision.
- 68 On 28 February 2022, the Department advised that it did not seek to make submissions and was content to release the Maydena Bike Park RAA to Ms O'Connor, with the exception of pages 121-136 (inclusive), in accordance with my preliminary decision. The Department sought additional time to respond, however, in order to consult with Dirt Art before finalising its position.
- 69 On 6 April 2022, the Department advised that it had not received detailed submissions from Dirt Art but that Simon French had advised that:

*We remain in strong objection to the release of this information. The entire structure of the lease (and subsequent lease values) is the result of*

*significant development time and effort, and contains proprietary and commercially sensitive information. The release of this information will result in significant potential and actual harm to our business, and provides highly-valuable proprietary information to our current and potential market competitors. The release also outlines future commercially sensitive plans for our development, which may hinder our ability to pursue these developments.*

- 70 The Department advised that it had not changed its position but sought for me to consider the objections of Dirt Art in finalising my decision.
- 71 As the Department's original decision did not propose to release any of Dirt Art's information, it was not necessary for Dirt Art to apply for review under ss43 or 44 of the Act and object to the release of information relating to its business affairs. Now that I propose to overturn the majority of the Department's decision, there is no separate external review right for Dirt Art under the Act in these circumstances. Due to this, I have carefully considered Dirt Art's submissions to ensure procedural fairness is observed before making my final decision.
- 72 Despite this, as the objections of Dirt Art do not provide any additional detail to that which I had already considered in reaching my preliminary decision, my decision accordingly remains unchanged. While Dirt Art raises concerns about the disclosure of proprietary information and harm to its business, it is non-specific about which information it alleges will have this effect and it is not otherwise obvious why this would occur from the content of parts of the RAA proposed to be disclosed.
- 73 I am satisfied that the exemptions applied strike the appropriate balance of transparency and protection of legitimate business interests, and the Department no longer maintains any objection to this position.
- 74 Accordingly, the Maydena Bike Park RAA should be released in full to Ms O'Connor, except for pages 121-136 inclusive which I determine are exempt pursuant to s37.

### **Conclusion**

- 75 For the reasons given above, I determine the following:

- Exemptions claimed pursuant to s39 are not made out; and
- Exemptions claimed pursuant to s37 are varied.

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

**Dated:** 14 April 2022

**Richard Connock**  
**OMBUDSMAN**

## **Attachment I**

### **Relevant Legislation**

#### **Section 37 – Information relating to business affairs of third party**

- (1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party" ) and –
  - (a) the information relates to trade secrets; or
  - (b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.
- (2) If –
  - (a) an application is made for information under this Act; and
  - (b) the information was provided to a public authority or Minister by a third party; and
  - (c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of substantial concern to the third party –
    - (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.

### **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**

- (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:** O1702-

**115 Names of Parties:** Clive Stott and Hydro Tasmania

**Reasons for decision:** s48(3)

**Provisions considered:** s12, s19, s30, s31, s36, s37, s38 and s39

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**Background**

- 1 The Basslink cable runs between Tasmania and Victoria on the seafloor of Bass Strait. It enables the transmission of electricity between the two States.
- 2 In 2015, the cable experienced a fault resulting in its shut down for a significant period of time. With Tasmania unable to import electricity during this period, alternatives such as diesel power generation were used. Amidst uncertainty as to how long it would take to repair the cable, the issue and concerns about it were widely reported in Tasmania.
- 3 Mr Stott, a retired former employee of the Electricity Commission of NSW, was interested in the failure of the cable.
- 4 On 2 November 2016, Mr Stott submitted an application for assessed disclosure to Hydro Tasmania ('Hydro') seeking a range of information in relation to the cable and the fault that occurred. The application was in the following terms:

*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:*

- 1) *What the ROVs found when looking for the subsea fault:*
  - a. *If the cable was buried in the area of the fault and it was still bundled.*
  - b. *If the cable bundle was still in the charter position it had been original laid.*
- 2) *Why it took so long for the Ile-De Re to locate the cable, and*
- 3) *The fault.*

- 4) *The damage observed and over what length when the bundled cable was brought to the surface.*
  - 5) *If there was only one visible tear or if there was other visible damage to the cable/s.*
  - 6) *What prompted those on the Ile-De Re to start looking for the fault at the southern end.*
  - 7) *The observed cause of the fault.*
  - 8) *Siemens Win-TDC control and protection report.*
  - 9) *How much cable was sent away for forensic analysis.*
  - 10) *The result of the forensic analysis.*
  - 11) *The actual cause of the fault.*
- 5 Mr Stott sought a waiver of the fee pursuant to s16(2)(a) on the basis that he is a pensioner and therefore impecunious for the purposes of the Act, and pursuant to s16(2)(c) on the basis that he intends to use the information for a purpose that is of general public interest or benefit.
  - 6 On 23 December 2016, Mr Alan Evans, a delegated officer, released a decision to Mr Stott. The decision released some information, claimed Hydro was not in possession of some information, further claimed other information was already publicly available, claimed some information to be exempt and, finally, refused to provide some information pursuant s19 on the basis that the work involved in providing that information would substantially and unreasonably divert Hydro's resources from its other work.
  - 7 The exemptions Hydro claimed to be applicable to some of the information were one or more of, that the information:
    - is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege (s31);
    - is personal information of a person other than the applicant (s36);
    - if released, would disclose information related to business affairs acquired by a public authority from a person or organisation other than the person making an application (s37);
    - relates to the business affairs of a public authority (s38); or
    - is information obtained in confidence (s39).
  - 8 On 10 January 2017, Mr Stott wrote to the principal officer of Hydro, Mr Stephen Davy, and requested an internal review pursuant s43.
  - 9 By 13 February 2017, Hydro had not released an internal review decision to Mr Stott. The timeframe set by the Act for the provision of a decision had expired and Mr Stott requested external review by this office.

- 10 When Mr Stott's request for external review was assessed, it became apparent that Hydro had not expressly made a determination on his request for waiver of the fee.
- 11 Before an application is accepted by a public authority the application fee must be paid or a decision to waive the fee made.<sup>1</sup>
- 12 It was thought at the time that, absent payment of the fee or an express waiver of it by a public authority, I lacked jurisdiction to review a decision to disclose, or refuse to disclose information. Accordingly, on 15 February 2017, this office wrote to Mr Stott and Hydro and drew their attention to this issue.
- 13 On 8 March 2017, Hydro waived the fee under s16(2)(a) on the basis that Mr Stott had provided sufficient evidence that he was experiencing financial hardship. Hydro also re-released its decision to him.
- 14 On that same day, Mr Stott requested an internal review of the decision.
- 15 On 22 March 2017, Mr Michael Howarth, also a delegated officer, released an internal review decision to Mr Stott. The internal review decision ultimately reached the same conclusion as the original decision.
- 16 On 1 April 2017, Mr Stott asked for the decision to be externally reviewed.
- 17 Mr Stott's request for external review was accepted on 1 April 2017 on the basis that by then, the application fee had been waived, he was in receipt of an internal review decision, and it had been submitted for external review within 20 working days of his receipt of it.
- 18 It is now understood that s16(3) does not make the decision to disclose, or refuse to disclose information conditional on payment or waiver of the fee. Consequently, a failure to collect the fee, or waive its payment, does not invalidate either a decision made by the public authority in relation to the application or the Ombudsman's power to review such a decision.

## **Relevant Law**

- 19 As noted, Hydro has relied on s12, s19, s31, s36, s37, s38, and s39.
- 20 Copies of each of these sections are attached to this decision. As ss36-39 are contained in Division 2 of Part 3 of the Act they are subject to the public interest test. Thus, if information is determined to be prime facie exempt under those provisions, it will only be exempt if it would be contrary to the public interest to disclose it. Section 33(2) provides that *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*. A copy of Schedule 1 is also attached.
- 21 Section 19(1)(c) provides that when determining whether the work involved in providing the information Mr Stott seeks would substantially and unreasonably

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<sup>1</sup> s16(3)

divert Hydro's resources from its other work, regard must be had to the matters contained in Schedule 3. A copy of that schedule is also attached.

- 22 Through submissions made to this office during the course of the review, the law of contracts was also raised. The office has therefore also considered how the common law interacts with the legislative requirements of the RTI Act.

## **Submissions**

- 23 This matter has been ongoing for a significant period of time and many submissions have been made by Mr Stott, Hydro, and DLA Piper, the solicitors representing Basslink Pty Ltd. These submissions are summarised below.
- 24 Mr Stott ultimately claims the failure of the Basslink submarine cable caused a massive disruption to Tasmanians and that there is an inherent public interest in bringing the cause of the fault and actions subsequently taken to correct it into the public arena.
- 25 He further claims poor decision-making by Hydro in its handling of his request for information, which he asserts to be a deliberate attempt to hide information from him.
- 26 Hydro claims the information of public interest has already been released to Mr Stott and the information withheld has been so withheld for valid reasons. The majority of the claims for exemption are primarily linked to the commercially sensitive nature of the information to both Hydro and Basslink; Hydro claims the release of this information would commercially hurt it and/or Basslink.
- 27 In addition to its claim for exemption in relation to the substantive information responsive to Mr Stott's request, however, it also claims staff names should be redacted for privacy reasons.
- 28 It also claims some information should not be released because it would be privileged from production in legal proceedings on the ground of legal professional privilege as it would reveal legal advice it had received and that it might rely on at a later date.
- 29 Basslink made a separate submission through its legal representatives, DLA Piper. While Basslink is not a party to this review, Hydro formed the view that the disclosure of the information given to it by Basslink may be reasonably expected to be of substantial concern to Basslink, and s37(2) therefore required it, before deciding whether the disclosure of the information would be likely to expose Basslink to substantial harm to its competitive position, to notify Basslink of the application and seek its view as to whether the information should be provided.
- 30 Basslink raises very similar arguments to those made by Hydro, being in short compass that information it provided to Hydro was given in confidence and its release would expose Basslink to significant competitive disadvantage.

- 31 Basslink further claims that any decision to release the information would result in it taking legal action against Hydro for breach of contract, which action it claims Hydro would lose.

## **Analysis**

### **Section 12**

- 32 Hydro relied on s12 to refuse information sought by Mr Stott at Item 2 of his original request. This item went to the issue of why it took the ship, Ile-de-Ray, so long to locate the cable, and Hydro refused to provide it pursuant to s12(3)(c)(i) on the basis the information responsive to this part of the request was already in the public domain having been uploaded to the Basslink website.
- 33 A refusal made pursuant to s12 is not a decision that is reviewable by me under the Act. I only have jurisdiction to externally review decisions under s44 and s45. Section 45 is not relevant to this review.
- 34 Section 44 gives me the power to review decisions to which ss43(1), (2) or (3) applies. Section s43 applies to decisions on internal review where notice of such a decision has been given to an applicant by a public authority pursuant to s22. Section 22 in turn is confined to decisions where it has been determined that:
- (a) *the applicant is not entitled to the information because it is exempt information; or*
  - (b) *that provision of the information be deferred in accordance with section 17; or*
  - (c) *that provision of the information be refused by virtue of section 19 or 20 –*

- 35 Section 22 does not refer to refusals pursuant to s12, such decisions are not therefore subject to internal review under s43 and cannot be externally reviewed by me.

### **Section 19**

- 36 Section 19(1) allows a public authority to refuse a request where, having regard to the matters specified in Schedule 3, the work involved in providing the information responsive to it would substantially and unreasonably divert its resources from its other work.
- 37 Section 19(2) provides that a public authority must not refuse to provide information relying on s19(1) without first giving the applicant a reasonable opportunity to consult with it with a view to helping the applicant to make an application in a form that would remove the ground for refusal.
- 38 Hydro relies on s19 to refuse to provide information responsive to Item 3 of Mr Stott's request, being all information from Hydro databases, emails, diary entries, reports, notes, and photography to do with the fault itself.

- 39 Hydro claims that the request for items on the broad topic of “the fault” will cover far too much information to process than is practical or reasonable. The original decision maker therefore refused to provide it, as did the decision maker on internal review.
- 40 As noted, s19(2) requires the applicant to be given a reasonable opportunity to consult with a public authority with a view to amending their request. Hydro claims that it did provide Mr Stott with such an opportunity by telephone. Mr Stott remembers a phone call but says it was only a discussion about extensions of time, not refusal of information under s19.
- 41 Section 19(2) does not require the consultation to be recorded in writing, and in cases such as this, when there is no record of a consultation having taken place and there are conflicting versions of what transpired, it is difficult to adjudicate on that conflict.
- 42 Section 19 requires a decision maker to have regard to the nine matters set out in Schedule 3 of the Act. These are designed to give applicants and public authorities some guidance as to what are relevant considerations when making a decision to refuse a request, and to help quantify the burden processing the request places on the public authority.
- 43 Hydro claims it did consider the matters specified in Schedule 3 but it has nothing to demonstrate this to either Mr Stott or this office.
- 44 Addressing these matters with an applicant would, at least *prima facie*, indicate that a reasonable opportunity to consult was being afforded. For example, the applicant could be informed of such things as the estimated number of pages of information responsive to their request, and the time it would take, and what it would cost to process that information. While this is only one matter, it is one of the most useful in terms of helping an applicant understand the potentially substantial and unreasonable nature of their request.
- 45 With no evidence to show that Hydro properly considered the matters in Schedule 3 or gave the applicant a reasonable opportunity to consult, I must conclude that Hydro has failed to discharge the onus it bears to show that the disclosure of information should be refused pursuant to s19.<sup>2</sup>
- 46 I determine Hydro has not complied with the requirements of s19. This issue will be returned to Hydro to reconsider. Its reconsideration might consist of:
- applying s19 properly, in the manner I have described above;
  - releasing the information (which s3(4)(b) supports);
  - assessing it under another exemption(s); or
  - a combination of these options.

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<sup>2</sup> Section 47(5)

## Section 31

- 47 Information is exempt pursuant to this section ‘if it is of such a nature that [it] would be privileged from production in legal proceedings on the ground of legal professional privilege’.
- 48 Legal professional privilege, also known as client-lawyer privilege, is a common law principle that protects the confidentiality of communications made between a lawyer and their client if brought into existence for the purpose of giving or obtaining legal advice.
- 49 Australia applies the dominant purpose test when determining whether information attracts legal professional privilege. This means that information can be privileged if it was brought into existence for the dominant purpose of giving legal advice or advice in relation to litigation or possible litigation. It does not attach to documents as such, but to communications that are for the giving or seeking of legal advice.<sup>3</sup>
- 50 It is worth noting that this can also extend to in-house lawyers giving advice to the organisation in which they are employed.<sup>4</sup>
- 51 Hydro located relevant documents which it labelled A-G in its internal review decision and set out at Annexure A (Part 2) of that decision. It claims Documents A and C contain information that is exempt under s31. Hydro notes in relation to Document A that an email trail has had some information redacted due to it being legal advice.<sup>5</sup>
- 52 This is a three page email chain. Hydro has, in effect, released nothing of it to the applicant, although not all as a result of the application of s31. It essentially consists of a request from the Manager, Operational Contracts to an internal corporate solicitor at Hydro for advice about the contents of a telephone call. Advice is provided by the lawyer and that advice is then forwarded to three other employees of Hydro.
- 53 Of the three emails comprising Document A, I determine the information contained in brackets in the last email and the body of the earlier two emails is exempt under s31.
- 54 Document C is of a similar nature. There are four emails over two pages.
- 55 The first email (earliest at the bottom of the chain, sent at 3:51pm) is not exempt under s31 as it originated outside Hydro and was not generated for the purposes of seeking legal advice.
- 56 The second email is to a corporate solicitor at Hydro, forwarding the first email and seeking advice about it. This email would attract the privilege as a request for legal advice.

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<sup>3</sup> *Esso Australia Resources v Commissioner for Taxation* (1999) 201 CLR 49; [1999] HCA 67 at [35]; *Re Waterford v The Commonwealth* (1987) 163 CLR 54 at [64]-[65]

<sup>4</sup> *Archer Capital 4A v Sage Group (No 2)* [2013] FCA 1098

<sup>5</sup> Internal review decision, Annexure A, Part 2(A)(ii)

- 57 The third email is the reply from the solicitor, being the legal advice requested in the second email. As such, the third email would also be privileged.
- 58 The fourth email (7:42pm) appears to be a more elaborate summary of the first email, following a telephone call. It was sent to five recipients and copied to two others. One of those copied was the lawyer in the second and third emails. The fourth email, however, does not refer to legal advice. Being based on the first email and/or the telephone call - which was not a communication between a client and a lawyer, but rather, reporting of a technical nature - the fourth email is not privileged.
- 59 I determine the second email seeking advice and the third email providing it are exempt under s31, but the first and fourth emails are not. The body of the first and fourth emails are to be released to Mr Stott.

#### Section 36

- 60 Hydro also relied on s36 for parts of Document C. Section 36 provides that information is exempt if it is the personal information of a person other than the person making the request. Personal information is defined in s5 as being:

*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;*
- 61 The exemption in s36 is subject to the public interest test contained in s33.
- 62 Hydro claims Documents A – G to be exempt pursuant to s36. This information broadly includes information about people internal to Hydro and external, including employees of Basslink and consultants.
- 63 Hydro notes several times in its decisions that the names of officers and contact details have been exempted in line with verbal advice from this office. There is, however, no evidence on the case file to suggest that any such advice was given. It is also contradictory to the advice we ordinarily give, which is to refer to previous decisions under s36 published on our website, and the training we provide in relation to the Act.
- 64 Hydro also claims that the identity of staff is protected by the Privacy Act, presumably the Commonwealth *Privacy Act 1988*. That Act applies to Australian Government agencies and organisations with an annual turnover more than \$3 million, subject to some exceptions.
- 65 Some state authorities and instrumentalities are bound by the Privacy Act<sup>6</sup> but that does not prevent disclosure by them of personal information about an individual where ‘the use or disclosure of the information is required or

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<sup>6</sup> <https://www.oaic.gov.au/privacy/privacy-in-your-state/>

authorised by or under an Australian law'.<sup>7</sup> This allows the disclosure of personal information as required or authorised by or under the RTI Act.

- 66 Nor does the *Personal Information Protection Act 2004* (Tas) (the PIP Act) prevent the release of personal information under the RTI Act.
- 67 Section 4 of the PIP Act provides that if any provision of the PIP Act is inconsistent with a provision under any other Act, then:
  - (a) the other Act (in this case, the RTI Act) prevails; and
  - (b) the provision of the PIP Act has no effect to the extent of the inconsistency.
- 68 In addition, Clause 2(l)(f) of Schedule 1 of the PIP Act, which contains the Personal Information Protection Principles, provides that a personal information custodian must not use or disclose personal information about an individual for a purpose other than the purpose for which it was collected *unless the disclosure is required or authorised by or under law*. The RTI Act is such a law.
- 69 If a delegate making a decision under the RTI Act determines that personal information is not exempt under that Act, then the PIP Act would not prevent its release.
- 70 In the present case, it is not clear whether Hydro has even considered the requirements of this exemption. This is supported by the fact there are no public interest test considerations referred to or reasons provided in its decisions.
- 71 It is, however, clear from what Hydro says about the alleged verbal advice from this office and the Privacy Act that had Hydro been aware of the provisions of s36 it would have relied on it. I will, therefore, have regard to s36 and review the material in that context.
- 72 As noted earlier there are two categories of personal information in this review – the personal information of Hydro's internal staff and the personal information of external people. The information at issue falls into three primary categories: names, titles, and contact details, and I am satisfied that, in both categories, this information is the personal information of another person and, as such, is provisionally exempt.

#### *Section 36 – Public Interest Test*

- 73 I will deal first with the personal information of Hydro's internal staff.
- 74 The public interest matters in Schedule 1 of the Act provide little support for exemption of the names, job titles and/or contact details for internal staff of a State-owned entity such as Hydro.

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<sup>7</sup> [Australian Privacy Principle 6.2\(b\)](#) and 6.1(b)

- 75 Public authorities sometimes rely on the harm element in matter (m) of Schedule 1 to argue that basic employment information or contact details should be protected from release. There is little to support this in practice. The basic details of staff (including salaries for that matter) have been categorised as *relatively routine staff matters*, and *comparatively innocuous employment information*.<sup>8</sup>
- 76 In this instance, I see no reasonable likelihood of harm from the release of internal staff names, positions and contact details. On the other hand, this personal information has the potential to provide ‘contextual information to aid in the understanding of government decisions’<sup>9</sup> and to promote the object of the Act.<sup>10</sup>
- 77 Accordingly, I determine that it would not be contrary to the public interest to disclose the names, position titles, contact details and other personal information of the internal staff at Hydro contained in Documents A – G. Hence, these are not exempt under s36 and should be released to Mr Stott.
- 78 Similar considerations apply to the personal information of those people from organisations external to Hydro. There is equally little likelihood that disclosure of their names, position titles, or contact details will cause harm. The nature of engaging with public authorities is that it comes with an expectation of openness, transparency and accountability. The third parties engaging with Hydro were doing so either because they were engaged on a fee for service to carry out a function for Hydro or pursuant to other contractual obligations. Third parties would not reasonably refuse to engage again with a Tasmanian public authority purely on the basis that their name and other basic information might be disclosed under the RTI Act. If they did, then others would step up to take on the work.
- 79 Any minor risk of harm such as the above from release of third parties’ personal information is outweighed here by the public interest arguments favouring disclosure. These are arguably less strong in relation to external parties than for internal staff of Hydro, but third parties’ employment information again provides ‘contextual information to aid in the understanding of government decisions’, given these third parties were engaging with Hydro in relation to the Basslink cable in the aftermath of its failure.
- 80 There is nothing in the information that persuades me that its disclosure would be contrary to the public interest. Accordingly, I determine the personal information from third parties external to Hydro is also not exempt and should be released to Mr Stott.

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<sup>8</sup> Deputy Premier and Minister for State Development, Infrastructure and Planning, and the Premier [2014] QICmr 41

<sup>9</sup> Matter (d) of Schedule 1

<sup>10</sup> s3

## Section 37

- 81 This section provides for the exemption of information that is related to the business affairs of a third party acquired by a public authority from a person or organisation other than the person making the application for disclosure, and either:
- (a) the information relates to trade secrets; or
  - (b) its disclosure would be likely to expose the third party to competitive disadvantage.<sup>11</sup>
- 82 Hydro relies on s37 to exempt information in its Documents E and F. Like s36, s37 is subject to the public interest test.
- 83 As to Document E, Hydro claims the information is exempt as its disclosure:
- would harm the financial or business interests of Hydro or a third party;
  - would not inform the applicant of the reasons for a decision;
  - might prejudice Hydro's ability to obtain similar information in the future; and
  - would not contribute to public debate regarding the Basslink fault.
- 84 Hydro claims exemption on the same bases for Document F with the exception of dot point three.
- 85 These matters reflect considerations relevant to the public interest test. I can see nothing in Hydro's decision, however, as to how s37 applies to the information; that is, I can see no reasons from Hydro to support a contention that release of the information would disclose a trade secret or would expose a third party, presumably Basslink, to competitive disadvantage.
- 86 I have reviewed the contents of Documents E to F and could find nothing that related to a trade secret of a third party. That leaves for consideration whether the release of the information would expose Basslink to competitive disadvantage.
- 87 In *Forestry Tasmania v Ombudsman*, the Supreme Court of Tasmania considered the equivalent provision to s 37 in the *Freedom of Information Act 1991*, predecessor to the RTI Act. As to the meaning of competitive disadvantage, His Honour Mr Justice Porter held:

*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,*

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<sup>11</sup> s37(1)

*but primarily the provisions are concerned with the potential impact on the undertaking or agency acting as a competitor in the market....<sup>12</sup>*

88 His Honour further held that:

*The application of the correct approach involves an assessment of the facts, and findings as to likely exposure to the relevant disadvantage...<sup>13</sup>*

- 89 The Court interpreted the meaning of “likely” to be ‘a real or not remote chance or possibility, rather than more probable than not’.<sup>14</sup>
- 90 As a result of the decision of the Supreme Court of New South Wales Court of Appeal in *Kaldas v Barbour*,<sup>15</sup> the Ombudsman is not susceptible to the supervisory jurisdiction of the courts, and for that reason, the decision in *Forestry Tasmania v Ombudsman* was made ultra vires and is no longer binding authority.
- 91 The value of the case as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and to the meaning of the phrases *competitive disadvantage* and *likely to expose*, all of which are instructive and with which I agree.
- 92 I have seen nothing in either Document E or F that if disclosed, would be likely to expose Basslink or any other third party to *competitive disadvantage* as that term is interpreted above. Information in these documents is predominantly technical information about the cable fault, the fact of which is widely known.
- 93 In that case, and again given the absence of any reasons from Hydro as to why or how a competitive disadvantage might accrue to Basslink as a result of the release of the information, I am not satisfied that the exemption is made out.
- 94 I determine no information in Documents E or F is exempt under s37, and subject to any other exemption that I might find applicable to the documents, they are to be released to the applicant.

### *Section 38*

- 95 This section, also subject to the public interest test, exempts information that relates to the business affairs of a public authority. There are several potential bases upon which a claim for exemption might be made.
- 96 Section 38(a) provides that information is exempt 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;*

<sup>12</sup> [2010] TASSC 39 at [52]

<sup>13</sup> Ibid at [59]

<sup>14</sup> Ibid at [41]

<sup>15</sup> [2017] NSWCA 275

- 97 Section 38(b) potentially relevantly, extends the exemption to information:
- 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*
- 98 Hydro has not provided any reasons to support the claim for exemption pursuant to s38 so I am unsure which of the above two sub-sections it relies on. Hydro has referred to some matters that might be relevant to the public interest test in a similar fashion that it did in relation to the application of s37.
- 99 For the same reasons set out above in relation to s37 I am not satisfied that the information refers to trade secrets. I accept that Hydro engages in trade or commerce, but am not satisfied that the information is of the requisite sort, which if released, would be likely to expose Hydro to competitive disadvantage.
- 100 It may be that Hydro considers the information to be of a technical or scientific nature, but I am not convinced that the information at issue here regarding the Basslink cable is ‘the result of technical or scientific research’ as required by s38(b), and Hydro has not put forth anything to suggest that it is. Even if it is, there is nothing to suggest that any of the three alternate circumstances which found the exemption exist.
- 101 For the purposes of ss38(b)(i) and (iii), there is no evidence of any research, and no suggestion of a patentable invention.
- 102 Section 38(b)(ii), requires that disclosure of incomplete results would be likely to unreasonably expose Hydro to disadvantage. For a start, there are no results of any research indicated. In addition, as is the case in relation to s37, if disadvantage exists, it would be largely due to information already known about the fault and the length of time taken to find it. Disclosing additional technical information such as where the fault was and how it was located would not, in my view, unreasonably expose Hydro to further disadvantage, and s38(b)(ii) is not applicable here.
- 103 Accordingly, I determine no information in Documents E or F is exempt under s38, and subject to any other exemption that I might find applicable to those documents, they are to be released to the applicant.

## Section 39

- 104 Subject to the public interest test, information is exempt pursuant to s39(1) if its disclosure would divulge information communicated in confidence by or on behalf of a person or government to a public authority, and:
- (a) the information would be exempt if generated by the public authority; or
  - (b) the disclosure would be reasonably likely to impair the ability of a public authority to obtain similar information in the future.
- 105 Hydro stated in Part 3 of Annexure A to its internal review decision that ‘it was in possession of other information, while may be responsive to your Request was received by Hydro Tasmania in confidence and which Hydro Tasmania considers to be exempt pursuant to Section 39 of the RTI Act.’ I will refer to this information as Document H. This is a report from another independent third party expert employed by Basslink to investigate the fault that developed in the cable in December 2015.
- 106 DLA Piper on behalf of Basslink, asserts that both s39(1)(a) and (b) are relevant to the subject information. It is claimed that Document H is exempt under s39(1)(a) as it would be exempt under s31 if generated by a public authority for the purpose of instructing solicitors.
- 107 It is further claimed that Document H is exempt under s39(1)(b) in that it was communicated by Basslink in confidence to Hydro.
- 108 I do not agree that the document would be exempt under s31 if generated by a public authority. As referred to in detail above, s31 exempts information that would attract legal professional privilege in legal proceedings and is designed to protect communications between a client and their lawyer that have been generated for the primary purpose of giving and receiving legal advice.
- 109 The Document H report is not of itself such a communication and alone, would not attract the privilege. Communications about it might, as may parts that might be relied on in a prosecution or defence, but it would first need to meet the dominant purpose test.
- 110 The second claim that the document was communicated in confidence is a much stronger one.
- 111 Both Hydro and Basslink are large companies that contracted with each other in relation to the very large and expensive project of laying and maintaining the Basslink cable.
- 112 It would be reasonable to conclude that many communications passing between these two companies would be considered confidential. The Document H report is headed *Confidential and Privileged*, and given its nature, it seems to me more likely than not to have been submitted and received in confidence, and I am satisfied that it was.

I13 That being the case, I now need to consider whether release of the information would be reasonably likely to impair Hydro's ability to obtain similar information in the future as required by s39(1)(b).

I14 Basslink through DLA Piper, made it very clear that, if Hydro released the report, it would be in breach of the contract between them and that that breach would be met by legal proceedings; Basslink would sue Hydro for the breach.

I15 As a partner to the project that laid the cable, Hydro also has a right under the contract to be presented with material such as the report.

I16 By virtue of s39(2), the exemption contained in s39(1) does not include information if it:

- (a) *was acquired by a public authority or 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.*

I17 Each of sub-sections (a) to (c) must be met for the exemption to be excluded.

I18 The first two are easily satisfied; Document H was acquired by Hydro from Basslink and relates to the commercial activities of Hydro with Basslink which are heavily connected to their business undertaking.

I19 Section 39(2)(c), requires that the information must have been provided to Hydro pursuant to a requirement of any law.

I20 The contract between Hydro and Basslink Pty Ltd includes protection in that, if an incident arises (such as the fault that arose in December 2015), then information sharing will occur.

I21 This contract is legally binding and, hence, Document H was provided to Hydro *pursuant to any law*, namely the common law of contract. Accordingly, Document H satisfies each paragraph of s39(2) and, therefore, is not eligible for exemption under s39(1).

I22 I determine Document H is not exempt under s39. It should therefore be released to Mr Stott unless exempt under the following reasons.

### **Further Considerations**

I23 The determination above for s39 provides that, due to the contract between Hydro and Basslink Pty Ltd, Document H satisfies all matters in s39(2) preventing its exemption under s39(1).

I24 The same contract contains confidentiality provisions regarding the release of information, which is the premise of Basslink's claims that it will sue for breach of contract if Document H is released.

I25 This is clearly set out in clause 20 of the contract.

I26 While the determination above set out that Document H is no exempt under s39, it does not mean that it is not exempt elsewhere. As such, I will now consider s30.<sup>16</sup>

I27 There are many elements to s30. I will specifically consider s30(1)(a)(ii). This paragraph exempts information if its disclosure under the RTI Act 'would be reasonably likely to' prejudice 'the enforcement or proper administration of the law in a particular instance'.

I28 While the contract prevented exemption of Document H under s39, the same contract also contains provisions that prevent the unilateral release of confidential information.

I29 If I direct Hydro to release Document H, then I will be directly placing Hydro in a position where it will need to breach a common law contract in order to satisfy my direction.

I30 Accordingly, release of Document H under the RTI Act would, or would be reasonably likely to, prejudice the proper administration of the law (namely, the law of contract) in this particular instance. Subsection 30(1) is not subject to the s33 public interest test.

I31 Therefore, I determine Document H is exempt information under s30(1)(a)(ii).

### **Preliminary Conclusion**

I32 For the reasons set out above, I determine the following:

- A decision to refuse a request pursuant to s12 is not reviewable by me under the Act
- 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
- Exemptions claimed pursuant to s31 are varied
- Exemptions claimed pursuant to s36 are not made out and the information in relation to which Hydro applied s36 should be released to Mr Stott
- Exemptions claimed pursuant to s37 are not made out and the information in relation to which Hydro applied s37 should be released to Mr Stott

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<sup>16</sup> Information relating to enforcement of the law

- Exemptions claimed pursuant to s38 are not made out and the information in relation to which Hydro applied s38 should be released to Mr Stott
- The refusal to provide information pursuant to s39 is not made out, however that information (Document H) is exempt information under s30 and is not required to be released to Mr Stott.

### **Submissions to the Preliminary Conclusion**

- 133 The above preliminary decision was adverse to Hydro, and a copy of it was therefore forwarded to Hydro seeking its input before finalising the decision, as required by s48(1)(a).
- 134 Hydro requested an extension of time to provide its input, as its key personnel required for the submission were engaged in an arbitration with Basslink. This office weighed that against s7 and s3(4)(b) and consulted with Mr Stott who agreed to the extension. Accordingly, this office granted Hydro the extension sought.
- 135 On 16 September 2020, Hydro provided a five page letter responding to the preliminary decision. Its response focused on sections 19, 31 and 36 in terms which are set out or in relation to s36, so as to avoid naming individuals, summarised below. For ease of reference, this decision's numbering of paragraphs and footnotes has been inserted into longer extracts of Hydro's input below (replacing Hydro's numbering).

### **Submission regarding Section 31**

136 *Hydro Tasmania agrees with the determinations regarding privileged information under s31. Hydro Tasmania notes for future reference that the use of the word ‘sensitive’ in Documents A and C is an internal shorthand for the competition law issue of inside information and not an attempt to claim privilege where not appropriate.*

137 I accept this submission. No further analysis is needed.

### **Submission and Further Analysis regarding Section 19**

138 Hydro submitted that:

- 139 *In accordance with paragraph 53 of the Decision<sup>17</sup> and s 19 of the RTI Act, Hydro Tasmania intends to consult with Mr Stott on Item 3 of his request, giving proper consideration to the matters in Schedule 3 of the RTI Act.*
- 140 *Item 3 of Mr Stott’s request was for all information in Hydro databases, emails, diary entries, reports, notes and photography to do with the fault itself. This request is of a global kind and not precise enough to locate the documents sought within a reasonable time and exercise of reasonable effort. Hydro Tasmania has performed a search using reasonable criteria and found some 9,264 responsive documents. This figure includes some, but not all,*

<sup>17</sup> Due to slight amendments for clarity to the preliminary decision as set out in this final decision, paragraph 53 has been renumbered to 46.

*photographs taken by Hydro Tasmania-engaged investigators on board the cable repair vessel or by Hydro Tasmania staff at the forensic examinations of the failed cable sections.*

- 141 *The effort required for Hydro Tasmania to review 9,264 documents would be significant. If it was assumed that each document would take one minute to review (which we expect to be an extremely conservative estimate), the review would take one full-time employee 4.22 weeks to complete. There is a real possibility that this estimate would be greatly exceeded. Hydro Tasmania would need to devote a minimum of two full-time employees to the application to complete the document review within the 20 working day timeline set by the RTI Act. In addition, the subject matter of the documents is the subject of a formal dispute process that has been referred to arbitration for binding determination. Much of the material will be privileged, which will add to the review burden as it will be necessary to determine specific privileged information in each document where a document is partially privileged.*
- 142 *The issue described at paragraph 47 of the Decision<sup>18</sup> will be taken into consideration by Hydro Tasmania when dealing with future RTI matters in which s 19 is applied.*

**143 I accept Hydro's undertakings at paragraphs 140 and 143 above.**

**144 I also accept that Hydro has identified 9,264 documents responsive to Part 3 of Mr Stott's request and the volume of information and time required to assess this information under the Act would require an unreasonable diversion of resources if the request is not refined.**

**145 The effort described by Hydro at paragraph 142 can be best remedied by it giving Mr Stott a reasonable opportunity for consultation, as required by s19(2), and in accordance with:**

- **Hydro's undertaking at paragraph 140;**
- **paragraph 46 (referred to by Hydro as paragraph 53); and**
- **earlier associated paragraphs of my preliminary decision.**

**146 A proper consultation process will be informed by the above and could include, for example, Hydro providing Mr Stott with a high-level breakdown of its search results, identifying the relative resources required for it to collate and assess the different categories of documents responsive to Item 3. Presumably Hydro has already needed to collate and organise significant documentation regarding the fault, so it is best placed to explain to Mr Stott which information it could most easily and usefully provide him.**

**147 For example, photographs such as Hydro describe may be readily separated from other documents by searching by file type or category. Photographs generally epitomise 'purely factual information' under the RTI Act, so are unlikely, in themselves, to be exempt.**

**148 On the other hand, Mr Stott may (I do not know) be less interested in receiving many repetitive photographs of large file size than he is in more**

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<sup>18</sup> As in note 17, paragraph 47 has been renumbered to 41.

nuanced documents reporting on the most significant photographs. Some reports, however, may take longer for Hydro to assess for legal professional privilege if, as Hydro states:

*Much of the material will be privileged, which will add to the review burden as it will be necessary to determine specific privileged information in each document where a document is partially privileged.*

149 Hydro's submission agreed with the preliminary decision's application of s31. As described below, Mr Stott took a very reasonable and accommodating approach to Hydro's s36 concerns.

150 Consequently, through a proper s19(2) consultation process, it should be possible for the parties to negotiate an agreement as to which Item 3 documents Hydro can most usefully provide to Mr Stott, within what timeframe(s), without 'substantially and unreasonably divert[ing] the resources of the public authority from its other work' having regard to the matters specified in Schedule 3.

### **Submission and Further Analysis regarding Section 36**

151 Hydro's overview of its input summarised its primary submissions as follows:

- (1) *The individual email addresses and direct telephone lines of internal Hydro Tasmania personnel are exempt information with respect to Schedule 1 of the Right to Information Act 2009 (Tas) ('RTI Act') and should not be disclosed; and*
- (2) *The names and contact details of external personnel are exempt information with respect to Schedule 1 of the RTI Act and should not be disclosed, particularly the names of individuals not engaged by Hydro Tasmania.*

152 Hydro provided extensive further written arguments as to why it considered that it would be contrary to the public interest to disclose personal information of three categories of personnel. Those categories were:

- internal Hydro Tasmania personnel;
- former Hydro Tasmania personnel; and
- personnel external to Hydro.

153 Hydro made specific submissions tailored in relation to each of these three categories and the application of s36 and the public interest test.

154 This office also received a submission from a former Hydro employee who, in some of the information which the preliminary decision proposed be released, was named, his former Hydro email address was given, and included what is now his personal mobile phone number which he continues to use.

155 It ultimately proved unnecessary, due to a concession by Mr Stott, for me to fully consider and determine the s36 public interest issues. I have therefore

(and in view of s48(4)) not set out the detail of the submissions on s36 and associated public interest issues by Hydro and its former employee.

156 Nevertheless, I note the following which would have informed my initial consideration of this issue absent Mr Stott's concession described at the end of this decision.

157 Information in a person's email signature such as their name, email address and direct phone number(s) is *purely factual information* under the Act. As such it is not exempt under, for example: s27, due to s27(4); nor s35, due to s35(2). It is, however, *personal information* as defined in s5(1), so s36 must be considered.

158 The names and contact details of public authority staff are typically not exempt under s36 due to the s33 public interest test. As was stated, for example, in *Bryan Green MP and Department of Treasury and Finance*<sup>19</sup> at paragraphs 52-53:

52 The names of those staff members is personal information in accordance with the terms of s36(l), however, the public interest test must be considered before the exemption can apply.

53 It is open to conclude that the release of the names of officers who prepare official information could lead to better accountability, and there is little in the way of 'harm' if the names are released. Especially as the staff members are performing their official duties and carrying out the functions they were employed to do.

159 This approach is consistent with that in most other jurisdictions, including in a recent position paper on the issue by the Office of the Australian Information Commissioner.<sup>20</sup> As that paper's executive summary relevantly states:

*The following principles will inform updates to Parts 3 and 6 of the FOI Guidelines:*

*The FOI Act plays an important role in promoting transparency and accountability in government.*

*Public servants are accountable for their decisions, their advice and their actions. Agencies and ministers must ensure staff understand this and that this is made clear in staff induction programs and ongoing training.*

*Agencies and ministers should start from the position that including the full names of staff in documents released in response to FOI requests increases transparency and accountability of government and is consistent with the objects of the FOI Act.*

<sup>19</sup> O1411-123 at [www.ombudsman.tas.gov.au/\\_data/assets/pdf\\_file/0006/392793/Bryan-Green-and-Department-of-Treasury-and-Finance-July-2017.PDF](http://www.ombudsman.tas.gov.au/_data/assets/pdf_file/0006/392793/Bryan-Green-and-Department-of-Treasury-and-Finance-July-2017.PDF)

<sup>20</sup> Office of the Australian Information Commissioner, *Disclosure of public servants' name and contact details in response to FOI requests*, 20 August 2020 at [www.oaic.gov.au/freedom-of-information/guidance-and-advice/public-servants-names-and-contact-details](http://www.oaic.gov.au/freedom-of-information/guidance-and-advice/public-servants-names-and-contact-details)

*Agencies and ministers who have not identified work health and safety risks associated with disclosure of staff names and contact details should generally continue to provide full access to this information on request.*

<sup>21</sup>  
...

- 160 Equivalent reasoning applies under the RTI Act, given its s3 object with its analogous focus on improving democratic government and accountability. The accountability arguments generally apply to both current and former staff.
- 161 To discharge its onus under s47(4) and s33(l), a public authority would need to show demonstrable harm to the public interest, outweighing the ‘accountability’-related matters enumerated early in Schedule 1 of the Act which favour disclosure.
- 162 Hydro’s submissions referred, amongst other matters, to my decision in *T and Tasmania Police* (June 2020).<sup>22</sup> Hydro argued that, like Tasmania Police, Hydro provides generic phone and email contact details for the use of the public, and for media enquiries.<sup>23</sup> Be that as it may, the concerns Hydro raised associated with disclosure of its staff names and contact details are not, with respect, on par with the work health and safety risks posed to Tasmania Police staff.
- 163 Generally speaking, therefore, disclosure in 2021 under the RTI Act of the personal information in the email signature of a public authority staff member would not ‘be reasonably expected to be of concern to [them]’: s36(2)(c).
- 164 The former Hydro staff member who wrote to my office did raise unusual circumstances, particularly in terms of their mobile phone number which Hydro’s submission confirmed ‘was transferred from Hydro Tasmania to [its former employee] personally and is no longer associated with Hydro Tasmania.’
- 165 I also accept that the personal information of people external to Hydro (ie, not otherwise subject to the RTI Act, except for their dealings with a public authority), raises more complex issues, some of which I have considered in other decisions regarding s36 and the public interest test.
- 166 Consequently, after giving both the submissions due consideration, this office consulted Mr Stott pursuant to s47(l)(j) and (h). The nature of Hydro’s arguments regarding s36 were explained to Mr Stott in general terms by telephone, without revealing the identities of the individuals named by Hydro, nor the author of the personal submission.
- 167 In short, Mr Stott agreed to redaction by Hydro of the personal information which it, and its former employee, contested in their submissions on the preliminary decision.

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<sup>21</sup> Ibid

<sup>22</sup> O1702-189 [www.ombudsman.tas.gov.au/data/assets/pdf\\_file/0006/573576/T-and-Tasmania-Police-Final-Decision.pdf](http://www.ombudsman.tas.gov.au/data/assets/pdf_file/0006/573576/T-and-Tasmania-Police-Final-Decision.pdf)

<sup>23</sup> [www.hydro.com.au/contact](http://www.hydro.com.au/contact)

168 Mr Stott's agreement to such redactions can be considered akin to refining the scope of his application under s13(7) so as to exclude that personal information contested in the submissions on the preliminary decision.

### **Correction to reasoning in preliminary decision regarding Section 39**

169 In the preliminary decision provided to Hydro and set out above, I considered whether Document H was exempt information under s39 of the Act. I remain of the view that Document H is exempt information but wish to correct the reasoning in finding that it is so.

170 The preliminary decision stated that s39 could not apply to Document H, as it was information which met the requirements of s39(2). This was not correct. Document H cannot properly be categorised as information which was provided to a public authority or Minister pursuant to a requirement of any law and s39(2)(c) is accordingly not satisfied. While Document H was required to be provided to Hydro under a provision of a legally binding contract under the common law of contract, this does not make its provision a requirement pursuant to a specific law.

171 Ultimately, this error did not change the conclusion reached in my preliminary decision or my consideration that s39 was not the appropriate provision to exempt Document H. I found that Document H was exempt from release under s30 of the Act as Hydro would be required to breach a common law contract to provide this information. I considered that this 'would be reasonably likely to prejudice...the enforcement or proper administration of the law in a particular instance' and justified exemption under s30.

### **Conclusion**

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

- A decision to refuse a request pursuant to s12 is not reviewable by me under the Act;
- 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;
- Exemptions claimed pursuant to s31 are varied;
- Exemptions claimed pursuant to s37 are not made out and the information in relation to which Hydro applied s37 should be released to Mr Stott;
- Exemptions claimed pursuant to s38 are not made out and the information in relation to which Hydro applied s38 should be released to Mr Stott;
- The refusal to provide information pursuant to s39 is not made out, however that information (Document H) is exempt information under s30 and is not required to be released to Mr Stott.

173 I am not required to determine whether personal information contained in the documents is exempt pursuant to s36, as this information is to be redacted by agreement between the parties.

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

**Dated:** 18 February 2021

**Richard Connock**  
**OMBUDSMAN**

## **Section 12 – Information to be provided apart from the Act**

- (1) This Act does not prevent and is not intended to discourage a public authority or a Minister from publishing or providing information (including exempt information), otherwise than as required by this Act.
- (2) Subject to guidelines issued by the Ombudsman under section 49, public authorities or Ministers may disclose information to the public as –
  - (a) a required disclosure; or
  - (b) a routine disclosure; or
  - (c) an active disclosure; or
  - (d) an assessed disclosure.
- (3) Assessed disclosure is the method of disclosure of last resort and –
  - (a) the principal officer of a public authority is to ensure that there are adequate processes in place in the public authority to ensure that there is appropriate active disclosure, routine disclosure or required disclosure of information by the public authority; and
  - (b) the principal officer of a public authority is to ensure that the processes in place under paragraph (a) comply with the guidelines issued by the Ombudsman under section 49; and
  - (c) the principal officer of a public authority or a Minister may refuse an application made in accordance with section 13 if the information that is the subject of the application –
    - (i) is otherwise available; or
    - (ii) will become available, in accordance with a decision that was made before receipt of the application, as a required disclosure or routine disclosure within a period of time specified by the public authority or Minister but not exceeding 12 months from the date of the application.

## **Section 19**

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

- (a) would substantially and unreasonably divert the resources of the public authority from its other work; or
- (b) would interfere substantially and unreasonably with the performance by that Minister of the Minister's other functions –

having regard to –

- (c) the matters specified in Schedule 3 –

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

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

## **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.

Where, under s5(1):

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

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

### **Section 37 – Information relating to 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.

### **Section 38 – Information relating to business affairs of public authority**

Information is exempt information –

- (a) if it is –
  - (i) a trade secret of a public authority; or
  - (ii) in the case of a public authority engaged in trade or commerce, information of a business, commercial or financial nature that would, if disclosed under this Act, be likely to expose the public authority to competitive disadvantage; or
- (b) if it consists of the result of scientific or technical research undertaken by or on behalf of a public authority, and –
  - (i) the research could lead to a patentable invention; or
  - (ii) the disclosure of the results in an incomplete state would be likely to expose a business, commercial or financial undertaking unreasonably to disadvantage; or
  - (iii) the disclosure of the results before the completion of the research would be likely to expose the public authority or the person carrying out the research unreasonably to disadvantage; or
- (c) if it is contained in –
  - (i) an examination, a submission by a student in respect of an examination, an examiner's report or any such similar record; and

- (ii) the use for which the record was prepared has not been completed.

### **Section 39 – Information obtained in confidence**

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

**OMBUDSMAN TASMANIA**  
**DECISION**

**Right to Information  
Act Review**

**Case Reference:** R2202-024  
O1907-050

**Names of Parties:** Clive Stott and TT-Line Company Pty Ltd

**Reasons for decision:** s48(3)

**Provisions considered:** ss30, 36 and 38

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**Background**

- 1 On 16 March 2019, Mr Clive Stott made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to TT-Line Company Pty Ltd (TT-Line). Mr Stott sought air quality monitoring information on board Spirit of Tasmania I and Spirit of Tasmania II.
- 2 Mr Stott expressed his request as follows:
  - a) *Please advise if there is an air monitoring program undertaken on-board the two Tasmanian vessels, Spirit of Tasmania I and Spirit of Tasmania II*
  - b) *If so, when did it commence?*
  - c) *Who undertakes it (name)? And,*
  - d) *How often?*
  - e) *Under which applicable legislation and marine convention requirements (names) does Spirit of Tasmania comply with in relation to on-board air monitoring?*
  - f) *Please provide me with the air monitoring results for the last three years*
- 3 On 9 May 2019, Kevin Maynard, a delegated officer of TT-Line under the Act, issued a decision answering the first five questions above and found two documents relevant to the request in f), namely:
  - a) Bureau Veritas HSE – Carbon Monoxide and Diesel Particulate Assessment Report dated 14 July 2016; and
  - b) Bureau Veritas HSE – Carbon Monoxide and Diesel Particulate Assessment Report dated 1 June 2018.
- 4 The delegate relied upon ss 30 and 38 exemptions under the Act to refuse to release the entirety of the above documents. These exemptions concern the enforcement of the law and the business affairs of a public authority. The delegate referred to concerns that release of the reports would prejudice an ongoing investigation into the deaths of 16 polo ponies in January 2018.

- 5 On 28 May 2019, Mr Stott requested an internal review of the decision. He refuted claims by TT-Line that the information on air monitoring is related to any law enforcement or that it would expose it to competitive disadvantage relating to its business affairs.
- 6 On 18 June 2019, TT-Line's Principal Officer under the Act, Chief Executive Officer Bernard Dwyer, issued an internal review decision. Mr Dwyer also identified a third document that was responsive to the request:
  - a) Bureau Veritas HSE – Exhaust Emission Testing: Prime Movers dated 7 July 2016.
- 7 Mr Dwyer affirmed Mr Maynard's decision and relied upon the same exemptions pursuant to ss30 and 38, as well as s36, to decline to release any of the information.
- 8 I will refer to the three documents throughout this decision as the 'Reports'. The Reports total 248 pages.
- 9 On 8 July 2019, Mr Stott made an application for external review of TT-Line's decisions.
- 10 The application was accepted under s44 on the basis that Mr Stott had received an internal review decision and he submitted it to this office for review within 20 working days of his receipt of it. The fee had been waived pursuant to s16(2)(a).

### **Issues for Determination**

- 11 I must determine whether the information responsive to Mr Stott's request eligible for exemption under ss30, 36, 38 or any other relevant section of the Act.
- 12 As ss36 and 38 are in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under these sections, I must then determine whether it is contrary to the public interest to disclose it. When doing so, I must have regard to, at least, the matters contained in Schedule 1 of the Act.

### **Relevant legislation**

- 13 TT-Line relied on ss30, 36 and 38 of the Act in its decision to exempt information. I attach copies of these sections to this decision at Attachment 1.
- 14 Copies of s33 and Schedule 1 of the Act are also attached.

### **Submissions**

- 15 Mr Stott made submissions on two matters: whether the responses he received to his questions at items 2 a) to e) of his request for information were accurate; and whether exemptions applied to the information were justified.

- 16 In relation to the accuracy of information provided by TT-Line, primarily in relation to e), Mr Stott questioned whether TT-Line's statement that air quality testing is not required under legislative or marine convention requirements was correct. This is not a matter I am able to consider as part of this external review. TT-Line has provided information to Mr Stott and he will need to raise any concerns about any allegedly incorrect understanding of legal requirements by TT-Line in a different forum, as no review is available under the Act on this point.
- 17 In contesting that the exemptions applied were appropriate and seeking for all three reports to be released in full, Mr Stott submitted as follows (verbatim):

**5 Assessment of Exemptions**

*5.2 (b)i Mr Dwyer refers to pony deaths. However, there are other compelling reasons for releasing the Reports that Mr Maynard chooses to overlook.*

*5.2(b)ii Pony deaths occurred prior to, during, or following that one trip which does not form part of the Reports. Again this adds weight to the Reports being released.*

*5.2(e)i It is being claimed (all three?) Reports contain names. This is not sufficient reason to exempt the bulk of each Report from being released.*

*5.2(k) Air monitoring reports. This has been covered in my previous documentation where I have indicated air reports are made publically available.*

*When it comes to health issues (this being the primary reason for carrying out air quality testing) there should be no justification for these air monitoring Reports not to ordinarily be released to those with an interest in the matter, specifically when: Mr Dwyer in 7.a) acknowledges, "...there is a general public need for government information to be accessible..." And, Mr Dwyer accepts, "...that certain members of the public may wish to have access to information such as the Reports."*

*As far as misinterpreting the Reports, Mr Dwyer claims the Reports are complex. They might appear to be to him if he is not qualified in this field. He ignores the fact that I would not be relying on anyone else to misinterpret the Reports to me and there are other people who would not view them as complex. This again is insufficient reason to withhold the Reports.*

**6 Exemption not subject to public interest test**

*6 (a) & (b) Personal information does not exempt the bulk of the Reports from being released.*

*Air monitoring is not undertaken to protect competitive advantage on the Spirits, therefore their release would not put Spirit at competitive disadvantage.*

## **7 Public Interest Factors**

7.a) Mr Dwyer acknowledges, “..there is a general public need for government information to be accessible...” And, Mr Dwyer accepts, “...that certain members of the public may wish to have access to information such as the Reports.”

Mr Dwyer cannot just rely on, “...[his] opinion [that] there is no general public need for access to the Reports...” Mr Dwyer’s ‘opinion’ should not be a factor in preventing disclosure of the Reports.

7.i) My Dwyer, “...accept(s) that, given the subject matter of the Reports, public disclosure would arguably promote a public health issue, albeit in an indirect way.” And, Mr Dwyer has, ”...determined that this factor supports disclosure of the Reports.”

7.j) Mr Dwyer acknowledges the pony deaths occurred in 2018 which is some two years after the 2016 Reports. Air monitoring for the 2018 Report took place after that event, not during.

*These factors support the release of the Reports.*

- 18 Additionally, Mr Stott referred in his application for internal review to air monitoring reports often being publicly available:

*Engaging in trade or commerce does not give reasons for non-disclosure of air quality reports. Any vessel would need to carry out similar monitoring and would know the costings. In fact other vessels plying Bass Strait are already using hand-held air monitors therefore TT-Line would not be put to a competitive disadvantage.*

*It is not uncommon for other government businesses to have air monitoring reported in real-time on the internet.*

- 19 TT-Line did not make submissions in addition to the reasoning contained in its decision, which is summarised as follows. Mr Dwyer determined in his internal review decision that s30(1)(a)(i) and (ii) and s30(1)(f) of the Act applied to the three reports, stating:

*Information is exempt from disclosure under the Act if its disclosure would, or would be reasonably likely to:*

- i. *prejudice the investigation of a breach or possible breach of the law;*
- ii. *prejudice the enforcement or proper administration of the law in a particular instance; or*
- iii. *hinder, delay or prejudice an investigation of a breach or possible breach of the law which is not yet complete.*

*I have determined that the exemptions identified above apply to the Reports. This determination is based on the following considerations:*

- i. *there is an ongoing investigation by Biosecurity Tasmania into the deaths of 16 polo ponies in January 2018 that travelled on a TT-Line vessel; and*
  - ii. *I consider that the public release of the Reports is reasonably likely to prejudice and/or hinder or delay the ongoing investigation and/or the outcome of that investigation.*
- 20 In relation to s36 of the Act, Mr Dwyer said information is exempt information if its disclosure would involve the disclosure of the personal information of a person other than the person making the relevant application and referred to the definition of personal information in the Act. He determined that the reports contain personal information in the form of names of individuals, including TT-Line staff, and the exemption in s36(1) applies to that information.
- 21 Mr Dwyer also addressed s38, which concerns information relating to the business affairs of a public authority. He said that TT-Line is a public authority which engages in trade or commerce and the Reports constitute information which is of a business, commercial or financial nature. Mr Dwyer stated:

*I have determined that releasing the Reports would expose TT-Line to competitive disadvantage in the markets in which TT-Line operates because:*

  - i. *The Reports contain sensitive operating information that is of commercial value to TT-Line's market competitors and would not ordinarily be made publicly available; and*
  - ii. *There is a real risk that the contents of the Reports would be misinterpreted and then used in a manner that has the potential to unfairly damage TT-Line's reputation and commercial standing.*
- 22 In addressing the public interest factors for ss36 and s38 of the Act, Mr Dwyer considered all of the factors in Schedule 1 of the Act. Specifically, Mr Dwyer said in relation to the matters he considered relevant:
  - (a) - *In my opinion there is no general public need for access to the Reports or the relevant personal information*

*Accordingly, I have determined that this factor mitigates against disclosure of the Reports;*
  - (i) - *I accept that, given the subject matter of the Reports, public disclosure would arguably promote a public health issue, albeit in an indirect way;*
  - (j) - *Given that the investigation into the deaths of the polo ponies in January 2018 is ongoing and has the potential to reveal breaches or possible breaches of the law that may be pursued, in my opinion there is a risk that disclosing the Reports has the clear potential to prejudice or otherwise harm the administration of justice and the enforcement of the law insofar as the ongoing investigation is concerned. Turning to the 2016 report, I maintain this view despite the fact that the polo pony incident occurred in January 2018;*

- (k) – TT-Line is a significant contributor to the Tasmanian economy, both in absolute terms and as the sole provider of transport for people travelling with vehicles to and from Tasmania.

*In light of the ongoing investigation into the deaths of the polo ponies and the real risk that TT-Line would be exposed to competitive disadvantage, releasing the Reports has the potential to harm TT-Line's commercial standing, which, in turn, risks harm to the Tasmanian economy.*

*Accordingly, I have determined that this factor mitigates against disclosure of the Reports.*

- (m) - I consider that disclosing the names of the TT-Line workers referred to in the Reports has the potential to harm the individual interest of those workers.
- (s) - *In light of the ongoing investigation into the deaths of the polo ponies in January 2018, and the real risk that TT-Line would be exposed to competitive disadvantage, releasing the Reports has the potential to unfairly and unnecessarily harm TT-Line's business or financial interests.*

*Accordingly, I have determined that this factor mitigates against disclosure of the Reports.*

## **Analysis**

### **Section 30 – Enforcement of the law**

23 For information to be exempt under s30(l)(a) or (f), I must be satisfied that if the information was released it 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.*

...

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

24 The word prejudice is not defined in the Act and is therefore to be given its ordinary meaning. The Macquarie Dictionary relevantly defines it as meaning to affect disadvantageously or detrimentally.<sup>1</sup>

25 The testing for the Reports was conducted on 9 to 13 May and 14 June 2016 and 2 to 6 April 2018. The 16 polo ponies referred to by TT-Line died on or

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<sup>1</sup> Macquarie Dictionary Online, 2022, [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au).

about 28 January 2018 during their journey from Devonport, Tasmania to a location in Victoria. There is a current legal dispute as to whether the horses died during transport on the Spirit of Tasmania I and what caused the deaths.

- 26 Mr Dwyer did not provide any details about how the information would be reasonably likely to prejudice the investigation of the deaths of the polo ponies. The information contained in the reports relates to air monitoring, with a focus on the impact of carbon monoxide and diesel particulate on TT-Line staff. There was no data or analysis about readings inside vehicles or prime movers and no reference to the transportation of animals. The Reports related to discrete periods of time in 2016 and 2018 that were not relevant to the deaths and there is no indication that the testing was sought or the methodology altered in light of the pony deaths.
- 27 I accept that the report dated 7 July 2016 did specifically relate to prime movers exhaust emission testing, and this may have greater relevance to legal dispute regarding whether the deaths of the polo ponies occurred during their transport on a TT-Line vessel. This testing was conducted in 2016, however, and no reasoning was provided to demonstrate how releasing this report would prejudice the investigation into the deaths of the polo ponies in 2018.
- 28 In any event, due to the passage of time and unfortunate delay in the finalisation of this external review, the investigations are now complete. TT-Line and the two horse trailer drivers have been charged with animal welfare offences following the incident and the prosecution of these charges is ongoing. One of the owners of the ponies has also commenced civil legal proceedings in Victoria.
- 29 In those circumstances, I do not consider that s30(1)(a)(i) or s30(1)(f) of the Act apply, as the investigation into the relevant breaches of the law has concluded and so cannot be prejudiced by any disclosure.
- 30 Mr Dwyer referenced s30(1)(a)(ii) but provided no explanation as to why it was applicable and so I do not consider TT-Line has discharged its onus to show that this information should not be disclosed, as required by s47(4) of the Act.
- 31 I considered, however, whether the Reports would be reasonably likely to prejudice the fair trial of a person or the impartial adjudication of a particular case but am not satisfied that these factors are applicable.
- 32 Given the lack of direct relevance of the Reports, it is not apparent how disclosure would detrimentally affect the fair trial of any of the matters before the courts regarding the deaths of the polo ponies. I therefore do not consider that s30(1)(a)(iii) applies.
- 33 I understand the animal welfare trials are before a magistrate as opposed to a jury. A magistrate will be capable of disregarding any irrelevant information. It seems unlikely, in those circumstances, that the Reports, which are not directly relevant to the charges relating to animal welfare breaches, will have a

deleterious impact on the impartial adjudication of the cases. I have no information before me to suggest that the civil proceedings in Victoria are before a jury and so similarly disclosure seems unlikely to have an impact. I therefore do not consider that s30(1)(a)(iv) applies.

- 34 The onus rests upon TT-Line to demonstrate the exemptions in s30 applies and I am not satisfied that it has discharged the onus based on its internal review decision. Section 30 is not subject to the public interest test and it would defeat the object of the Act if information were exempted under such provisions without a clear rationale. TT-Line has not demonstrated sufficient causal link between the Reports on air monitoring from May and June 2016 and April 2018 and the legal matters related to the deaths of polo ponies in January 2018 for the exemptions in s30 to apply.
- 35 I determine that the Reports are not exempt under s30 and should be released to Mr Stott, subject to any other exemption I may find applicable.

### ***Section 36 – Personal information of person***

- 36 TT-Line has claimed that names of its staff and consultants contained in the Reports are exempt under s36. For information to be exempt under this section I must be satisfied that its release would reveal the identity of a person other than Mr Stott, or that the information would lead to that person's identity being reasonably ascertainable. Section 36 is subject to the public interest test found in s33 of the Act.

#### *TT-Line staff*

- 37 Two of the Reports contain the names of a number of TT-Line staff who participated in the air monitoring data collection. These staff members wore monitoring devices whilst performing their work loading and unloading on the passenger and freight decks. The names of the staff and the corresponding readings from these devices were contained in the report.
- 38 The name, title and work contact details for a TT-Line staff member were also contained in the address block of the report from 7 July 2016.
- 39 While this does constitute personal information under s36, no reason has been advanced by Mr Dwyer as to why it is in the public interest to exempt this information beyond stating that it may harm the individual interests of staff members.
- 40 I note again my repeatedly expressed view that the names of public officers performing their regular duties are not usually exempt under s36. This is consistent with previous decisions from this office<sup>2</sup> and the standard Australian practice<sup>3</sup> that the default position is that personal information of public

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<sup>2</sup> See Simon Cameron and Department of Natural Resources and Environment Tasmania (January 2022), Camille Bianchi and the Department of Health (November 2021), Clive Stott and Hydro Tasmania (February 2021), C and Department of Primary Industries, Parks, Water and Environment (December 2021) at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions).

<sup>3</sup> See Hunt and Australian Federal Police [2013] AICmr 66 (23 August 2013) at [72]-[74].

servants which relates to the performance of their regular duties (such as name, position information, work contact details) is not exempt from release. While the information is *prima facie* exempt, it is not contrary to the public interest to release it.

- 41 This type of information will only be considered exempt when there are specific and unusual circumstances identified which justify a finding that it would be contrary to the public interest to release it. Mr Dwyer has not provided any such reasons or discharged TT-Line's onus under s47(4) to show why this information should be exempt.
- 42 I determine that this information is not exempt pursuant to s36 and it should be released to Mr Stott.

*External professional parties*

- 43 The Reports also contain the names, titles, work contact details and signatures of the people who performed the air monitoring work and the person that reviewed two of the Reports from Bureau Veritas HSE, and the signature of the person who reviewed the report from 7 July 2016. The 2018 report also contains the name, title, work contact details and signature of a staff member from Maxxam Analytics.
- 44 While this does constitute personal information, no reason has been advanced by Mr Dwyer as to why it would be necessary to exempt this information. The external parties were acting in their professional capacity to provide assessment reports to TT-Line or Bureau Veritas HSE, and it is not apparent why any disclosure would be of concern to them or contrary to the public interest. I do not consider that Mr Dwyer has discharged TT-Line's onus to show why this information should not be released.
- 45 I determine that the personal information related to external parties is not exempt under s36 and is to be released to Mr Stott.

**Section 38 - Information relating to the business affairs of a public authority**

- 46 Mr Dwyer has claimed that the Reports are exempt under s38(a)(ii) of the Act. This section exempts information that relates to the business affairs of a public authority. Section 38 is subject to the public interest test found in s33 of the Act.
- 47 For s38(a)(ii) of the Act to apply, I must be satisfied that TT-Line is a public authority engaged in trade or commerce, and that the relevant information is of a business, commercial or financial nature that would, if disclosed, be likely to expose TT-Line to competitive disadvantage.
- 48 TT-Line is a state owned corporation, which is clearly engaged in trade or commerce as it provides passenger and freight transport across the Bass Strait on its vessels to paying customers.

49 The next consideration is whether the information responsive to the request is that of a business, commercial or financial nature that would, if released, be likely to expose the public authority to competitive disadvantage.

50 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...*

51 The Court further held that:

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

52 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.

53 I note here, that in the New South Wales Supreme Court decision of *Kaldas v Balbour*<sup>4</sup> 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.

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

#### *The Reports*

55 Mr Dwyer determined that the Reports contained sensitive operating information which is of commercial value to its market competitors and would not ordinarily be made publicly available. He considered there was a real risk that the contents of the Reports would be misinterpreted and then used in a manner that has the potential to unfairly damage TT-Line’s reputation and commercial standing.

<sup>4</sup> [2017] NSWCA 275 (24 October 2017)

- 56 I am not sufficiently persuaded that this is the case. The reasoning provided in the internal review decision was limited in nature. There was no explanation given to justify the assertion that the Reports were sensitive operating information of a business, commercial or financial nature or that competitive disadvantage was likely to result from their disclosure.
- 57 There were some basic details about which, and how many, decks are used for freight and passengers in the Reports but this would seem to be information that would be otherwise easily accessible. It is not apparent why this would be sensitive operating information or would be likely expose TT-Line to a competitive disadvantage.
- 58 I consider it necessary to take a narrow interpretation of the meaning of information of a business, commercial or financial nature in order to fulfil the object of the Act, and its explicit intention that discretions conferred by the Act, such as the application of exemptions, be exercised so as to facilitate and promote the provision of the maximum amount of information. Accordingly, even though TT-Line is a commercial enterprise, not all of its information will fall within the category of information of a business, commercial or financial nature.
- 59 Two of the Reports indicate that workers at TT-Line involved in unloading/loading operations raised concerns as to the levels of carbon monoxide and diesel particulate generated from those activities on the freight and vehicle decks of the Spirit of Tasmania I and II. To address these concerns, air quality testing commenced ten years ago and is performed every two years. The conclusions in the Reports about air quality were predominantly positive and TT-Line asserts that it undertakes the testing as a matter of 'best practice' rather than this being a mandatory requirement.
- 60 The Reports contain data that was collected from air monitoring activities and the analysis of that data in terms of the health impact on staff loading and unloading Spirit of Tasmania vessels I and II. It would appear that the Reports were obtained for purposes which were tangential to its primary business activities, namely ensuring the health and safety of staff and that air quality was maintained. It is not clear that the Reports would fall within the category of information of a business, commercial or financial nature.
- 61 Further, arguments regarding the Reports being complex and potentially misinterpreted, which may result in unfair criticism of, and damage to, TT-Line's brand, and that this represents another form of competitive disadvantage are unconvincing. TT-Line is a state-owned company with the resources and ability to respond to criticism, fair or otherwise, and to have three largely positive air monitoring reports released is not likely to expose it to commercial disadvantage. The Reports appear to demonstrate it was responsive to staff health and wellbeing concerns and has been pursuing best practice in doing the testing.

- 62 I also consider that s38(a)(ii) is not a mechanism under which public authorities can seek to suppress information which may lead to negative publicity under the guise of this causing competitive disadvantage. The Act is clear in its intention to increase the accountability of public authorities, and it would frustrate this object if reputational damage resulting from this scrutiny of a public authority's activities was deemed to give its competitors an advantage under s38(a)(ii).
- 63 I am not satisfied that TT-Line has discharged its onus under s47(4) to show why this information should not be disclosed. Accordingly, I determine that the Reports are not exempt under s38(a)(ii) of the Act and they should be released in full to Mr Stott.
- 64 This determination means that it has not been necessary for me to consider the public interest test. I will note, however, that TT-Line's argument that it would be contrary to the public interest to disclose the Reports due to their complexity, and potential misinterpretation, is misconceived. Schedule 2 of the Act clearly sets out at (b) and (d) that it is irrelevant whether the disclosure would confuse the public or whether it might cause the applicant to misinterpret or misunderstand the information. I urge TT-Line to exercise greater care to ensure it is in full compliance with the Act in any future assessment of the public interest test.

### **Preliminary Conclusion**

- 65 In accordance with the reasons set out above, I determine that the exemptions claimed pursuant to ss30, 36 and 38 are not made out. The Reports should be released in full to the applicant.

### **Conclusion**

- 66 As the above preliminary decision was adverse to TT-Line, it was made available to TT-Line on 12 May 2022 under s48(1)(a) to seek its input before finalising the decision.
- 67 TT-Line advised on 15 June 2022 that it would not be making any submissions in response to the preliminary decision.
- 68 Accordingly, for the reasons set out above, I determine that the exemptions claimed pursuant to ss30, 36 and 38 are not made out. The Reports should be released in full to the applicant.
- 69 I apologise to the parties for the inordinate delay in finalising this decision.

**Dated:** 20 June 2022

**Richard Connock**  
**OMBUDSMAN**

## **ATTACHMENT A**

### **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.

### **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.

### **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.

### **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.

### **SCHEDULE I - Matters Relevant to Assessment of Public Interest**

[Sections 30\(3\)](#) and [33\(2\)](#)

- I. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:
- (a) the general public need for government information to be accessible;

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

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

# **OMBUDSMAN TASMANIA**

## **DECISION**

**Right to Information Act Review**

**Case Reference:** O1903-002

**Names of Parties:** D, E and Department of Education

**Reasons for decision:** s48(3)

**Provisions considered:** s36

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### **Background**

- 1 D sought information from the Department of Education (the Department) concerning E, who is the alleged perpetrator of child sexual abuse against D. D applied for assessed disclosure under the *Right to Information Act 2009* (the Act) as part of a potential civil claim regarding historical sexual abuse. He is legally represented.
- 2 E is a former employee of the Department and D sought information held by the Department regarding his suspension from teaching duties, his subsequent reinstatement and any subsequent complaints.
- 3 During the assessment of D's application, the Department located a letter containing E's personal information which was responsive to the request. The letter was written by E on 10 April 2003 and sent to the Department. It relates to his appeal of a decision made by the Teacher Review Board (TRB).
- 4 On 26 November 2018, the Department wrote to E and consulted with him under s36(2) of the Act, seeking his view on the potential disclosure of his personal information.
- 5 On 10 December 2018, E responded to the Department's consultation claiming that the information was confidential and private and that it was his desire that nothing be released to the applicant.
- 6 On 21 December 2018, Ms Rowena Taylor, a delegated officer under the Act, wrote to E informing him that the Department's decision was to release the letter in full. It claimed its assessment of the public interest test and the specific nature of this request found, on balance, that release was more appropriate than exemption.
- 7 On 1 January 2019, E wrote to the Department and sought an internal review of this decision.

- 8 On 1 February 2019, Mr Tim Faulkner, a delegated officer under the Act, released an internal review decision to E. The internal review decision primarily upheld Ms Taylor's decision but found that some of the information was exempt pursuant to s36. The information redacted on internal review was E's address, phone number, and email address.
- 9 On 11 February 2019, E sought an external review through this office. It was accepted under s44 of the Act on the basis he was in receipt of an internal review decision and his external review request had been submitted to this office within 20 working days.

### **Issues for Determination**

- 10 I must determine whether E's information is eligible for exemption under s36.
- 11 As s36 is contained in Division 2 of Part 3, it is subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under that section, I am then required to determine whether it would be contrary to the public interest to release it having regard to, at least, the matters contained in Schedule 1.

### **Relevant legislation**

- 12 Section 36 is relied upon by E to object to the release of the information. A copy of this section is attached.
- 13 Copies of s33 and Schedule 1 are also attached.

### **Submissions**

- 14 E made submissions indicating that he does not dispute that the object of the Act cited in the decision by the Department favours the release of the letter, however, he maintained that this object could be met without including his personal information. Specifically, he claimed:

*Mr Faulkner has invoked section 3 of the Act (1a, b, c; 2; 3 and 4a, b) as a reason for releasing the information. It is my contention that good governance can be conveyed, but naming the writer is irrelevant and thus should be redacted.*

*Likewise, Schedule 1 of the Act refers to 'matters' of 'public interest', not 'persons'. Therefore, names should be redacted as irrelevant to the assessment of matters of 'public interest'.*

*Mr Faulkner's argument that Tasmanian schools have processes in place to check the registration of their employees to teach is a blatant attempt to mislead with respect to the confidential registration status of teachers. The argument I have put forward is that the general public does not have access to the decisions of the TRB and the release of this information would be in breach of that confidence.*

- 15 The Department set out its position, that a balancing exercise had been done and that the recent Royal Commission into Institutional Responses to Child Sexual Abuse evidenced a stronger public interest in the information being released. Specifically, it submitted:

*The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) effectively highlighted the failings of the past and provided institutions with a body of work that will protect our community's most vulnerable from the impact of abuse.*

*In the context of the Royal Commission and protecting our vulnerable people, I consider the release of the letter dated 10 April 2003 is in the public interest. The release of this document, among other things, may inform a person about the reasons for a decision, may aid in the understanding of government decisions and may enhance scrutiny of government decision-making and administrative processes. Additionally, given this information was requested by someone pursuing a claim in relation to historical sexual abuse, I consider that its disclosure may in fact promote the administration of justice, including affording procedural fairness and the enforcement of the law.*

*I also consider that the release of the letter dated 10 April 2003 aligns with the objects of the Act (section 3). In particular, the release of this information's [sic] may increase accountability of the executive, to [sic] which the Department forms part of, to the people of Tasmania.*

*Further to my above consideration on whether the release of the letter dated 10 April 2003 is in the public interest and aligns with the objects of the Act, I will now consider your objection to its release based on decisions of the TRB being "confidential". The document in question is a letter dated 10 April 2003 in which you wrote to the Department's Director of Human Resource Management. You advise in this letter that you had appealed a decision of the TRB to the Magistrate's Court. You also requested, in this letter, that the Department not proceed with any further action in regard to this matter until such time as an outcome is known.*

*While your 10 April 2003 letter does not provide specific information on the TRB's decision, given you refer in this letter to appealing a decision of the TRB and that you did not want the Department to proceed with any further action, it is likely that this TRB decision may have affected your teacher registration and therefore employment with the Department. You advised in your 10 December 2018 letter that you considered the decision of the TRB confidential.*

*I consider it important to highlight that information on whether someone has registration with the TRB is not confidential information. Any person wanting to teach in a Tasmanian school, college or the TasTAFE must have registration or a limited authority to teach. Due to this all*

*Tasmanian schools have processes in place to check the registration of their employees to teach. These processes usually involve a school confirming a teacher's registration with the TRB either online or via telephone. Therefore I do not consider a reference to a TRB decision to be confidential. Any Tasmanian school could have enquired with the TRB as to your registration status at that time.*

## **Analysis**

*Does E's letter constitute personal information for the purposes of s36 and if so, does the public interest test support its release or exemption?*

- 16 For information to be exempt under s36, I must be satisfied that it contains information that is the personal information of a person other than the person making an application under s13. Personal information is defined as any information about an individual whose identity is apparent or reasonably ascertainable from that information, and who is alive or has not been dead for more than 25 years.
- 17 The direct personal information relating to E is his name, signature, address, telephone number, and email address. The remainder of the letter the parties agree would not render E's identity ascertainable if his personal information were redacted, however would obviously be attributable to him if it remains.
- 18 I am satisfied that, in line with the Department's internal review, E's address, telephone number, and email address is information that, if released, would render his identity apparent. E and the Department agree that this information is exempt pursuant to s36 and I also consider that it would be contrary to the public interest to release this information.
- 19 This leaves the decision regarding his name and signature, which are clearly personal information and are conditionally exempt under s36, pending consideration of the public interest test.

### *Public interest test*

- 20 I will consider E's name first. My consideration of the public interest test is informed by the type of information proposed to be released. If E's name is not redacted, the information in the letter will be attributable to him. The letter is short, alludes to some form of action against him by the Department's Human Resources team and that E is currently appealing a decision of the TRB. It does not indicate the nature of the TRB decision or the employment action being taken by the Department. It is likely that this related to the investigation of child sexual offences, but this is not specified in the letter.
- 21 E has since been convicted of multiple child sexual offences and is serving a lengthy prison sentence. He was publicly identified during his trials and sentencing, and his former employment as a teacher was widely reported.
- 22 E's primary concerns expressed have related to his privacy and the confidentiality of TRB decisions.

- 23 I have considered the public interest test and of particular relevance are matters (b) whether the disclosure would contribute to or hinder debate on a matter of public interest, (j) promote or harm the administration of justice, and (m) promote or harm the interests of an individual weigh in favour of release. I am of the view that accessibility to information relating to historical child sexual offences, in light of the Royal Commission on Institutional Responses to Child Sexual Abuse and the current Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings, is a matter of significant public interest.
- 24 I maintain my reasons expressed in my past decision of X, Y and Tasmania Police (March 2021)<sup>1</sup>, however, and consider:
- The primary Schedule 1 factor warranting consideration in this matter, however, is (m) whether the disclosure would promote or harm the interests of an individual or group of individuals. This information is of critical importance to... [the applicant] and it will enable him to make a civil claim regarding alleged child sexual abuse. That the information would significantly promote the interests of an individual is a consideration strongly in favour of the release of the information.*
- I accept that there is potential for harm to...[the alleged perpetrator's] interests in releasing the information, but the public interest in protecting the interests of alleged perpetrators of child sexual abuse is lower than that of the victims of alleged abuse.*
- 25 I also agree with the Department that there is little in the 2003 letter which is inherently confidential. E's teacher registration status could have been checked and divulged at the time and the contents of the letter only indicate that a TRB decision had been made, not any detail of that decision. E is a convicted child sex offender and has been widely publicised as such. Consistent with my decision in *Camille Bianchi and the Department of Health* (November 2021)<sup>2</sup>, I do not consider that it is likely that any additional harm to his interests or reputation would occur due to the release of a historical letter which may relate indirectly to his investigation for child sexual offences.
- 26 Accordingly, I determine that the release of E's name is not contrary to the public interest and not exempt pursuant to s36.
- 27 I do not consider that the same applies for E's signature. As with his address, telephone number and email address, this information does not aid understanding or scrutiny and divulges the personal information of a person other than the applicant. I determine that it is contrary to the public interest to release E's signature, and this should not be provided to the applicant.

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<sup>1</sup> See [https://www.ombudsman.tas.gov.au/\\_data/assets/pdf\\_file/0006/605481/O1901-107-Final-Decision-X,-Y-and-Tasmania-Police.pdf](https://www.ombudsman.tas.gov.au/_data/assets/pdf_file/0006/605481/O1901-107-Final-Decision-X,-Y-and-Tasmania-Police.pdf)

<sup>2</sup> See [https://www.ombudsman.tas.gov.au/\\_data/assets/pdf\\_file/0006/638412/O2006-133-Bianchi-and-DoH-Final-Decision.pdf](https://www.ombudsman.tas.gov.au/_data/assets/pdf_file/0006/638412/O2006-133-Bianchi-and-DoH-Final-Decision.pdf)

### **Preliminary Conclusion**

- 28 For the reasons given above, I determine that the letter dated 10 April 2003 should be released to the applicant with the address, signature, telephone number and email address of E redacted.

### **Conclusion**

- 29 As the above preliminary decision was adverse to the Department, it was made available to the Department on 22 November 2021 under s48(1)(a) to seek its input before finalising the decision.
- 30 The Department advised on 16 December 2021 that it would not be making any submissions in response to the preliminary decision.
- 31 Accordingly, for the reasons given above, I determine that the letter dated 10 April 2003 should be released to the applicant with the address, signature, telephone number and email address of E redacted.
- 32 I apologise to the parties for the inordinate amount of time taken to finalise this decision.

**Dated:** 17 December 2021

**Richard Connock  
OMBUDSMAN**

## **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.

## **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:** O1901-082

**Names of Parties:** D, E and Tasmania Police

**Reasons for decision:** s48(3)

**Provisions considered:** s36

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**Background**

- 1 In October 2018, D sought information from Tasmania Police concerning his alleged sexual assault as a child in 1984 at a location in Tasmania. D applied for assessed disclosure under the *Right to Information Act 2009* (the Act) as part of a potential civil claim regarding historical sexual abuse. He is legally represented.
- 2 The information D seeks includes Tasmania Police interview records it holds of the alleged perpetrator, E, in relation to the abuse allegations. As a result of the allegations, E was charged with gross indecency, then later indicted and prosecuted on one count of indecent practices between males regarding offending towards D. A trial occurred at the Supreme Court of Tasmania in Hobart in September 1985, in which E was acquitted.
- 3 Sergeant Lee Taylor, a delegated officer under the Act, assessed D's application for information. On 2 November 2018, he sought E's view under s36(2) of the Act as to whether a proof of evidence from former Sergeant Blue, which included the record of interview conducted with E in 1984, should be released in response to this Right to Information application.
- 4 On 11 November 2018, E submitted in reply that he opposed the release of the information. He provided a brief explanation:

*The information provided to Tasmania Police was that no such event occurred. The interview was not recorded in any form. A subsequent unsigned statement was fabricated by the officers concerned and was a false representation.*

- 5 Sergeant Taylor wrote to E again on 21 November 2018 to note E's preference to not release the information but to advise that Sergeant Taylor had nonetheless decided to release the information with some redactions of exempt information pursuant to s36. A copy of the information with proposed redactions was attached to Sergeant Taylor's letter to E.
- 6 Sergeant Taylor indicated to E that 'to balance appropriate disclosure of information with protection of personal information, I will not be releasing any part of the Record of Interview that identifies your home address (or that of

any third party), your personal phone number/s (or that of any third party) or your date of birth (or that of any third party).’ He further stated:

*I have considered the following in making my decision:*

- A person’s legally enforceable right to be provided, in accordance with the Act, with information in the possession of Tasmania Police;
  - The applicant [sic] need for information to assist in preparing for civil court proceedings;
  - The personal information exemption at Part 3 of the Act; and
  - The public interest test at Schedule 1 of the Act, particularly subsections (h) and (j) which respectively state:
    - “whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government”
    - “whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and enforcement of the law”
  - The fact you were not convicted of any offence on this occasion;
  - Your belief that, ‘the information provided to Tasmania Police was that no such event occurred’;
  - Your belief that, ‘the interview was not recorded in any form’; and
  - That, ‘an unsigned statement was fabricated by the officers concerned and was a false misrepresentation’.
- 7 E sought internal review of Sergeant Taylor’s decision on 1 December 2018. His submissions as to why he sought a review are discussed in more detail under the heading ‘Submissions’ below.
- 8 Commander TB Dooley, another delegated officer under the Act, conducted the internal review of Sergeant Taylor’s decision and wrote to E on 21 December 2018 to provide his decision. He made a determination that Sergeant Taylor had appropriately applied the provisions of the Act and had afforded E the opportunity to oppose the release of the personal information.
- 9 He stated that he had considered the relevant provisions of the Act, particularly s7, Division 2 of Part 3, s36(1), s5 regarding personal information, and Schedule 1 particularly (a), (j), (m) and (n), and made a fresh decision, which is set out as follows:

*I therefore advise that I have upheld the decision of Sergeant L Taylor in respect of what information will be withheld and redacted, with the addition of your name.*

*It follows, therefore, that the remainder of the information will be released.*

*Please note that:*

- *the proof of evidence and notes of the Record of Interview will be redacted so as to only reflect the content pertaining to the allegations made by the RTI applicant;*
- *where they appear, personal identifiers, such as name, employment details, place of residence, date of birth, and phone number/s etc. will be redacted; and*
- *a copy of the information to be disclosed to the applicant is attached for your information.*

10 E applied for an external review of Tasmania Police's decision to release his personal information under the Act, which was received and accepted by this office on 14 January 2019.

### **Issues for Determination**

- 11 I must determine whether E's information is eligible for exemption under s36.
- 12 As s36 is contained in Division 2 of Part 3, it is subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under that section, I am then required to determine whether it would be contrary to the public interest to release it having regard to, at least, the matters contained in Schedule 1.

### **Relevant legislation**

- 13 Section 36 is relied upon by E to object to the release of the information. A copy of this section is attached.
- 14 Copies of s33 and Schedule 1 are also attached.

### **Submissions**

- 15 E made the following submissions in his external review request, setting out his opposition to the release (in part or in full) of his personal information:

*The veracity of the comments in the Record of Interview were challenged in the Supreme Court in 1985, and I again state that the Record of Interview was fabricated by the officers concerned and is false. This is supported by the fact that the interview was not recorded. Had this been done, then there could be no dispute.*

*The public interest test at Schedule 1 of the Act, sub-section (j) states – “whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and enforcement of the law”*

*I contend that the release of this document would “harm the administration of justice”, would not afford procedural fairness and would reflect poorly on the police procedures at the time.*

*The document refers to written notes taken by Sergeant Petrie of the Record of Interview. In my responses to your letters I have questioned this, yet a copy of these notes has not been provided as proof of their existence.*

*In the Supreme Court in 1985 Sergeant Blue consistently and unconvincingly avoided answering questions put to him about the Record of Interview by stating “if it is written there, that is what was said.” This in itself is a lie and constitutes perjury.*

*On page 5, the report refers to being taken before Inspector Prins. The statement made by Sergeant Blue to Inspector Prins did not include the words “He will be proceeded against” whilst I was present. I queried the words “certain admissions” to which Prins replied that only referred to things such as confirming my presence with the complainant at certain times and places, otherwise it would say “full admissions”. The vague wording “certain admissions”, was, as I would later discover, an initial step in fabricating a false Record of Interview.*

*I submit that the document referred to in the Right to Information Application – Reference No. RTI 228/18 contains responses to questions ascribed to me which I did not make and the document is a falsehood. Accordingly, the document should not be released.*

- 16 No submissions were made by Tasmania Police beyond the reasoning of its original and internal review decisions.

## **Analysis**

- 17 I am satisfied that the unredacted proof of evidence containing the record of interview contains E's personal information, as his identity is clearly ascertainable. Due to the highly sensitive nature of the information and clear identification of E, I do not consider that this is personal information which it would be likely to be in the public interest to release.
- 18 Tasmania Police did not propose to provide the unredacted proof of evidence and notes of the record of interview, however, but a version which removed all personal information except for that of D. The personal information of the applicant is not exempt under s36 of the Act. Whether the information in the form proposed to be released by Tasmania Police, with E's name, address and property details and the names of third parties removed, contains exempt personal information is the matter I must determine.
- 19 It would be difficult to identify E from the redacted record of interview and associated notes but it may be possible for persons familiar with the allegations to do so. Given the passage of time since the interview and trial took place in 1985, the likelihood of this is significantly reduced. I could not be completely satisfied that E's identity could not be ascertained from the redacted information, however, so I consider the information *prima facie* exempt under s36 and will proceed to an analysis of the public interest test.

*Public interest*

- 20 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.
- 21 E submitted that the release of the information would be contrary to the public interest and referred to factors in Schedule 1, particularly (j) – *whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and enforcement of the law.*
- 22 E submits that the information proposed to be released by Tasmania Police *contains responses to questions ascribed to me which I did not make and the document is a falsehood. Accordingly, the document should not be released.*
- 23 E further contends that the purported record of interview has been fabricated and that the writer of the proof of evidence may have committed perjury at trial. I do not have the power to investigate such allegations, nor is it necessary to do so to undertake an external review under the Act. I accept that E disputes the contents of the proof of evidence, pleaded not guilty to associated charges, was acquitted and strongly contests that he acted unlawfully towards D.
- 24 I have considered the factors in Schedule 1 in making my own assessment of whether release would be contrary to the public interest. Of particular relevance in this matter are (c) whether the disclosure would inform a person about the reasons for a decision, and (d) whether the disclosure would provide contextual information to aid in the understanding of government decisions. Providing information to a victim of crime regarding the investigation of their complaint is in the public interest as it gives reasons for, and context to, government decisions.
- 25 The primary Schedule 1 factor warranting consideration in this matter, however, is (m) whether the disclosure would promote or harm the interests of an individual or group of individuals. This information is of critical importance to D and it will enable him to make a civil claim regarding alleged child sexual abuse. That the information would significantly promote the interests of an individual is a consideration strongly in favour of the release of the information.
- 26 I accept that there is potential for harm to E's interests in releasing the information, but the public interest in protecting the interests of alleged perpetrators of child sexual abuse is lower than that of the victims of alleged abuse. Due to the redaction of his personal information, the previous exposure in court proceedings of these matters, and his ability to defend any civil action brought against him, I do not consider that the potential for harm to E's interests makes the disclosure contrary to the public interest.
- 27 I also considered the fact that E had a right to silence when he was interviewed by Tasmania Police and was legally represented at the time. That he voluntarily

provided information in the knowledge that it may be made public and that this then occurred during his trial in 1985, I consider a relevant factor supporting the conclusion that it would not be contrary to the public interest to release this information.

### **Preliminary Conclusion**

- 28 For the reasons given above, I determine that the proof of evidence containing E's record of interview should be released to the applicant in the redacted form provided to E in the Tasmania Police internal review decision dated 21 December 2018.
- 29 I apologise to the parties for the inordinate amount of time taken to finalise this decision.

### **Submissions to the Preliminary Decision**

- 30 On 7 December 2021, this office received E's response to the Preliminary Decision with further submissions enclosed. These were relatively brief and are set out as follows (verbatim):

*I would point out errors in paragraph 27, in that*

1. *I was not legally represented at the time of the interview;*
2. *This is not a record of the information I provided.*

*I disagree with the decision for the reasons I have previously stated and additionally I would draw your attention to s36 Schedule 1 (u)*

- (u) *whether the information is wrong or inaccurate.*

*A copy of a letter to Police, Fire and Emergency Management submitting a complaint concerning the production of a false record of interview has been included.*

*I submit that the Record of Interview is wrong and inaccurate in that it is not a true record of the interview and, further, that it was fabricated by the police officers concerned. Accordingly it should not be released.*

- 31 On 16 December 2021, the Secretary of the Department emailed a letter to this office in response to the Preliminary Decision of this external review and submitted that the Department does not seek to make a submission.

### **Further Analysis**

- 32 E submitted that he was not legally represented and I was in error in my analysis at paragraph 27 above. The statement of Sergeant Blue references E's solicitor being present for part of the interview and providing advice to E, on the receipt of which he declined to answer further questions. This was the basis of my comment, however, I accept that E disputes the veracity of the statement and I cannot verify if he was actually legally represented at the time. In any event, whether he was legally represented did not form a critical part of

my assessment of the relative weight of factors in the public interest test and my conclusion would have been the same had he not been legally represented.

- 33 E's primary submission, raised in response to the initial consultation by the Department, when he sought internal review and on external review, is that the statement of Sergeant Blue which contains a record of his interview is inaccurate and potentially fabricated. I wrote my Preliminary Decision in full cognisance of E's concerns around the accuracy of the information and his repetition of these concerns does not change my previous analysis and conclusion.
- 34 I acknowledge that I did not specifically reference factor (u) in Schedule 1 and that this was an oversight, though I did discuss the accuracy of the statement in light of E's concerns<sup>1</sup>. I can confirm that I remain of the view that it is not contrary to the public interest to release this information (in redacted form), despite E's complaints regarding the accuracy of the account of his responses to police questioning.

### **Conclusion**

- 35 For the reasons given above, I determine that the proof of evidence containing E's record of interview should be released to the applicant in the redacted form provided to E in the Tasmania Police internal review decision dated 21 December 2018.
- 36 Once more, I apologise to the parties for the inordinate amount of time taken to finalise this decision.

**Dated:** 20 December 2021

**Richard Connock**  
**OMBUDSMAN**

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<sup>1</sup> See particularly paragraph 23.

## **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.

### **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**

- (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:** O1708-051

**Names of Parties:** Damien Matcham, on behalf of Nigel Matcham, and Department of Justice

**Reasons for decision:** s48(1)(a)

**Provisions considered:** s36

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### **Background**

- 1 In the early hours of 29 November 2016, Mr Nigel Matcham was working a night shift at the Claremont chocolate factory owned by Mondelez Australia Pty Ltd. The factory is referred to in some of the information subject to this decision by the name of its long-term former owner, the company Cadbury.
- 2 Mr Matcham suffered a serious head injury at the factory that night ('the incident'). He was taken by ambulance to the Royal Hobart Hospital. A site investigation was carried out after the incident.
- 3 On 1 June 2017, Mr Damien Matcham, brother to Nigel, submitted to WorkSafe Tasmania an application for assessed disclosure under the *Right to Information Act 2009* (the Act). The application sought:

*Any and all documentation held by WorkSafe Tasmania regarding Mr Nigel Matcham including any inspections, reports, notifications (emails, file notes, etc).*

- 4 As part of the RTI application process, Mr Nigel Matcham signed an authority for his brother, Mr Damien Matcham, to act on Nigel's behalf and to obtain any documentation held by WorkSafe. This was accepted by those determining the application.

### **Original decision**

- 5 On 19 June 2017, Ms Lorraine Case, a delegated officer of the Department of Justice (DoJ), released a decision and schedule of documents to the applicant. The DoJ is the relevant 'public authority' as that term is defined in ss5(1), (4) and (5) of the Act. WorkSafe Tasmania is taken for the purposes of the Act to be part of the Department.

- 6 Ms Case released emails, letters, medical certificates and a workplace attendance record. She found to be exempt information: three medical reports); and four statements (the statements) each signed by another person working at the factory on the night of the incident.
- 7 Ms Case decided the three medical reports were provided directly to lawyers acting for Mondelez and were exempt under s31 which exempts information if *it is of such a nature that the information would be privileged from production in legal proceedings on the grounds of legal professional privilege*.
- 8 Ms Case decided each of the four statements contained *personal information*, which is defined in s5(1) and is therefore potentially exempt pursuant to s36. Ms Case therefore considered whether or not she was required to consult the four authors as required by s36(2). Ms Case's decision stated that, as the statements *contain no contact details for the Cadbury employees*, she had formed the view it was impracticable to consult them. If not 'practicable', then consultation is not required by s36(2).
- 9 Ms Case further stated, *it is reasonable to assume that they would not expect their personal information to be released without their consent*. Ms Case decided the statements contained personal information and were exempt in full. Being mindful that s36 is subject to the public interest test contained in s33, Ms Case went on to say that disclosure *has been found to be contrary to the public interest*.

#### ***Internal review decision***

- 10 On 20 June 2017, the applicant sought internal review of the original decision.
- 11 On 12 July 2017, Ms Julia Hickey, a delegated officer, released an internal review decision and a schedule of documents to the applicant. Ms Hickey determined that the s31 exemption no longer applied as the applicant, or his brother, already held the three medical reports.
- 12 Regarding the four statements, the internal review decision reached the same conclusion as Ms Case's decision. In relation to consultation pursuant to s36(2), Ms Hickey noted, *Section 36(1) [sic] of the RTI Act does not oblige me to consult with any person whose personal information is revealed in the statement*.
- 13 Ms Hickey considered the public interest test, which requires that the matters contained in Schedule 1 be taken into consideration. She found that matter (a) in Schedule 1 weighed in favour of release of the personal information, but that matters (c), (d), (e), (f) and (m) weighed in favour of exemption.
- 14 Ms Hickey found that '*statements from Mr Nigel Matcham's four co-workers – would not aid in understanding government decisions, as they were not relevant to any government decisions.*'
- 15 On 8 August 2017, this office received an application from Mr Damien Matcham seeking external review of Ms Hickey's decision. His application sought release of the four statements.

16 Mr Matcham's request was accepted under s44(1)(b)(i) on the basis it was submitted to this office within 20 working days of him receiving the internal review decision.

### **Relevant legislation**

17 *Personal information* is defined in s5(1) of the Act to mean:

*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.*

18 Section 36, headed *Personal information of a person*, applies to such information, in conjunction with s33, which as noted, contains the public interest test. Both are relevant to this matter. Copies of s36 and s 33 are attached to this decision.

19 Subsection 36(2) requires consultation with a third party who has provided information if the requirements of ss36(2)(a), (b) and (c) are met and consultation is 'practicable'.

20 Subsection 36(1) *provisionally* renders information exempt from release if doing so would disclose the *personal information of a person other than the person making an application under section 13?*

21 I say *provisionally* because as already noted, the above exemption is subject to the s33 public interest test. Hence, such information, provisionally exempt from release under s36(1), is only exempt if, *after taking into account all relevant matters, ... it is contrary to the public interest to disclose the information*: s33(1).

22 Relevant matters which must be considered when applying the public interest test include those matters specified in Schedule 1 of the Act: s33(2). I therefore attach a copy of Schedule 1 to this decision.

### **Issues for determination**

23 There are, thus, three key issues for determination in this case.

1. Under s36(2), was consultation required with each author/maker of a statement?
2. Under s36(1), do the statements contain the *personal information of a person other than the person making an application under section 3?*

If information in the statements is *personal information* for the purposes of the Act, then:

3. Under s33, considering all relevant matters, is it '*contrary to the public interest to disclose the information*' (the public interest test)?

## **Application for external review**

- 24 In his application for external review received by this office 8 August 2017, Mr Damien Matcham initially said of the four statements:

...WorkSafe Tasmania should release in-full (minus names and positions and any address details)

- 25 This office asked Mr Matcham to indicate which parts of the decision of the Department he wanted reviewed. On 30 August 2017, Mr Matcham replied. He listed four names of those he said were the authors of the four statements. He said they worked with his brother in the factory, then added:

... that there is no need for the DoJ to refuse full release of these documents.

- 26 I take this to mean that Mr Matcham now wants the statements released in full, including the names and signatures of their authors (the statements do not contain other contact details).

## **Personal information of the applicant: s36(1)**

- 27 A set out earlier, for information to be exempt under s36(1) it must be information that, if released, would disclose the *personal information of a person other than the person making an application under section 13*.
- 28 In this case, Mr Nigel Matcham signed an authority for his brother, Mr Damien Matcham, to act on his behalf and to obtain any documentation held by WorkSafe Tasmania. The Department accepted that authority in relation to the RTI application, and while Mr Damien Matcham is entitled to make the application in his own right, for the purposes of this external review I too accept that the application is made on behalf of his brother.
- 29 Hence, for at least the purposes of s36(1), Nigel Matcham can be considered the *person making an application under section 13*. It follows that his personal information in the statements is not exempt under s36(1) from release in response to the application.

## **No consultation by Department: s36(2)**

- 30 Subsection 36(2) of the Act provides that, 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.*

- 31 In this case, the four statements meet the requirements of ss36(2)(a) and (b). Paragraph 36(2)(c) then requires that if the principal officer, or in this case their delegate, decides that disclosure of the *information concerned* may be reasonably expected to be of concern to the third party who provided it to the public authority, then they must consult that person in writing to ascertain their view on the release of the information.
- 32 The Department did not consult any third party regarding the four statements before deciding they should not be disclosed. Its original decision contained the following:
- ...as these four statements contain no contact details for the Cadbury employees, we are unable to write to or telephone them seeking their views as to release of their statement. It is reasonable to assume that they would not expect their personal information to be released without their consent.*
- 33 The train of thought therefore appears to have been as follows:
- i. The *four statements contain no contact details for the Cadbury employees.*
  - ii. Therefore, the Department determined that it was unable to consult them under s36(2).
  - iii. The decision-maker made an assumption which they considered reasonable, that the authors would not expect (and presumably under s36(2)(c)), the decision maker believed the authors might reasonably be expected to be concerned by) disclosure of their personal information *without their consent*, which the Department was unable to seek.
- 34 Point i is correct as far as it goes, in that the statements contain no direct contact details. The statement makers, however, all worked at the factory. This provided a method to contact and consult them. This office was able to do so through their employer (that will be discussed later), rendering point ii above incorrect, and thereby affecting point iii. The Department could have done this or possibly found more direct means of contact.
- 35 The order of points ii and iii in above does not match that of the elements set out in s36(2). Also of concern is the assumption numbered iii above. It appears that the claimed impracticality of contacting the statement makers was central

to the decision that the statements were exempt in full, given it was assumed that they would not expect their personal information to be released without their consent.

- 36 If consultation with a third party is impractical under s36(2), then their consent cannot be obtained. However, while consultation and consent are highly relevant to an application for the disclosure of personal information, neither are essential preconditions determinative of the decision. The s33 public interest test must still be considered, as will be discussed later under the *Analysis* heading.
- 37 The internal review decision simply stated in relation to consultation:

*I consider that the statements constitute 'personal information'. Section 36(1) [sic] does not oblige me to consult with any person whose personal information is revealed in the statement.*

- 38 Presumably the internal review decision meant s36(2), which governs consultation under s36. Further explanation of Ms Hickey's reasoning here would have been helpful. Given her ultimate decision that the statements were exempt in full, presumably she too considered consultation impractical.

### **Consultation by this office: s36(2)**

- 39 As set out earlier, the definition of *personal information* in s5(1) relevantly includes information or opinion about an individual from which their *identity is apparent or is reasonably ascertainable*.
- 40 Each of the four statements were signed and dated early December 2016 and were made by people working at the factory at the time of the incident. In that context, each statement contains the *personal information* of its author (and in some cases, other people), such as, for example, their name and (where it reveals their name) signature.
- 41 Lacking direct contact details for any author of the four statements, on 26 April 2018 this office sent four individual third party consultation letters, one addressed to each author, to them via their employer. Each letter sought the view of the relevant author as to whether their statement ,which was copied to them, should be disclosed to the applicant.
- 42 Two responses were received. One author objected by simply saying, *I would not like my views to be disclosed to the applicant. Thanks.* The author did not expand on that. A second author consented, stating that they were happy for this office ... to use that statement in any way necessary'
- 43 These responses, which will be considered in my *Analysis*, contradict the sentence in the Department's original decision that;

*... as these four statements contain no contact details for the Cadbury employees, we are unable to write to or telephone them seeking their views as to release of their statement.*

## **Subsequent Consultation**

- 44 On 21 January 2021, this office wrote directly to the author who had said they would not like their views disclosed. The office reminded the author of their response to its initial consultation, noting that their response had not provided further detail such as reasons why they did not want their statement released. The office explained its preliminary view - in summary, that the public interest test favoured release of their statement, the reasons for which are discussed later - and gave the author the opportunity to provide further input. The author did not reply to this correspondence.
- 45 Some of the four statements contain, in addition to the names of their authors, the names of other authors of statements as well as the names of, in total, five other people working at the factory that night. The combination of all that additional information, including each worker's name, presence and (in some cases) job position at the factory that night, arguably meets the definition of personal information under s5(1) of the Act.
- 46 Under s36(2), three cumulative elements are required to mandate consultation with a third party. One of these, s36(2)(b), is that *the information was provided to a public authority or Minister by a third party* (my emphasis), who is the one who must, if practicable, be notified and consulted if ss36(2)(a) and (c) are also met.
- 47 Accordingly, in this case there was no obligation for either the Department, or this office to notify and consult about disclosure of the statements with anyone other than their authors. That is, other co-workers who were named in, but did not provide, statements fall outside s36(2)(b). The statements suggest these co-workers were less actively involved in the immediate response to the incident than the authors.
- 48 On 5 February 2021, this office wrote to Damien Matcham, asking if he sought the names and positions of other employees who were present at the time of the incident, or if he was happy for these co-workers' details to be redacted from the statements. Mr Matcham replied:

*Yes since you have that information available, please provide it.*

- 49 Mr Matcham thereby confirmed he sought all four statements in full. **Analysis**

- 50 The issue(s) remaining for determination below is, in summary, whether any personal information in the statements, other than that of Nigel Matcham, is exempt from release to the applicant. As noted earlier, since the application was made on his behalf of Nigel Matcham with his express consent, his personal information is not exempt under s36(1) from disclosure in response to this application.

- 51 Section 7 of the Act provides:

*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.*

- 52 Subsections 47(4) place the onus of showing that information should not be disclosed upon external review on those asserting that it shouldn't:
- (4) Where the Ombudsman is determining a matter brought by an applicant, the public authority or Minister concerned has the onus to show that the information should not be disclosed and it is open to the Ombudsman to determine the outcome of a review on the basis that the onus is not discharged.

***Personal information: s5(1)***

- 53 Section 36 regarding *personal information*, and the definition of that term in s5(1), have been discussed earlier. As was noted in *Tziolas v NSW Department of Education and Communities* regarding an equivalent definition of *personal information* in the NSW Act,<sup>1</sup> Notwithstanding the definition, what amounts to '*personal information*' is not readily capable of an exhaustive statement ...<sup>2</sup>
- 54 The RTI Act's definition of *personal information* in s5(1) relevantly includes information or opinion about an individual from which their *identity is apparent or is reasonably ascertainable*.
- 55 This definition does not specify the person to whom the individual's identity must be *apparent or ... reasonably ascertainable*. Does the phrase mean, for example, *apparent or ... reasonably ascertainable* to:
- (a) the applicant for the information, who may (in a case such as this) possess additional specific knowledge of surrounding circumstances; or
- (b) some putative reasonable person, reading the information on its face without the benefit of any specific knowledge held by the applicant?
- 56 Arguably, the word *reasonably* in the phrase suggests, at least in relation to that part of the definition, the second 'reasonable person' or objective approach. This would also be more consistent with the interpretive approach to the Act set out in s3(4)(a).
- 57 However, the Department's delegates must have assumed the phrase *apparent or ... reasonably ascertainable* meant the former (a), to be taken from the perspective of Nigel Matcham recalling other employees and their roles at the factory shortly before the incident and in its immediate aftermath. That is the only way to make sense of the Department's decisions that the entirety of the statements comprised personal information of persons other than Nigel

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<sup>1</sup> *Personal information* is defined in the *Government Information (Public Access) Act 2009* (NSW), Sch 4(4)(1) as follows:

... information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion.

<sup>2</sup> [2012] NSWADT 69 at [52].

Matcham. This is because most of the information in the statements is factual narrative which, if the names of factory workers were redacted, would not identify them to a person reading the statements without other knowledge of the incident and who did what before or after it.

- 58 For the purposes of this review, it is not necessary to resolve this definitional debate since whichever approach I adopt will (for reasons following later) reach the same ultimate conclusion based on the public interest test. Furthermore, even if the Department's subjective approach from the applicant's perspective is the correct one, Mr Nigel Matcham's head injury and the unfortunate length of time now elapsed since are likely to have impaired his recollection of events around the incident.
- 59 More clear is that the Department's original decision-maker misconstrued the s5(1) definition of *personal information* when she stated:

*I consider that these statements are exempt in full as releasing someone else's personal information (this includes their observations, opinions or recollections) or information which infringes their right to privacy has been found to be contrary to the public interest.*

- 60 I will address the public interest later. However, a person's observations, opinions or recollections are only '*personal information*' under s5(1) if, from them, the person's identity is *apparent or ... reasonably ascertainable*. Yet both the Department's decisions found the entirety of all statements exempt as personal information. That goes too far.
- 61 The statements make clear that their authors and all the people named in them (except one person referred to only by their first name, and then only briefly as they could not be found by the author) were working at the factory on the date of the incident. Knowing that employment context, an employee's name, signature (if legible), and potentially some other identifying information in the statements meet the definition of *personal information*. If permitted after considering the public interest test, then that personal information could have been redacted, leaving no basis to withhold under s36 the non-personal information in the rest of the statements.
- 62 The line between personal and non-personal information under s5(1) is not easy to draw and describe in a decision such as this, but more readily doable on the statements themselves.
- 63 Most of the information contained in each statement describes events as they unfolded, witnessed from the perspective of its author. In that sense, the narrative statements, comprise predominantly factual information (as distinct from opinion), such as:
  - the date and approximate time the author became aware of the incident;
  - the job positions or work areas of named employees;

- events directly prior to the incident;
  - how the author found out about the incident;
  - direct evidence of what they did;
  - direct evidence about what they saw;
  - what they did after the incident; and
  - a summary of conversations between employees at the time.
- 64 Suffice it to say, given what follows, that only parts of the statements constituted, in themselves, personal information, to which the public interest test should then have been applied.
- 65 Other parts could be released without making the identity of anybody other than Nigel Matcham *apparent or ... reasonably ascertainable* on either of the above two approaches to the interpretation of that phrase. This was not *personal information* under s5(1) and there was, therefore, no basis for exemption of those parts under s36. For example, this sentence in one statement is clearly not personal information of anybody other than Nigel Matcham, *The area where Nigel had the accident was very tidy with no pallets or equipment out of order*.
- 66 So, at the very least, redacted statements should have been released to the applicant in response to his initial RTI application, rather than all information in the statements being declared exempt under s36 and withheld.
- 67 To the extent that some information in the statements, such as a worker's name and other identifying information, meets the s5(1) definition of *personal information*, that information is *provisionally* exempt pursuant to s36. *Provisionally*, as personal information is only exempt if *after taking into account all relevant matters, ... it is contrary to the public interest to disclose the information*.<sup>3</sup>
- 68 As it turns out below, the result of applying of the public interest test below renders it unnecessary for me to precisely specify here the extent of the personal information in the statements.

#### ***Public Interest Test***

- 69 The public interest test requires determination as to whether '*it is contrary to the public interest to disclose the information*': s33(1). The relevant information at issue is limited to that provisionally exempt, which for this review is, under s36(1), personal information, other than that of Nigel Matcham, in the statements.
- 70 Relevant matters which must be taken into account when considering the public interest test include those detailed in Schedule 1: s33(2).
- 71 A public authority's notice of its original or (due to s43(5)) internal review decision is governed by s22. Its requirements include that, under s22(2)(d):

<sup>3</sup> This is because s36 is found in Division 2 of Part 3 of the Act: see s33(1).

*if the decision involves or relies upon consideration of the public interest in the application of a provision of this Act, [the decision is to] state the public interest considerations on which that decision was based.*

*Department's decisions – public interest test*

- 72 The Department's original decision-maker did not specify any matters listed in Schedule 1. While those matters are not an exhaustive list of matters potentially relevant to the public interest, compliance with s22(2)(d) required consideration of Schedule 1 before a decision the statements were exempt in full from disclosure. Rather, the original decision contained the following:

*I consider that these statements are exempt in full as releasing someone else's personal information (this includes their observations, opinions or recollections) or information which infringes their right to privacy has been found to be contrary to the public interest.*

- 73 The original decision-maker did not provide any authority for this proposition. I have considered the first part of this sentence regarding 'personal information' earlier. Privacy is not explicitly mentioned in Schedule 1. Disclosure of these statements under the Act in response to this application would not infringe any putative right to privacy so as to make such disclosure contrary to the public interest.

*Department's internal review decision – public interest test*

- 74 Ms Hickey's internal review decision correctly stated:

*As the information falls within Division 2 of the Act, it is only exempt from release if its release would be contrary to the public interest. I am required to consider the factors at Schedule 1 of the Act, i.e. factor [sic] relevant to assessment of public interest. I confirm that I have not taken into account any of the factors in Schedule 3 (i.e. matters that are irrelevant to consideration of the public interest).*

- 75 Ms Hickey considered matter (a) of Schedule 1 weighed in favour of release:

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

- 76 She then paraphrased from the object of the Act its elements contained in s3(3) and s3(1)(a):

*The object of the RTI Act is to disclose information where possible and in particular 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.*

- 77 Under s3(3), giving members of the public the right to obtain information about the operations of Government is indeed to be pursued. Even more directly relevant in this case is s3(2) which provides that the object of the Act is to be pursued by giving members of the public the right to obtain information held by public authorities and Ministers.

78 On the face of it, this right in s3(2) applies across information *held by* public authorities and Ministers, potentially extending beyond the right in s3(3) to *also obtain information about the operations of Government.*

79 Ms Hickey correctly continued:

*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. The release of the information at issue would promote the object of the RTI Act.*

80 I agree. However, Ms Hickey then found that ‘the following factor [sic] weighs against release of 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;*
- (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;*
- (m) *whether the disclosure would promote or harm the interests of an individual or group of individuals;*

81 The internal review decision then stated:

*The information at issue - statements from Mr Nigel Matcham's four co-workers - would not aid in understanding government decisions, as they were not relevant to any government decisions. Their release would therefore not increase the accountability of the executive to the people of Tasmania.*

82 It then concluded:

*I consider that to release personal information of those individuals would clearly be contrary to the public interest.*

83 I can see how Ms Hickey might have reached the view that Schedule 1 matters (c) to (f) inclusive were not relevant to the statements, if she considered (which I do not, for reasons described below) the incident and statements about it to be isolated solely to the privately owned factory in which the incident occurred. A view that those matters were not relevant, however, should have left each with a *neutral* weighting, counting neither for nor against disclosure. I do not see how these matters could properly have been taken further so as to weigh, as the decision stated, ‘against release of the information’. To count irrelevant Schedule 1 matters as detracting from the general public interest in disclosure of information, as the internal review

appears to have done, runs completely counter to the Act's object and scheme.

- 84 As it happens, I do not agree that Schedule 1 matters (c) to (f) were all irrelevant to the statements, which were provided by Mondelez to WorkSafe Tasmania.
- 85 The statements would have contributed to WorkSafe's decision whether to proceed under the Work Health and Safety Act 2012, or, as happened in this case, to ultimately close the incident. Consequently, disclosure of the statements to the applicant would:
  - i. under matter (c), inform him about the reasons for WorkSafe's decisions in relation to the incident, including its decision to close it; and
  - ii. under matter (d), provide contextual information to aid in understanding WorkSafe's decision(s).
- 86 The applicant's submissions to this office (after the internal review decision) expressed his concerns in this regard. I make no comment as to the accuracy or otherwise of his claims, but include them as relevant to his:
  - perspective on matters (c) and (d); and
  - response to Ms Hickey's internal review decision saying 'the following factor [sic] weighs against release of the information'.
- 87 Mr Matcham submitted the following:

*I believe that the Department of Justice, WorkSafe Tasmania should have all part's fsic] of their decision reviewed that they tried to prevent the release of the x4 Statements regarding the reporting and action's fsic] where WorkSafe Tasmania seriously failed in carrying out their statutory function's fsic] and also seriously failed in their overall "DUTY OF CARE".*
- 88 He added (again, I make no comment as to the accuracy or otherwise of his claims):

*I also note that the DoJ WorkSafe Tasmania also failed in prosecuting this multi-billion dollar company the legislated fine of \$3Million for the non-reporting of this near death Workplace Injury where my Brother fsic] sustained a very serious TRAUMATIC BRAIN INJURY. ...*
- 89 Application of matter (m) is more nuanced than other Schedule 1 matters, in that disclosure of a statement might conceivably somehow harm the interests of the individual who made it. The original decision mentioned privacy, but seemed to conflate that with the mere presence of personal information, or a person's observations, etc. Beyond listing matter (m) as one of the factors it weighed against release, the internal review decision did not mention it. So I do not see what harm to an individual the Department's decision makers believed disclosure under the Act would cause.

- 90 Certainly, I cannot see harm that would outweigh the obvious benefits to the interests of Mr Matcham in gaining understanding from the statements of the circumstances they describe before and after the incident, which left him, according to the statements, unresponsive save a grunt, then later, in the ambulance, barely coherent seeming not to know what was going on. I will say more about matter (m) later.
- 91 It would have been open to me under s47(4) to determine the outcome of this review on the basis that the Department has not discharged its onus to show that disclosure of the information would be contrary to the public interest. However, as discussed earlier, despite the Department's failure to consult statement authors pursuant to s36(2), this office was able to do so.

*One objection to disclosure – after Department's decisions*

- 92 As explained earlier, the Department's original decision said it was unable to consult any author of a statement under s36 in the absence of their contact details.
- 93 After receiving the external review application, this office sent a third party consultation letter to each statement author via their employer. Two of the four authors replied.
- 94 One author objected to release of their statement simply by saying:
- I would not like my views to be disclosed to the applicant. Thanks.*
- 95 This person did not explain their objection. Another author consented to release of their statement.
- 96 In her text, *Freedom of Information and Privacy in Australia: Information Access 2.0*, Associate Professor Moira Paterson writes, *A decision-maker is not obliged to comply with the wishes expressed by any third parties consulted.*<sup>4</sup>
- 97 Hence, the objection received in this case is not a veto on disclosure. Nevertheless, it is relevant so I will consider it later.
- 98 Associate Professor Paterson then paraphrases *Tziolas v NSW Department of Education and Communities [2012] NSWADT 69* at [53]. In its reasons for that decision, the New South Wales Administrative Decisions Tribunal held in relation to the *Government Information (Public Access) Act 2009 (NSW)* [GIPA Act]:

*Section 54(2)(a) of the GIPA Act requires agencies, as far as reasonably practicable, to consult with persons before disclosing their personal information. If a person consents or does not object to the disclosure of their personal information, the application of clause 3(a) will be without effect or at least without weight in the application of the public interest test.<sup>5</sup>*

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<sup>4</sup> (2015) (2<sup>nd</sup> ed) at [3.120], p235.

<sup>5</sup> *Tziolas v NSW Department of Education and Communities [2012] NSWADT 69* at [53].

99 This passage is applicable in the present context, given the similar triggers for consultation under s54(2)(a) of the GIPA Act and the RTI Act, s36(2).<sup>6</sup>

100 Both Acts contain closely matching definitions of *personal information*.<sup>7</sup>

101 So too, the GIPA, s4(1), defines ‘*government information*’ to mean ‘*information contained in a record held by an agency*’. That would clearly include the statements once held by WorkSafe, even though they originated outside government. The RTI Act similarly defines ‘*information in the possession of a public authority*’<sup>8</sup> so as to include the statements in the possession of WorkSafe related to its official business.

102 Therefore, applying the passage of *Tziolas* quoted above to the present facts, it follows that the:

- consent to disclosure by the author of one statement; and
- lack of objection by the two authors who did not reply to their consultation letters

would, under the GIPA Act, render its equivalent exemption to the RTI Act, s36 ‘*without effect or at least without weight*’ in determining whether there is an overriding public interest against disclosure of ‘*government information*’.

103 Applying the above reasoning in the RTI Act context of ss36 and 33, it is not contrary to the public interest to disclose the three statements of those who consented or did not object when consulted.

104 That leaves the brief objection by one statement author as the remaining ground on which it might potentially be contrary to the public interest to disclose their statement. While I should consider their objection in the context of the public interest test (which I will below in relation to Schedule 1, matter (m)), I am not bound by it and must weigh it with other relevant matters.

105 I do not need to identify in these reasons who the objector was, and will not do so, in order to best protect all those consulted by this office.

106 After taking into account all relevant matters, including those set out in Schedule 1, I must decide whether or not it is contrary to the public interest

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<sup>6</sup> Consultation is only required under the GIPA Act, s54(2)(a) if, amongst other matters:

- information, includes personal information about the person, (s54(2)(a)) and
- the person may reasonably be expected to have concerns about the disclosure of the information, (s54(1)(b)) and
- those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information (s54(1)(c)).

<sup>7</sup> Personal information is defined in the GIPA Act, Sch 4(4)(1) as follows:

... information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion.

<sup>8</sup> Under the RTI Act, s5(1), 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.

for personal information in the statements to be disclosed: s33. I have considered that public interest test, including the matters listed in Schedule 1.

- I07 Fundamentally, the only public interest matter I consider weighs against release of all four statements in full is that one author objected to release of their statement. I consider the *fact* of that objection relevant in the context of Schedule 1 matter (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals. However, I gain little further assistance from its content (or lack thereof), for the following reasons.
- I08 The minimalist objection contained no explanation and later attempted follow up correspondence from this office – which may or may not have been read by the author – went without response. The objection does not leave me any the wiser as to the reasons for it, nor why or how the author thought in 2018 that disclosure of their statement in full could harm the interests of any individual under Schedule 1, matter (m).
- I09 The objector's statement is almost entirely factual narrative in nature, as one would expect from such a statement.
- I10 I do not see any personal information in it, the disclosure of which under the Act would harm the interests of the author, nor those of any other individual.
- I11 Perhaps the objector was concerned that if they consented to release, that consent might have employment ramifications for them. If so, then that would go to their subsequent objection to release, rather than information in the statement itself. Moreover, I can minimise any such risk by not identifying in these reasons the authors who responded to this office.
- I12 Given the objection, I do not rule out that disclosure could cause some harm of which I am unaware. However, if so, then I think such harm would likely be mitigated by the long passage of time since the objection and the incident itself.
- I13 I do find pursuant to matter (m), however, that disclosure of the statements would promote the interests of Mr Nigel Matcham and those concerned about the incident such as his brother. Reading the statements will, for example, enable them to better understand the context of the incident, before and after it, in terms of what the authors say they witnessed (and, in particular, the limits of that since all say they did not see it occur), what they say Mr Matcham said, and what they did afterwards.
- I14 This benefit will be amplified if Nigel Matcham's head injury has left him without a full recollection of the incident. The four statements may assist him to be better able to place himself at the scene with various co-workers. He may be able to build a better picture and understanding of circumstances around the incident, including the roles of others which he did not observe, or cannot recall.
- I15 The limits of the statements should also help the Matcham brothers to understand the apparent lack of evidence as to the cause of the incident. The statements say that nobody saw the injury take place, or could work out how

it happened. For example, the statements collectively describe who mopped up the blood where Mr Matcham fell, and how someone else subsequently ‘went back to the area to start the investigation only to find the mop and bucket with the water in it and the blood pool had been mopped up.’

I116 The apparent lack of witnesses and lack of evidence for how the injury occurred may help to explain the context of why WorkSafe did not proceed further before closing the case. Given this, for the reasons described earlier, I also find in favour of release Schedule 1 matters:

- (c) whether the disclosure would inform a person about the reasons for a decision; and
- (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions.

I117 In the above regard, I also find Schedule 1 matter (i) in favour of release – whether the disclosure would promote or harm public health or safety or both public health and safety. This matter is relevant in the context of work health and safety, for example, in explaining how Mr Matcham’s blood was mopped up from the floor (probably prematurely as the statement quoted above suggests). Disclosure of this may assist, for example, in providing opportunities for: education regarding the preservation of evidence after such an incident to aid its investigation; or process improvements.

I118 Given the reasons above, I cannot conceive of any harm from disclosure of the statements in full which would outweigh the substantial public interest factors in support of that. The benefits to the Matcham brothers will be greater the more comprehensively the statement, so I see no justification to redact any personal information within them.

### **Preliminary Conclusion**

I119 The Department’s decisions were incorrect insofar as they determined that all four statements comprised throughout exempt information under s36.

I120 I determine that it is not contrary to the public interest to disclose, in response to the application, any of the personal information the statements contain.

I121 Accordingly, all four statements should be released to the applicant in full.

### **Submissions to the Preliminary Conclusion**

I122 The above preliminary decision was adverse to the Department. Hence, a copy was forwarded to its Secretary on 15 April 2021 seeking input before finalising the decision, as required by s48(1)(a).

I123 On 7 May 2021 the Department’s Acting Secretary replied, advising most cooperatively:

*I have no submission to make on the preliminary decision. I note that this matter dates back to 2017 and the Department now, as a general rule, releases such witness statement as a matter of course for the reasons outlined in the decision.*

## **Conclusion**

- 124 For the reasons given earlier, I determine the following.
- 125 The Department's decisions were incorrect insofar as they determined that all four statements comprised throughout exempt information under s36.
- 126 I determine that it is not contrary to the public interest to disclose, in response to the application, any of the personal information the statements contain.
- 127 Accordingly, all four statements should be released to the applicant in full.
- 128 I apologise to the parties, and in particular the applicant, for the time taken to finalise this application.

**Dated:** 10 May 2021

**Richard Connock**  
**Ombudsman**

## **Right to Information Act 2009**

**'Personal information'** is defined in s5(1) of the Act to mean: 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.

### **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.

### **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)

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:** OI710-077

**Names of Parties:** Mr Darryl Howlin and City of Clarence

**Reasons for decision:** s48(3)

**Provisions considered:** s20(a) and (b)

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**Background**

- 1 Mr Howlin has had a long standing and ongoing dispute with the City of Clarence in relation to his property in Marsh St, Opossum Bay. His dispute is concerned with who has responsibility for Marsh St: he says Council does, but Council says it is a private road and not its responsibility.
- 2 The dispute has been the subject of applications to the Resource Management and Planning Appeal Tribunal (RMPAT) and appeals to the Supreme Court of Tasmania.<sup>1</sup> The finding of the court at first instance and on appeal was that Marsh Street is not a highway and therefore not Council's responsibility. While not entering into the dispute itself, it seems clear that Mr Howlin does not accept the findings of the court, and is of the belief that Council holds further information relevant to the matter.
- 3 On 26 July 2017, Mr Howlin submitted an application for assessed disclosure to the City of Clarence seeking information falling within 17 categories as follows:

*Subdivision approval file records of:*

- a) *Mr Frederick Herbert over Harmony Lane, South Arm*
- b) *Ms Marion Mifsud over Harmony Lane, South Arm*
- c) *3189 South Arm Road, South Arm*
- d) *The subdivision at the end of Bisdee Street, South Arm*
- e) *The “B?” individual Bisdee Street individual file*
- f) *The “General” Bisdee Street South Arm file*
- g) *The “M11” individual Marsh Street Opossum Bay file*
- h) *The “General” Marsh Street Opossum Bay file*
- i) *The “G?” individual Gellibrand Lane Opossum Bay file*
- j) *The “General” Gellibrand Lane Opossum Bay file*
- k) *The “B?” individual Blake Street Opossum Bay file*

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<sup>1</sup> *Clarence City Council v Howlin (2012) 192 LGERA 360; Howlin v Clarence City Council [2013] TASFC 7; Howling v Clarence City Council [2014] TASSC 20; Howlin v Resource Management Planning Appeal Tribunal [2015] TASSC 48; Howlin v Resource Management Planning and Appeal Tribunal (No 3) [2016] TASSC 49*

- i) *The “General” Blake Street Opossum Bay file*
- m) *All records pertaining to declarations made by the CCC or the CMC in respect of Harmony Lane, Hope Lane, and Bisdee Street, South Arm*
- n) *All records pertaining to declaration made by the CCC and the CMC in respect of Marsh Street and Gellibrand Lane, Opossum Bay*
- o) *All records of excel spread sheets [sic] from c1992 prepared by the CCC or the predecessors of ‘DIER’ for the purpose of claiming federal funding for the maintenance and repair of Marsh Street and Gellibrand Lane, Opossum Bay and Bisdee Street, Hope Land, and Harmony Lane, South Arm*
- p) *All records of the demolition, building permits and certificates of completion issued by the CCC for the No 3 Marsh Street, Opossum Bay property of Mr Robin Barnes*
- q) *All records of CCC & CMC electronic datum printouts downloaded for the purpose of issuing local government certificates requested by the purchasers of property fronting Marsh Street, Opossum Bay.*

4 Mr Howlin sought to have the application fee waived on the basis that:

*... the documents requested should have been long produced under FOI, RTI, subpoena, summons or duty to make proper disclosure of the MC's and CCC's express knowledge which has been concealed to obtain judgments that would not have reasonably been obtained if that express knowledge had been declared over 14 years ago.*

- 5 On 2 August 2017, however, Mr Alex van der Hek, Council's Corporate Secretary and delegated officer, wrote to Mr Howlin to inform him that Council would not be waiving the fee as requested and on 4 August 2017, Mr Howlin paid it.
- 6 On 11 August 2017, Mr van der Hek again wrote to Mr Howlin and provided him with Council's preliminary response to the request. Attached to the letter was a schedule listing the information held by Council responsive to the request. That Schedule contained the following advice.
  - information responsive to categories a), b), c), d) and f) would be released;
  - information responsive to categories h), j), and l) had already been released in response to an earlier request by Mr Howlin for assessed disclosure;
  - Council held no information responsive to categories m) and n);
  - information responsive to category o) was the same or similar to information sought by an earlier application for assessed disclosure and had either been released or was not in Council's possession; and
  - information responsive to category q) had either been produced under subpoena in the Supreme Court proceedings or released in response to an earlier application and was already in the applicant's possession.

- 7 Council sought refinement of the request pursuant to s13(7) in relation to the information sought in categories e), i), and p) and on 17 August 2017, Mr Howlin submitted a letter to Council purportedly providing that clarification.
- 8 On 25 August 2017, Mr van der Hek emailed Mr Howlin to inform him that he was going on long service leave and that the decision on his request would instead be made by Ms Clare Shea, another delegated officer.
- 9 On 15 September 2017, Ms Shea released a decision to Mr Howlin refusing to release any information. In her decision, Ms Shea referred in some detail to the history of the dispute, previous requests for information made by Mr Howlin and information already released to him. For the purposes of the decision, Ms Shea organised the responsive information into six groups:
  - Group A information relevant to categories a) to d) being information in relation to various subdivisions in South Arm Road, South Arm;
  - Group B information relevant to categories e) to l) being information in relation to certain streets in the municipality and the properties in each street;
  - Group C information relevant to categories m) and n) being information in relation to declarations concerning specified roads and lanes;
  - Group D information relevant to category o) being information in relation to Federal funding for repairs to specified streets;
  - Group E information relevant to category p) being information specific to Mr Howlin's property; and
  - Group F information relevant to category q) being information on relation to local government certificates issued for all Marsh Street properties.
- 10 In short compass, and despite Mr Van der Hek's advice that some information would be released, Ms Shea took the view that Mr Howlin was seeking the information referred to in each group in order to continue to advance his argument that Marsh Street was a public road, maintainable by Council, despite the clear findings of the courts, and was therefore vexatious. Alternatively, she decided, the information in Group A had already been sought by Mr Howlin in earlier requests, and had been released to him, and no reasonable basis for again requesting the information had been disclosed. For these reasons the subject request was refused as a repeat or vexatious application pursuant to s20.
- 11 Mr Howlin rejected these claims and on 21 September 2017 sought an internal review by Council of Ms Shea's decision.
- 12 On 9 October 2017, Mr Andrew Paul, Council's General Manager and therefore its principal officer, released an internal review decision. This decision reached the same conclusion as the original decision, adding nothing to it.
- 13 On 13 October 2017, Mr Howlin submitted a request for external review to this office. It was accepted under s44 on the basis that he had received a decision on internal review and had made his application for external review within 20 working days of his receipt of it as required by the Act.

## **Issues for Determination**

14 There are two issues for determination:

- Does the request for the information in Group A amount to a repeat request for information that Council can refuse pursuant to s20(a)?
- Does the remainder of the request in the application constitute a vexatious application for the purposes of s20 having regard to the matters contained in *Guideline No. 2/2010* issued by this office?

## **Relevant legislation**

15 Section 20 is the only section of the Act that has been relied on and a copy is attached to this decision. I also attach a copy of the Ombudsman's Guideline.

## **Submissions**

16 Mr Howlin had made many submission, both to Council and this office, in relation to the ongoing dispute, and most of the material submitted by Mr Howlin during the course of this review relates to the legal and other issues arising from Council's practices and actions with which he takes issue.

17 In relation to this external review itself, Mr Howlin did not submit anything. From the many conversations my office has had with him, however, it is clear that he refutes Council's claim that his application is vexatious or a repeat of an earlier one.

18 Council claims that the request for information falling under items (a) to (d) of the original application, which it has grouped together and called Group A, is both a repeat request and vexatious, while the application in so far as it relates to the information in Group B to F is just vexatious. Specifically, it says:

*I have formed the opinion that the Applicant's request for information, as it relates to this group of requested information, is vexatious and as such is an abuse of the statutory right to information process as it is aimed at continuing the Applicant's argument that his property has legal access to a public road and that it is maintainable by Council. I am also of the opinion that the information requested is same or similar to information requested under the Applicant's 2010 RTI request and the Applicant has not disclosed any reasonable basis for again seeking access to this information. Therefore, I have determined to refuse this request pursuant to section 20(a) and (b) of the Act.*

19 Similar arguments are made in relation to the application of s20(b) to the information in the remaining Groups B to F, which, interestingly, is the information Mr van der Heck proposed releasing.

## **Analysis**

20 Before I address the matters for determination, I wish to make it clear that I have no interest in the background dispute. Both Mr Howlin and Council raise many issues relating to the various Court proceedings and the ongoing differences between them, but these are not relevant to my determination.

21 My role is to review Council's decisions under the RTI Act and determine whether the refusal to provide the specific items of information, relying on s20,

can be sustained. Should Mr Howlin wish to pursue claims that certain actions of Council had been improperly taken, it remains open to him to lodge a complaint with this office under the *Ombudsman Act 1978*.

*Does the request for the information in Group A amount to a repeat request for information that Council can refuse pursuant to s20(a)?*

- 22 I received a copy of a decision sent to Mr Howlin on 9 October 2010, in which Council claims it had already released information to him, and relies on this as the basis for refusing to provide the information pursuant to the subject 2017 application.
- 23 I have reviewed the earlier decision against the information sought in items (a) to (d) in Group A of Council's 2017 decision.
- 24 I looked for references in the 2010 application to the terms "Mr Frederick Herbert", "Ms Marion Mifsud", "Harmony Lane", "3189 South Arm Road", and "subdivision Bisdee Street" which appear in the current application.
- 25 With the exception of a reference to "Harmony Lane", there are no matches in the 2010 application. Further, the earlier reference to Harmony Lane related to two gentleman, not Mr Herbert nor Ms Mifsud.
- 26 While I accept that both Mr Howlin's requests concerned information on the same general topic – the dispute - that is not the test for a repeat application. It is my view that the information sought now is not the same as the information sought earlier, though it is similar, and that the current application is not a repeat of the earlier one.
- 27 Other items in other groups are suggestive of some information already sought and received, and I accept there may be some cross over material that may have been provided previously common to the general topic, as distinct from the specific items requested. This would not, however, enliven s20(a) as the actual requests are fundamentally different.
- 28 I determine that s20(a) does not apply to the information referred to in items (a) to (d), identified by Council as Group A, and accordingly Council is not entitled to refuse to provide it. It now remains for Council to assess this information for disclosure under the Act.

*Does the remainder of the request in the application constitute a vexatious application for the purposes of s20 having regard to the matters contained in Guideline No. 2/2010 issued by this office?*

- 29 For an application to be capable of refusal pursuant to s20(b) it must be vexatious or remain lacking in definition after negotiation entered into under section 13(7). Here, Council says the application is vexatious.
- 30 As noted, this office has created a Guideline in accordance with s49(1)(b) of the Act as to the factors that should be considered when determining to refuse an application pursuant to s20. In relation to s20(b), the guideline refers to three relevant considerations:
  - a. the first is that it is the application which is vexatious, not the applicant;
  - b. secondly, regard has to be had to the objects of the Act contained in s3, which are 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; and
- c. whether the application might be refused under a more specific provision of the Act.
- 31 Council relied on s20(b) to refuse all remaining parts of the application, which includes items (e) to (q) of the original application, which is Groups B to F in Council's decision. This includes some parts of items (a) to (d) in Group A.
- 32 Turning to the first consideration, that the application is vexatious, I note that the word *vexatious* is not defined in the Act. The guide line refers to the Macquarie Dictionary, which defines *vexatious* in the context of vexatious proceedings in litigation, as being *instituted without sufficient grounds, and serving only to cause annoyance*. The guideline also cites s6 of the *Vexatious Proceedings Act 2008 (NSW)* where it defines such proceedings 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.*
- 33 The guideline goes on to suggest that depending on the circumstances, factors for consideration may also include the wording of the application and, in particular, whether it is intemperate, obscure, unreasonably long, unreasonably complex, or otherwise inappropriate.
- 34 Council has provided extensive background in its decision relating to the previous civil matters between Council and Mr Howlin, but significantly, has not assessed the application other than to say it is a vexatious one. It says this in the context of the ongoing dispute and on the basis that it is *an abuse of the statutory right to information process as it is aimed at continuing the Applicant's argument in relation to that dispute.*
- 35 In my view, it does not follow that because Mr Howlin has sought to prosecute his dispute with Council pursuant to other legislation in other places, he is somehow precluded from seeking to enforce his right to information pursuant to s7 of the RTI Act.
- 36 In addition, what Mr Howlin intends to do with the information is of no relevance. He has a right to that information unless it is exempt information or there is some lawful basis for refusing to provide it.
- 37 It would seem that Council considered the conduct of the applicant when concluding that the application is a vexatious one, rather than the application itself. I appreciate that Council might have experienced some frustration in its

dealings with Mr Howlin, which have been substantial and protracted, but that is not a valid reason to refuse his request under s20(b), especially having regard to the objects of the Act referred to above.

- 38 I note the third consideration in the guideline requires Council to turn its mind to whether the application might be refused under a more specific provision, which it has not done.
- 39 I am not satisfied s20(b) applies in this matter, and Council cannot refuse to provide Mr Howlin with information responsive to his request relying on that provision.

### **Preliminary Conclusion**

- 40 For the reasons given above, I determine that ss20(a) and 20(b) do not apply to Mr Howlin's application and it cannot thus be refused relying on those provisions. I direct Council to assess the information requested for disclosure in accordance with the provisions of the Act.
- 41 I apologise to the parties for the inordinate amount of time taken to finalise this decision.

### **Submissions to the Preliminary Conclusion**

- 42 The above preliminary decision was sent to Council on 12 November 2020, seeking its input as required by s48(1)(a).
- 43 In a letter dated 7 December 2020, Mr Ian Nelson (the General Manager of the City of Clarence) provided submissions in response to the preliminary findings.
- 44 Council stated that it 'does not wish to make any specific submission on the determination that the application was not vexatious.' It did provide further information to support its delegated officer's position that the application was a repeat request for information under s20(a), which is set out below.

*The Preliminary Decision provides that as the 2010 application and the 2017 application did not contain any word matches, except for Harmony Lane, the two applications are not the same or similar pursuant to section 20(a). At paragraph 26 of the Preliminary Decision, it is commented "the information sought now is not the same as the information [sought] earlier, though it is similar".*

*At paragraph 27, it is commented "other items in other groups are suggestive of some information already sought and received, and I accept there may be some cross over material that may have been provided previously common to the general topic, as distinct from the specific items requested. This would not, however, enliven s20(a) as the actual requests are fundamentally different".*

*The comments at paragraph 26 and 27 are confusing as it supports the delegated officer's view that while the information was not precisely the same, it was sufficiently similar. Council submits that the information requested under the two applications are similar and are not fundamentally different and therefore enliven section 20(a). The information under the two applications is similar in that the information sought related to Mr Howlin's allegation that Council had declared other parcels of land in*

*Opossum Bay to the roads maintainable by Council which Mr Howlin believes would support his argument that Marsh Street should be similarly be declared as a road maintainable by Council.*

*It has not been suggested that Mr Howlin was seeking the same information as is suggested at paragraphs 24-25 of the Preliminary Decision which states only one exact reference, being Hope Lane, was in both applications. With respect, this view fails to take into account the nature of the information Mr Howlin was seeking which was Council precedent to support his claim that Council had declared other parcels in the Opossum Bay and South Arm area to be roads maintainable by Council.*

*In his 2010 application, Mr Howlin, in part, requested:*

- *Municipal Rural Roads as they related to Marsh Street and Gellibrand Lane;*
- *Blake Street file “for the purposes of establishing what Council approved a subdivision with frontage to the then unnamed Blake Street, which was not shown on the Council Municipal road map nor was it declared by a formal resolution of Council to be a public highway maintainable by Council”; and*
- *Subdivision approval for 3668 South Arm Road (Hope Land) as “likewise Hope Land South Arm was approved...without any formal resolution by Council that the adjoining land was a public road for subdivision frontage purposes ...and records that show that the land no [sic] known as Hope Lane, at that time the property of Mr John Calvert had never been dedicated to Council, nor was it shown as a road or a road maintainable by Council on its S208 Municipal road maps, or any predecessor of that map. Therefore I am requesting all past and recent records relating to Blake Street Opossum Bay and Hope Land South Arm be produced in order to establish recent precedent which contradicts Councils stated legislative position on Marsh Street”.*

*In his 2017 application, Mr Howlin, in part, requested:*

- *General information from Council’s relevant records which would confirm “acceptable legal and appropriate access and frontage to subdivision and other developed property approved by the CCC”; and*
- *Specific information including for: “Subdivision approval file records of (a) Mr Frederick Herbert over Harmony Lane South Arm; (B) Ms Marion Mifsud over Harmony Land South Arm; (C) 3189 South Arm Road South Arm; (D) the subdivision at the end of Bisdee Street Southarm [sic].”*

*Council submits that the information requested under the two applications is sufficiently similar as both applications requested information on Council’s historic process of declaring a road maintainable by Council. Mr Howlin asserted in both applications that the reason for the application was to obtain information which would support his allegation that Mash Street should be similarly declared. The information sought under both applications*

*is concentrated on a specific subject, being Council's declarations, and within a very small area of Council's municipality.*

*Council submits that the intent of section 20(a) is to cover not only identical or "same" information but also information that is a similar nature to previously requested information.*

### **Group B**

*It is noted that the delegated officer refused Group B documents for lacking definition after negotiation with Mr Howlin pursuant to section 13(7) of the Act not because the request was vexatious. It is noted that the Preliminary Decision does not refer to this part of her decision. Can you please clarify if you intend to consider this in the final decision, should you decide to make a final decision at this late stage?*

- 45 Council also expressed its view that due to the passage of more than three years since Mr Howlin's original application, it would be a 'significant imposition' to revisit the decision and 'an unreasonable and wasteful use of Council's resources.' It asserted that 'if an order is made pursuant to section 47(1)(p) requiring council to assess Mr Howlin's application, council would quite simply be unable to comply.' Council, through Mr Nelson, was highly critical of the delay in finalising this matter, and expressed his opinion that 'I now have no choice but to abandon any pretence of concluding this matter and apologise to the parties for the inconvenience caused' and asserting that there was 'a fundamental lack of procedural fairness due to the unreasonable delay.'

### **Further Analysis**

- 46 I again apologise for the delay in finalising this matter and express my agreement with Council's statement that delays in this and many other external reviews are to 'the detriment of us all.' My Office has been provided with additional resourcing and is working to address the backlog of Right to Information external reviews and I recognise and acknowledge the negative impact these delays have caused to applicants and respondent agencies.
- 47 I do not accept, however, that this delay should result in the abandonment of Mr Howlin's external review request or excuse a failure of Council to comply with the provisions of the Act. Any deficit in procedural fairness would be greatly exacerbated by such a course. Mr Howlin has confirmed his continued desire to obtain the information he requested in 2017 and any reassessment of his application should not be more arduous on Council than the assessment of a new application received.
- 48 In relation to Council's submissions regarding repeat applications for assessed disclosure, I agree that the intent of s20(a) is to include similar information and is not restricted to identical information requests. It specifically includes the word *similar* in the section and clearly intends that a request which is inappropriately repetitious may have differences to a previous request. I do not consider, however, that this wording should be interpreted as permitting all similar requests to be refused or that different requests for the same or similar purpose would be captured.
- 49 Many information requests cover similar topics and the word *similar* in s20(a) must be construed very narrowly in order to give effect to the objects of the Act.

I consider similar in this context to mean so similar as to be almost the same, as the provision concerns repeat applications. For example, if Mr Howlin had requested all subdivision approvals for the Clarence municipality and then later requested those for two streets in the municipality, I would consider these requests for similar information. The Council would then need to consider whether there was a reasonable basis for repeating the request, such as the passage of time and new approvals having been issued in that period.

- 50 In this instance, Mr Howlin's requests were seven years apart and, with the exception of the Hope Lane reference, were not for the same information. While the topic and purpose for obtaining the information might have been similar, I am not persuaded by Council's submissions that these were so similar as to justify refusal under section 20(a). Council appears to have struggled to separate its view of the appropriateness of Mr Howlin's litigation and arguments advanced in various court proceedings from the assessment of his request for assessed disclosure. While this is understandable, due to Mr Howlin also extensively referencing this in his request and it occurring in this context, the two matters must be considered separately.
- 51 It would not be appropriate for me to assess the merits of Council's or Mr Howlin's arguments in court proceedings or the import of a finding against Mr Howlin in RMPAT or the Supreme Court of Tasmania. That a person was unsuccessful in court proceedings does not necessarily mean that future proceedings or appeals may similarly fail or that all related requests for assessed disclosure may be refused.
- 52 If Council were not the respondent to the court proceedings, it does not seem likely that it would have considered that Mr Howlin's request for further information about Council's declarations of roads maintainable by the Council relating to different properties in a similar area of the Clarence municipality in the context of a legal dispute was unreasonable.
- 53 I consider the passage of seven years to also be highly relevant, as significant new information may have become available during this time and it does not show that Mr Howlin was overusing the right to information process through frequent applications. I remain of the opinion that s20(a) does not apply to the information referred to in items (a) to (d), identified by Council as Group A, and accordingly Council is not entitled to refuse to provide it.
- 54 In relation to the Group B request, I accept that there was some lack of clarity in my preliminary decision in relation to Council's reasons for decision. There is also some lack of clarity in Council's decision in this matter, with the same information seemingly being declined on two bases. Ms Shea initially stated that she 'found that the request remains lacking in definition after negotiation entered into under section 13(7) of the Act' and accordingly she refused it under s20(b). She went on to note, however, that Mr Howlin provided clarification and this showed that Mr Howlin 'is attempting to obtain information to support his continuing argument that Council is obliged to maintain Marsh Street.' His request for all Group B information, other than that already provided, she stated was 'vexatious and as such is an abuse of the statutory right to information process and it is refused pursuant to section 20(b) of the Act.'

- 55 I dealt with this refusal in my preliminary decision and found that the categorisation of Mr Howlin's application as vexatious was not justified. The first refusal appeared to have been overridden by the second and I referenced the second only in my preliminary decision. My determination that the refusal was made pursuant to 20(b) and that Council was not entitled to refuse Mr Howlin's application on that basis remains unchanged.
- 56 I do acknowledge that I failed to address the part of Council's decision regarding the request for provision of full property files relating to Marsh Street and Gellibrand Lane. Ms Shea declined these on the basis that this information had already been sought and provided in full to Mr Howlin in 2010. I am satisfied that Council was entitled to refuse to provide this information, again under s20(a), and I apologise for this omission in my preliminary decision.

### **Conclusion**

- 57 For the reasons given above, I determine that ss20(a) and 20(b) do not apply to Mr Howlin's application, except as it concerns the provision of property files relating to Marsh Street and Gellibrand Lane which were appropriately refused under s20(a). No other aspects of Mr Howlin's application can be refused based on those provisions. I direct Council to assess the information requested for disclosure in accordance with the provisions of the Act.
- 58 I again express my regret and apologise for the substantial delay in finalising this matter.

**Dated:** 18 February 2021

**Richard Connock**  
**OMBUDSMAN**

## **Section 20 – Repeat or vexatious applications**

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.

### **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.

**Simon Allston  
Ombudsman**

Date of first issue of Guideline : 1 July 2010

# OMBUDSMAN TASMANIA

## DECISION

**Right to Information Act Review**

**Case Reference:** O1808-137

R2202-026

**Names of Parties:** F and Department of Education

**Reasons for decision:** s48(3)

**Provisions considered:** s27, s35, s36

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### Background

- 1 F and G are parents of a young son, A, who attended a school (the District School) run by the Department of Education (the Department). F and G had concerns their son had been subjected to regular bullying by another boy, B. The boys were classmates in Kindergarten in 2016 and Prep in 2017.
- 2 On 15 March 2018, F submitted a request for information under the *Right to Information Act 2009* (the Act) to the Department and paid the appropriate fee. The request sought:
  - *Reports of any incidents involving A in 2016 and 2017 at the District School.*
  - *All records of the District School's communications with F and/or G.*
  - *The District School's bullying policy.*
  - *Any action taken by the District School and their findings.*
  - *Any action taken by learning services (Education Department) and their findings.*
  - *End of year report written by kinder teacher for the prep teacher and Teacher C outlining the behaviours of each child, strengths and weaknesses for A and B.<sup>1</sup>*
  - *End of year report written by prep teacher for the Grade 1 teachers and Teacher C outlining the behaviours of each child, strengths, and weaknesses for A and B.*
  - *All learning services reports in relation to the... family.*
- 3 On 14 June 2018, Ms Rowena Taylor, a delegated officer of the Department, provided a decision to F on his application. Some information was released, but

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<sup>1</sup> Teacher C is an Advanced Skills Teacher at the District School.

a substantial amount was considered exempt. This information was claimed to be exempt under the following sections of the Act:

- s27 - internal briefing information of a Minister;
- s35 - internal deliberative information; and
- s36 - personal information of a person.

- 4 On 6 July 2018, F wrote to the Department and sought an internal review on two bases: that he considered the information claimed to be exempt should have been released; and that there were documents he knew to exist which had not been located and assessed.
- 5 On 9 August 2018, Mr Robert Williams, a delegated officer of the Department, provided an internal review decision to F. The internal review decision reached the same conclusions as Ms Taylor's decision regarding the information she assessed. Further information was located by the Department and it apologised for the oversight in not locating this originally. Mr Williams assessed the further information in a similar manner, releasing some information and exempting the remainder under ss27, 35 and 36.
- 6 Additional information was identified but not provided due to one staff member being unavailable to produce this information during the review period. Mr Williams then offered to assess the information identified but not produced at a later date, if F requested that this occur.
- 7 On 27 August 2018, F submitted the decisions to this office and sought an external review, again on the bases that:
  - the information not released should not have been exempted by the Department; and
  - there had been an insufficient search for information responsive to his request.
- 8 It was accepted under s44 on the basis that F had received an internal review decision and he submitted it to this office for review within 20 working days of his receipt of it.
- 9 On 25 November 2021, F provided further submissions and details regarding the relevant information he believed was in existence but not located by the Department.
- 10 On 26 November 2021, further detail was sought from the Department by my office regarding the issue of whether a sufficient search for relevant information was undertaken.
- 11 On 7 January 2022, the Department responded confirming that further information existed and that this additional information had now been assessed in accordance with the Act. A copy of this decision made by the Department's delegate under the Act, Ms Ingrid Brown, was also provided. All information located was released in full (excepting the redaction of some information

which was out of scope). Some of the information was not actually newly located but was the same as information previously assessed as exempt by the Department.

- 12 On 19 January 2022, my office sought clarification regarding the different treatment of the same information in the 2018 and 2022 assessments, asking whether other exemptions claimed were also no longer maintained.
- 13 On 18 February 2022, the Department provided the following explanation for the discrepancy:

*The process undertaken by each delegated RTI officer to assess information is in accordance with the Act and guidelines issued through Ombudsman Tasmania. In some instances, one delegated officer may have differing opinions on the assessment of similar information to another delegated officer, but on all occasions an RTI officer is required to perform their function as prescribed according to the Act.*

- 14 The Department advised that it would appoint a delegate to conduct a review of the decisions, however, to ascertain if further information could be released by way of active disclosure.
- 15 On 18 March 2022, the Department provided additional information to F on 26 items of the 92 listed in its schedule of documents attached to Mr Williams' internal review decision.

### **Issues for Determination**

- 16 I must first determine whether the information not released by the Department is eligible for exemption under ss27, 35 or 36.
- 17 As ss35 and 36 are contained in Division 2 of Part 3, 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.
- 18 I must also determine whether the Department undertook a sufficient search for relevant information in responding to F's request.

### **Relevant legislation**

- 19 The Department has relied on ss27, 35 and 36 in its decision. Copies of these sections are at Attachment A.
- 20 Copies of s33 and Schedule 1 are also attached.

### **Submissions**

- 21 F made substantial submissions during the review process. These primarily expressed his belief that, in his view, the Department was protecting itself and

the alleged bully rather than considering the Act or the rights of his own son. Specifically, he submitted:

*Again they are refusing to supply most of their holdings in relation to my son, their decisions and information pertaining to the child who has been assaulting our son. It amazes me that they state that the rights of the child...[B] to not have any information relating to him being disclosed is more important than the rights of my child who has [been] repeatedly hurt and injured by him. I believe that Learning Services are not supplying these details as it shows how incompetent their actions i.e. lack of action, has been. They have written all this up as a personality clash between my wife and the parent/teacher.*

*S33 - Public Interest and Section 36. I find this hard to believe! I have a steady stream of people coming to see me in relation to the bullying of their children AND a teacher coming to see me in relation to this specific child. Surely my child has rights too!*

22 He later added (verbatim):

*I am asking that the ombudsman release the retracted [sic] information in relation only to matters that directly impacted my son...[A]. This includes information in relation to another student...[B] as ALL of the problems we encountered were as a result of our son being assaulted and bullied by this student. Now it is important to note that we have no issue with this child, he was a young child at this time and certainly not at the age of criminal responsibility. However our issue is that his behaviours were not dealt with adequately by the ...District School... We know that at the conclusion of Kindergarten a report is written about all the children and their strengths, weaknesses and any behavioural issues. This report on...[B] outlined significant issues with his behaviours and aggressiveness/violence towards other students and the need for high levels of close supervision. These reports were/are given to the Prep teachers to read and use. This report clearly shows that the teachers were aware of the situation prior to the start of that school year. This report on...[B] is in the public interest, not as an attack on that child, but as an example of how the school has been aware of a situation and failed to manage it. The ...District [School] have denied that these reports are done, I can assure you that they most definitely are! The same report on our son...[A] is also requested as it will outline his behaviours.*

*This request is in relation to the ...District School and Education Department not supplying information they are aware show they are in breach of the Secretary's Instruction No3 For Unacceptable*

*Behaviour of Students And Volunteers At And Visitors To State Schools Or School. Eg. 3.2.I E, F, H, J and L.<sup>2</sup>*

- 23 F also provided a comprehensive list of dates and descriptions of information that he believe should also exist but which were referred to in the Department's decisions.
- 24 The Department made no submissions in addition to the reasoning contained in its decisions. Its reasoning is set out in the context of specific exemptions claimed and analysed in the following part.

## **Analysis**

### **Section 27 – Internal briefing information of a Minister**

- 25 For information to be exempt under this section, it must relevantly consist of an opinion, advice or a recommendation prepared by an officer of a public authority in the course of, or for the purpose, providing a Minister with a briefing in connection with the official business of a public authority, a Minister or the Government and in connection with the Minister's parliamentary duty: s27(1).
- 26 Section 27(3) provides that the exemption does not apply to information solely because it was submitted to a Minister, or is proposed to be submitted to a Minister, for the purposes of a briefing, if the information was not brought into existence for that purpose.
- 27 Subsection 27(1) does not exempt 'purely factual information' unless *its disclosure would reveal the nature or content of an opinion, advice, recommendation, consultation or deliberations of the briefing*: s27(4).

#### *The Department's position*

- 28 The Department, in its first decision of 14 June 2018, decided that the exemption under s27(1)(a) and (b) of the Act applied for these reasons:

*The information was processed through the Department's Ministerial Services Unit (MSU). MSU is responsible for coordinating and managing support for the Minister. This includes coordinating all advice and correspondence to the Minister. It also includes supporting Department staff to ensure the best quality advice and service to the Minister. MSU does not provide information to the public.*

*To reiterate, the purpose of MSU is coordinating and managing support for the Minister. The Minister relies on officers of the public authority briefing him on important issues and these briefings take the form of opinion, advice or a recommendation. Disclosure of internal briefing information of a Minister could lead to a reluctance by officers to provide detailed briefings which would undermine the*

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<sup>2</sup> See Secretary's Instruction No 3, July 2017, accessible at [www.education.tas.gov.au](http://www.education.tas.gov.au).

*internal briefing process, and could harm the Minister's ability to manage important issues.*

- 29 The Department's internal review decision of 9 August 2018 affirmed this position and provided the following additional reasons as to why it considered s27 applied:

*The information is exempt as it was provided by officers of a public authority for briefing the Minister. This is a common and necessary practice and if information of this type were to be disclosed officers of a public authority would be averse to providing quality and detailed advice to the Minister. The resulting harm from lack of internal briefing information would be both to the public authority and the Minister's in an inability to act on or progress important issues.*

*Individual documents*

- 30 The Department has identified the documents it seeks to exempt under s27 in a schedule of information and has labelled them by number rather than page number. I will use its system in my reference to various documents to avoid confusion.
- 31 The Department originally claimed that Documents 39, 45, 47, 52(a), 61, 62, 66, 67, 68, 71, 72, 86, 86(a) and 90 were fully or partially exempt pursuant to s27. However, documents 39, 45, 47, 52(a), 61, 62, 66 and 71 have now been released by way of active disclosure by the Department following its review of the matter. I commend the Department for its decision to pro-actively release further information in the interests of greater transparency.
- 32 As a result, I will not discuss the individual documents originally claimed to be exempt which have now been released, except for document 47 as this is connected to the documents which the Department still maintains are exempt.

*Document 47*

- 33 This is a signed briefing note dated 28 November 2017 from the Secretary of the Department to the Minister for Education and Training and was originally claimed to be exempt in full. The document clearly contains the opinion and advice of a public officer in the course of providing a Minister with a briefing on what has occurred and is proposed to occur in future regarding F and G's complaints. While there is significant factual information included in the briefing, it is inextricably entwined with the opinion and advice and I do not consider that it stands alone. While the Department has actively released this document, I consider that it would have been validly exempt pursuant to s27(1)(a) had this not occurred.

*Document 72*

- 34 This is an unsigned briefing note from the Secretary of the Department to the Minister, which is identical to the signed document 47. It has not been actively released and accordingly is exempt under s27(1)(a).

*Document 86*

- 35 This document consists of emails between two Departmental officers regarding grammatical edits to the proposed briefing note to the Minister (which became document 47) which I have already found to be capable of exemption under s27(1)(a). I am satisfied that these emails are consultations between public officers in the course of providing a briefing to the Minister and are also exempt under s27(1)(b).

*Document 86(a)*

- 36 This is another draft version of the briefing note which became document 47 and is also exempt under s27(1)(a).

*Overall*

- 37 As s27 is not subject to the public interest test, no further assessment is required and Documents 72, 86 and 86(a) are not required to be released to F.

**Section 35 – internal deliberative information**

- 38 The Department relied upon s35(1)(a) to exempt other information responsive to F's request. I also consider that s35(1)(b) may be relevant. For information to be exempt under these parts of 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.
- 39 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.
- 40 The outlined exemption above does not apply to the following:
- purely factual information<sup>3</sup>;
  - a final decision, order or ruling given in the exercise of an adjudicative function<sup>4</sup>; or
  - information that is older than 10 years.<sup>5</sup>
- 41 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)*<sup>6</sup> 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.

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<sup>3</sup> Section 35(2).

<sup>4</sup> Section 35(3).

<sup>5</sup> Section 35(4).

<sup>6</sup> *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at 14.

- 42 Associate Professor Moira Paterson, in her text, *Freedom of Information and Privacy in Australia: Information Access 2.0*<sup>7</sup>, 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.*
- 43 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’.<sup>8</sup>
- 44 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.
- 45 Excluding information released as active disclosure, the Department maintains that the following documents are exempt pursuant to s35(1)(a) in part or in full: 10, 40, 43, 44, 49, 50, 51, 56, 57, 63, 69, 70 and 73. I will consider these individually in my analysis below.

#### *Document 10*

- 46 The information not released in this document is an email from the Operations Manager of Learning Services Northern Region to the Principal of the District School and the Principal’s response, both dated 30 October 2017. There are also some handwritten annotations by an unknown author on the Principal’s response. The emails are in response to an email from G dated 26 October 2017 raising concerns about A’s safety and well-being at the District School.
- 47 The emails consist of opinion or records of consultations between officers of the Department regarding the deliberative process of determining the way to respond to and address G’s complaint. Accordingly, I am satisfied that they are *prima facie* exempt pursuant to s35(1)(a) and (b).

#### *Document 40*

- 48 This comprises two short emails between Departmental staff dated 12 December 2017, consulting to finalise wording for a response regarding supports being provided to A’s class. I am satisfied that they consist of records of consultations between officers of the Department in the course of a deliberative process. Consequently, they are *prima facie* exempt under s35(1)(b).

<sup>7</sup> LexisNexis Butterworths Australia, 2<sup>nd</sup> edition 2015

<sup>8</sup> *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.

*Document 43*

- 49 The part of this document which has been claimed to be exempt is a portion of an email dated 5 December 2017 from Craig Woodfall, Operations Manager of Learning Services Northern Region of the Department. The contents contain opinion and records of consultation regarding how to manage the interactions between A and B and associated issues. I am satisfied that they are *prima facie* exempt pursuant to s35(1)(a) and (b).

*Document 44*

- 50 This is an email trail between Luke Padgett, Behavioural Learning Leader and Advanced Skills Teacher C of the Department between 30 November and 4 December 2017, with the final email forwarding this correspondence to the Operations Manager of Learning Services Northern Region of the Department. The emails discuss strategies for addressing the concerns about A and B's interactions, proposing various options and implementation challenges relating to these. I am satisfied that the emails are *prima facie* exempt pursuant to s35(1)(b).

*Document 49*

- 51 The part of this document which has been claimed to be exempt is a portion of an email dated 22 November 2017 from Mr Padgett to two other Department officers, which forwards correspondence between F and G and Teacher C. The sentence which is redacted is an expression of an opinion by Mr Padgett on the success of Department measures implemented at that time, in the course of the deliberative process of responding to the concerns raised. I am satisfied that it is *prima facie* exempt under s35(1)(a).

*Document 50*

- 52 This is an email trail between officers of the Department dated 21 November 2017 discussing options and co-ordinating an urgent response to concerns being raised about the District School. I am satisfied that the emails are *prima facie* exempt under s35(1)(b), as consultations and deliberations between public officers in the course of a deliberative process.

*Document 51*

- 53 This is two emails between the Operations Manager of Learning Services Northern Region and the Principal of the District School dated 21 November 2017. The first email is claimed to be exempt in full and the second has only one sentence redacted. The first email sets out contact which has been made and is proposed in future with F and G to attempt to address their concerns, the sentence redacted in the second email is an opinion regarding the matter. I am satisfied that the first email is *prima facie* exempt under s35(1)(b) and the sentence of the second email is *prima facie* exempt under s35(1)(a).

*Document 56*

- 54 This is an email trail between Mr Padgett and the Operations Manager of Learning Services Northern Region dated 9 November 2017, the parts of which that were claimed to be exempt are finalising wording for the email which is at Document 55. I am satisfied that these parts are *prima facie* exempt under s35(1)(b).

*Document 57*

- 55 The parts of this document which are claimed to be exempt are two sentences from emails dated 7 and 8 December 2017 between Departmental officers discussing F and G's bullying concerns. The sentences are opinions regarding the handling and progress of the matter to date and I am satisfied that they are *prima facie* exempt under s35(1)(a).

*Document 63*

- 56 This is a duplicate of Document 10, except that it does not include any handwritten annotations. I maintain my view expressed in relation to that document and am satisfied that these emails are *prima facie* exempt pursuant to s35(1)(a) and (b).

*Document 69*

- 57 This is a document which contains notes for a response and draft reply to concerns raised by G. It is undated and does not give any indication of its author. I am satisfied from the content, however, that it would have been prepared by an officer of the Department and that it is *prima facie* exempt under s35(1)(a).

*Document 70*

- 58 This is a copy of an email from G which has been annotated with handwritten notes which appear to be notes of a proposed response and follow up which will occur with other Department staff. It is also undated and does not give any indication of its author, but I am again satisfied from the content that it must have been prepared by a Departmental officer. I consider that it contains opinion and a record of consultations between public officers and is *prima facie* exempt under s35(1)(a) and (b).

*Document 73*

- 59 This is an email which post-dates F's request for information but contains a 'running timeline' which the Department has kept on its One Note system of the issues F and G have raised and the Department's actions in response. While there is some factual information included in the timeline, it is intertwined with opinion regarding the progress of the matter and was clearly developed as an internal overview. I am satisfied that it is *prima facie* exempt under s35(1)(a).

### *The public interest test*

60 Section 35 is subject to the public interest test in s33, so I turn to assess whether it would be contrary to the public interest to release the information I have found above to be *prima facie* exempt. I am required to have regard to, at least, the matters in Schedule 1 in making this assessment.

61 The Department considered the release of all of the information to be contrary to the public interest, reasoning:

*The information is exempt as officers of a public authority require the internal deliberative process, preparing their opinion, advice or recommendations, to carry out their duties. It is critical that officers, particularly relevant in schools, have some protected space to break down issues and find solutions. Without the deliberative process, officers have no recourse for working through and solving complexities.*

62 It said that it found matters (m), (n) and (p) in Schedule 1 to be of particular relevance in making this decision, though it did not expand on this beyond setting out that they were the key factors it considered.

63 I consider that the Department's assessment of the matters in Schedule 1 of the Act was quite limited and did not address all relevant considerations. It did not appear to find any matters in favour of disclosure, except perhaps (m), which I do not agree is correct. The pro-disclosure object of the Act and matter (a) – the general public need for government information to be accessible – are always relevant and will inevitably weigh in favour of release of information in any public interest assessment.

64 I also consider that (g) is relevant, as the release of this information would enhance scrutiny of government administrative processes. F and G are very concerned that the issues they have raised may not have been handled and addressed appropriately by the Department and the release of this information would enable them to scrutinise its processes. I consider this weighs in favour of disclosure in this instance.

65 I agree with the Department that (m) is particularly relevant, though there are reasons the disclosure would promote the interests of some individuals and have the potential to harm the interests of others. I consider that this primarily weighs in favour of disclosure, as F and G are highly desirous of obtaining this information and consider that it will advance their interests significantly if they do. There is a slight potential for the release of the information to harm the interests of B, as the accused bully of A, but this is of far less weight in relation to s35 and will be considered primarily in relation to s36 below.

66 The Department has primarily focused on (n) – whether the disclosure would prejudice the ability to obtain similar information in the future – in its objections, and the importance of allowing public officers protected space to discuss potential decisions.

67 Specifically, it indicated in the original decision:

*It could be assumed that the internal deliberative information could be disclosed to the broader public and this could harm individuals or a group of individuals by a reluctance to engage in and benefit from the possible better solutions of the thinking process.*

- 68 I agree that there are particular sensitivities around the handling of complaints and concerns in relation to school children and their parents. It is important that staff are able to develop strategies and discuss issues without records of these deliberations always being disclosed to parents. This is important for the management of a particular class, the relevant school and the broader management of education in Tasmania.
- 69 Despite this, however, it should never be forgotten that children are a particularly vulnerable cohort and there is a strong public interest in parents being able to obtain information in relation to the management of their concerns by the Department, and the safety of their children while under the care of the Department. The need for some internal deliberative processes to remain confidential must always be balanced with transparency and accountability regarding decisions and actions which have an impact on children. Departmental employees should also be conscious that all public information has the potential to be released under the Act. Section 35 is not a mechanism to protect flippant and passing comments in relation to parent complaints from release, only genuinely internal deliberative information in appropriate circumstances will be exempt.
- 70 The Department has also relied upon (p) – whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of its staff. I do not consider this factor to be of significant weight in this matter, as F and G's complaints were not targeted at a specific member of staff and the information does not relate to any staff disciplinary processes or management of staff in any major degree.
- 71 Overall, there are a number of factors which weigh strongly in favour of release and of disclosure. It is, accordingly, a difficult balance to strike in assessing whether the disclosure of this information would be contrary to the public interest.
- 72 I am not satisfied that the release of the first three paragraphs of Mr Woodfall's email and his signature block in Document 43 or Documents 49, 51 and 57 would be contrary to the public interest and this information should be released to F.
- 73 I consider that the information which has not already been disclosed in Documents 10, 40, 43 (except as outlined above), 44, 50, 56, 63, 69, 70 and 73 is exempt under s35 and is not required to be released.

### **Section 36 – personal information of a person**

74 Section 36 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.*

75 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.*

76 In his application, F specifically sought the personal information of B. Ms Taylor's decision on 14 June 2018 for the Department refused to provide this information, reasoning that:

*In your request I understand you are seeking the personal information of child/ren other than your son. The Department does not provide a person with the personal information of other individuals. Importantly, schools must remain a neutral place and properly protect the personal information of individuals, especially children.*

*However, I have released the personal information of Department employees, as the Department employees are known to you through your child/ren attending the school. Further, personal information such as names and positions of Department employees are easily accessible through various means, again pertaining to the fact you are aware of personal information such as names and titles of Department employees.*

...

*For it to be known that the Department disclosed personal information of individuals, particularly children, it could result in harm in an unwillingness of parents/carers to provide essential personal information to the school about their child/ren and/or family.*

77 In his request for an internal review, F protested:

*You have decided to omit anything in relation to [B]. This was the child who bullied our son all year. You agreed to supply this information in our RTI application.*

- 78 Mr Williams then addressed this matter in his internal review decision of 9 August 2018, setting out:

*I reiterate Ms Taylor's reasons for exempting personal information of other individuals, particularly that of children. To disclose personal information of individuals to promote the interests of some individuals would not outweigh the harm to a larger group of individuals. It is essential for the Department, particularly schools, to be trusted to responsibly handle the personal information of individuals, particularly that of children. For personal information of individuals to be disclosed would cause a loss of trust and considerable harm to the Department's ability to perform its core function which is providing educational services.*

- 79 The information claimed to be exempt by the Department under s36 is the names of other students in A's classes and B's parents. There was originally some redaction of pronouns and wording which would reveal the gender of students involved in incidents at the District School involving A, but this information was subsequently released by the Department.
- 80 Excluding information now released, information has been redacted pursuant to s36 in Documents 7, 23, 24, 27, 28, 29 and 43.
- 81 The names of other students and B's parents are clearly personal information and I am satisfied that this information is *prima facie* exempt under s36.

*Public interest test*

- 82 Section 36 is subject to the public interest test contained in Schedule 1 of the Act. The Department stated that it considered the following matters to be of particular relevance in coming to its determination that the release of this information was contrary to the public interest:
- h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
  - m) whether the disclosure would promote or harm the interests of an individual or group of individuals
  - n) whether the disclosure would prejudice the ability to obtain similar information in the future;
  - p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- 83 While I note that there remain factors in favour of release, particularly (a) – the general public need for government information to be accessible, I largely agree with the Department's arguments in relation to s36. I am not persuaded of the relevance of (p) in Schedule 1, but agree that (h), (m) and (n) are factors of significant weight and do not favour the release of this information.

- 84 The Department has only redacted the names of these individuals and has not sought to exempt any further information under s36. The information is intelligible without this information and the identity of B and his parents is known to F and G. There is very limited benefit in the release of this information and very strong factors weighing against disclosure. Once information is released under the Act its use cannot be controlled and to release the names of primary school children and their parents without their consent would only be justifiable in unusual circumstances, which do not exist here.
- 85 Accordingly, this information is exempt under s36 and is not required to be released to F.

***Insufficiency of searching for information***

- 86 Section 45(1)(e) of the Act provides that:

*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 –*

...

*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.*

- 87 F raised concerns following both of the Department's decisions on his application for assessed disclosure that relevant information had been omitted. Mr Williams' decision located additional information and assessed this and the Department located further information following correspondence from my office in relation to the external review.
- 88 It appears that it was only due to F's awareness of the existence of the majority of the missing documents that these discrepancies were identified and rectified by the Department, it is not apparent that the Department would otherwise have located and assessed this information. Applicants for information are often not aware of the volume and type of relevant information held by a public authority and it is a requirement of the Act that public authorities perform sufficient searches for information they hold to ensure the Act operates effectively.
- 89 I am not satisfied that the Department's search for information was sufficient and consider that it is imperative it undertakes better efforts in future to locate all relevant information when assessing an application originally.
- 90 Despite these issues, however, I am satisfied that the Department appears to have rectified its oversights in relation to searching by the conclusion of this external review. The Department has also revisited many of its original decisions to exempt information and has now released a significant amount of additional information, which is to be commended.

## **Preliminary Conclusion**

91 For the reasons set out above, I determine the following:

- Exemptions claimed pursuant to s27 are affirmed;
- Exemptions claimed pursuant to s35 are varied; and
- Exemptions claimed pursuant to s36 are affirmed.

92 I also determine that the Department did not conduct a sufficient search for information responsive to F's request, but had taken appropriate steps to rectify the issues in searching by the conclusion of my external review.

## **Submissions to the Preliminary Conclusion**

93 As the above preliminary decision was adverse to the Department, it was made available on 18 May 2022 under s48(1)(a) to seek its input before finalising the decision.

94 Mr Tim Bullard, Secretary of the Department, advised on 23 June 2022 that he accepted my findings in relation to the exemptions applied to the information but wished to make a submission regarding my proposed finding that the Department did not conduct a sufficient search for information. He set out that:

*The external review relates to decisions by Departmental Delegates dating back to 2018.*

*In the 2018/2019 financial year the Department recorded 38 Right to Information applications received, compared with 206 applications as at 16 June 2022 for the incomplete financial year of 2021/2022. The applications made to the Department have steadily increased in recent years, primarily due to applications made in respect of historical sexual abuse claims. This represents a significant increase in the numbers of RTI applications and associated workflow processes.*

*In response to the increasing numbers of RTIs, in approximately 2018-2020, the Department undertook a number of training sessions for Delegates and interested staff in conjunction with the Office of the Ombudsman. These training sessions were aimed at increasing awareness of Right to Information obligations, transparency and information request processing amongst staff within the Department.*

*The Department proactively initiated these statewide training sessions and coordinated the training which was also offered to other Departments...*

*Within the Department are 194 public schools, together with Child and Family Learning Centres, libraries, four organisation divisions and a broad range of internal business units responsible for various aspects of education management. Some Departmental information is centrally located on databases and formalised record keeping systems. The very nature of the Department and its functions means that information can be held in other*

*less formalised locations that are reliant on individual staff members conducting searching to ascertain information that may fall within the scope of any RTI request.*

*Whilst I acknowledge and understand your position as outlined, that being the Department did not conduct a sufficient search for information responsive to the applicant's request, I ask that you consider and recognise the natural challenges that exist for a large Department in responding to applications, particularly where information is sourced from a variety of business units. Due to its size, the Department necessarily targets searches to areas where it reasonably considers information within the scope of an application may be held. These sourcing efforts are reported to the applicant in all decision letters.*

*Since the date of the initial decision in 2018, the Department has improved RTI and information management processes, and staff working in RTI have increased knowledge of the likely location of files held by the Department in respect of broad categories of matters. However, there will always be instances where even the most well-directed searches at the time do not generate all information relevant to a matter.*

*Whilst I accept your observations that an individual applicant cannot be expected to know all areas of the Department that may hold information, the Department's approach is to be transparent about the areas searched during the decision process and invite an applicant to respond if they feel information exists which has not been located...*

*This approach has been developed to ensure applicants are clear about the scope of the searches conducted and provide opportunity for input.*

*The abovementioned increase in numbers of applications (and a related increase in requests being made to business units and schools in particular), in addition to the training delivered within the Department over recent years, has also likely increased general understanding of RTI within the Department and the importance of sourcing all information relevant to a request.*

*I am grateful for the support and advice from the Ombudsman's office, including the provision of training and consideration of any published decisions and findings, including this finding. The Department welcomes the learnings and opportunities that arise from the external review process to assist in firming up existing processes for the benefit of all future applicants.*

## **Conclusion**

- 95        I have considered the submissions of the Department and I accept and acknowledge that the issues raised regarding insufficiency of searching are now somewhat historical due to the unfortunate delay in this decision being finalised. I have been pleased with the engagement of the Department with

training and in responding to my office in relation to this external review, and I am satisfied that it has made, and continues to make, genuine efforts to improve its practices in relation to handling applications for information under the Act. The Department's submissions have not changed my findings but I appreciate its commitment and aspiration to best practice in relation to the Right to Information scheme.

- 96 Accordingly, for the reasons set out above, I determine that:
- Exemptions claimed pursuant to s27 are affirmed;
  - Exemptions claimed pursuant to s35 are varied; and
  - Exemptions claimed pursuant to s36 are affirmed.
- 97 I also determine that the Department did not conduct a sufficient search for information responsive to F's request, but had taken appropriate steps to rectify the issues in searching by the conclusion of my external review.
- 98 I apologise to the parties for the inordinate amount of time taken to finalise this decision.

**Dated:** 29 June 2022

**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 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.

### **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.

## **OMBUDSMAN TASMANIA**

## **DECISION**

**Right to Information Act Review**

**Case Reference:** R2202-082

**Names of Parties:** Geoffrey Swan and Huon Valley Council

**Reasons for decision:** s48(3)

**Provisions considered:** s31, s32

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### **Background**

- 1 In March 2021, the Huon Valley Council (Council) commenced a recruitment process for a new General Manager upon the resignation of the previous general manager, Emilio Reale. On 31 August 2021, Council Mayor Bec Enders announced the appointment of Jason Browne as the new General Manager and Council confirmed the appointment at a Special Council meeting on 15 September 2021.
- 2 As part of the General Manager recruitment process, Council engaged Red Giant, a Tasmanian recruitment agency. Following controversy surrounding the recruitment process, due to Mr Browne being in a relationship with Red Giant's Principal, Joanne Inches, Council requested an independent review from Edge Legal, a law firm in North Hobart. Rod Collinson, a Director of Edge Legal, completed the report in mid-September 2021.
- 3 Council provided the report to Ms Inches for her review and she made submissions in response. Council sought legal advice regarding those submissions from Simmons Wolfhagen, a law firm based in Hobart. This advice was provided to Council in late September 2021.
- 4 On 30 September 2021, Ms Enders issued a media release containing an apology to the community for the negative focus on Council's recruitment of its new General Manager and a redacted version of the key findings of the Review of the Recruitment Process for the New General Manager Appointment Report (Key Findings)<sup>1</sup>.
- 5 On 12 October 2021 the Auditor-General released a report titled *Council general manager recruitment, appointment and performance assessment* (the Auditor-General's report), which included a review of Council's recruitment

<sup>1</sup> Enders, R 2021, *Mayor apologises and vows to restore public confidence in recruitment processes*, media release, Huon Valley Council, 30 September 2021 at [www.huonvalley.tas.gov.au/wp-content/uploads/2021/09/Media-Release-GM-Recruitment-1.pdf](http://www.huonvalley.tas.gov.au/wp-content/uploads/2021/09/Media-Release-GM-Recruitment-1.pdf)

process in order to form a conclusion on the effectiveness of Huon Valley Council's management of conflicts of interest during the process to recruit a general manager.<sup>2</sup>

- 6 Mr Geoffrey Swan is a journalist and the Contributing Editor for an online publication, the Tasmanian Times. On 8 October 2021, Mr Swan made an application for assessed disclosure under the *Right to Information Act 2009* (the Act). In his application he specifically sought:
  - A complete copy of the Edge Legal report as presented to Council... to contain no redactions. If Council insists on redactions, then I am requesting the full report be provided with the redactions shown in the usual black highlight, and an explanation as to what the redactions refer to; ...
  - A full copy of the Simmons Wolfhagen report;
  - All correspondence from Council staff, the Mayor, and the GM Panel provided to Edge Legal and Simmons Wolfhagen which was the request for an investigation, and all correspondence provided to assist in the investigation on which the reports were based;
  - All correspondence from Edge Legal and Simmons Wolfhagen that accompanied the reports, or is associated with the investigations.
- 7 On 13 October 2021, Andrew Wardlaw, Acting General Manager and Principal Officer of Council for the purposes of the Act, released his decision and statement of reasons. He determined to refuse the application on the grounds that the information was exempt pursuant to:
  - s31 – legal professional privilege; and
  - s32 – information related to closed meetings of council.
- 8 On 17 October 2021, the applicant applied to this office under s45(1)(a) for external review of Council's decision. His application was accepted on the basis that Mr Swan had an original decision made by a principal officer and it was submitted for external review within 20 working days of his receipt of it. The fee had been waived by Council pursuant to s16(2)(c).
- 9 The applicant applied for priority consideration of his external review application on 24 February 2022. This application was accepted on the basis that it is a current matter of high community concern and swift resolution of this request for information was important.

### **Issues for Determination**

- 10 I must determine whether the information is eligible for exemption under ss31 and 32 of the Act.

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<sup>2</sup> Tasmanian Audit Office, *Report of the Auditor-General No. 2 of 2021-22: Council general manager recruitment, appointment and performance assessment*, 12 October 2021 at [www.audit.tas.gov.au/wp-content/uploads/Council-GM-full-report.pdf](http://www.audit.tas.gov.au/wp-content/uploads/Council-GM-full-report.pdf)

## **Relevant legislation**

- 11 As noted, Council has relied on ss31 and 32 in its decision to exempt information. I attach copies of these sections to this decision at Attachment I.

## **Submissions**

### *Council*

- 12 Council did not make submissions in relation to this external review, beyond its reasoning set out in Mr Wardlaw's decision. These reasons are as follows.
- 13 In relation to s31, in his decision Mr Wardlaw set out:

*The information you have requested is advice and correspondence between the Council and its legal representatives brought into existence for the purpose of giving or obtaining legal advice, therefore the information is subject to legal professional privilege.*

- 14 In relation to s32, Mr Wardlaw indicated:

*Some of the information subject to your request is available in the below resolution of Council and the report of the Tasmanian Audit Office titled – ‘Council general manager recruitment, appointment and performance assessment’ (the Auditor-General’s report).*

*Council in Closed Session at its meeting on 29 September 2021 considered legal advice in relation to the release of the Key Findings from the Edge Legal report. The Council formally moved to release the following information [Key Findings document omitted<sup>3</sup>].*

- 15 Mr Wardlaw then stated:

*The remainder of the information falling within the scope of [the applicant’s] request has not been released from Closed Council therefore the exemption under s32 of the RTI Act applies.*

*Disclosure of the information would also be a breach of the Local Government Act 1993 as the RTI Act does not compel disclosure of this exempt information.*

### *S.338A Disclosure of Information*

*(4) Except as required, or allowed, by this Act, another Act or any other law, an employee of a council, single authority or joint authority must not disclose information acquired as such an employee on the condition that it be kept confidential.*

*As the exemptions under section 31 and 32 of the RTI Act apply to the information you have requested, and the information that can be*

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<sup>3</sup> The redacted version of the Key Findings of the Review of the Recruitment Process for the New General Manager Appointment Report released by Council on 30 September 2021 is available here: [www.huonvalley.tas.gov.au/wp-content/uploads/2021/09/Media-Release-GM-Recruitment.pdf](http://www.huonvalley.tas.gov.au/wp-content/uploads/2021/09/Media-Release-GM-Recruitment.pdf).

*provided is already publicly available, a redacted version of any document containing information subject to your request will not be provided.*

*The applicant*

- 16 In relation to the release of the Key Findings of the Edge Legal report only, Mr Swan made the following submissions:

*The Auditor General's Report was damning of the performance of the Council. The AG report was released in full with no redactions.*

*The review conducted by the Huon Valley Council into itself should also be made public with no redactions. The importance of openness and transparency must be supported if the rule of law is to be abided by. Council has so far advised the cost of the Edge Legal report to ratepayers is \$15,000. The additional costs for the Simmons Wolfhagen advice has not yet been made public. These are expenditures that have been made by Council to investigate their own recruitment process which has subsequently been deemed as flawed and the community has every right to fully understand why these reports need to be redacted, and what information has been redacted.*

*Council has not supplied the customary full report with redactions marked in black ink, instead, what has been provided to the public appears to be a specially written summary of points only.*

*In responding to the legal aspects of Mr Wardlaw's reasons for not releasing the report in full, with no redactions, requires consideration of the possible legal implications of Mr Wardlaw holding a potential apprehension of bias as detailed above.*

- 17 The applicant then provided the following reasons as to why he considered s31 does not apply:

- *The contractual arrangements between Council and Edge Legal was [sic] not for the dominant purpose of providing legal advice and professional legal services. It was a simple review of the Council's appointment and recruitment processes as requested by the Director of Local Government.*
- *There is no production of legal proceedings in accordance with section 31 of the Right to Information Act 2009. The nature of the information requested is not legal but of an administrative research function.*
- *Legal Professional Privilege is a legal client relationship, and that legal relationship could not have existed in just reviewing HR matters in appointment and selection. In fact, if the relationship was possibly engineered by Council to engage legal assistance to possibly protect a conflicted appointment, then this becomes a very serious matter for the authorities for a proper independent investigation.*

- There is no evidence of any anticipated litigation in accordance with Section 3!. In fact, the Auditor-General released his unredacted report into the Council and to the public. Given the damning nature of the AG report, the likelihood of anticipated litigation from the Council Report would be inconsequential.
- 18 In relation to s32, the applicant first referred to s15 of the Local Government (Meeting Procedures) Regulations 20!5. He then provided the following reasons as to why he contended s32 does not apply:
- It is alleged the Huon Valley Council arranged and managed a closed Council Meeting in possible breach of the Local Government (Meeting Procedures) Regulations 20!5. It is alleged section !5 of the meeting procedures regulations provides no legal basis for Council to close the meeting for a report in reviewing its GM recruitment process.
  - In fact, in any professional report of this nature, all personal information must be addressed appropriately in accordance with reporting procedures and contemporary HR practices. Therefore, Council has possibly breached regulation !5 of the Local Government (Meeting Procedures) Regulations 20!5. Again, Edge Legal was not engaged to provide legal advice. In fact, if you applied Mr Wardlaw's assessment of section 32 to all Council meetings they could be held in closed Council because any decisions of Council could be subject to legal considerations. This is clearly not the intentions of the law.
  - On ABC radio on the !4 September 202! Leon Compton interviewed the Mayor Enders...The Mayor stated that Council would be considering the report in Closed Council and at the same time considering the newly appointed general manager's employment contract. It is acknowledged the meeting should be closed in accordance with section !5(2) to consider the Contract of Employment, but there are no provisions in the Local Government (Meetings Procedures) Regulations 20!5 to close the meeting to consider a report into Councils GM recruitment process to my understanding of the legislation. The mayor made it very clear the reason why Council Closed the meeting was because of consideration of the General Manager's contractual arrangements.
  - The mayor publicly stated the report would "**absolutely be released in full**," subject to components of legal ramifications for Council.
- 19 The applicant then concluded by arguing that section 3! cannot apply because the relationship between Council with Edge Legal is not a legal one, but of research and reporting. The Council report is no different than the Auditor-General's Report, which was not only made public, it was tabled into the Parliament. In relation to s32 he further stated, this is much more straight forward, as there are no provisions in the

*regulations as detailed above to close the meeting to consider a report into the GM Recruitment Processes.*

- 20 I note that the applicant provided with his submissions a copy of the Auditor-General's Report and a *community discussion paper: Conflicted General Manager Employment Huon Valley Council* (Community Discussion Paper) which he said was *circulating within the community and which may assist [me] in better understanding the context of this RTI*. The applicant also enclosed media statements issued by the Mayor on this matter which includes an “apparent” redacted version of the Edge Legal report, and a transcript of an ABC Leon Compton interview with Mayor Enders. Also enclosed, but not directly mentioned by the applicant, is a Community Statement which *calls on the Minister for Local government the Hon Roger Jaensch to suspend the Huon Valley Council appointment of the conflicted General Manager Mr Jason Browne until such time as to formal independent forensic investigation is conducted* [Mr Swan’s emphasis].
- 21 I have considered all of these documents as background information to the applicant’s submissions.
- 22 On 3 March 2022, the applicant made further submissions as part of his request for priority processing of his external review. He stated:

*The Information contained in the Edge Legal Report may possibly contain very important information for members of the public with [a Director of Local Government]... Investigation. This is information which was not relevant to the Auditor General’s investigation. This entire matter may soon become a matter before the Solicitor General and the evidence we are seeking from the Edge Legal Report, if correct, will have serious ramifications which possibly extend beyond the Huon Valley Council.*

*Council promised to provide a redacted version of the Report, but instead they provided a summary of what Council deemed were the salient points.*

*...*

*Delays in making information available and timelines for closing investigations leave many in community believing there is a cover up to ensure the conflicted General Manager appointment is confirmed by the 21 March 2022.*

## **Analysis**

- 23 The information responsive to the applicant’s request is comprised of 15 documents, as outlined in the Table of Documents provided by Council with the full unredacted information on 22 March 2022. Section 31 was primarily relied upon, with some reliance also on s32.
- 24 Council also mentioned section 37 as an alternative exemption in relation to some documents, but Council said that it had not undertaken consultation or assessed the public interest considerations given its reliance on other

exemptions. I have not further considered s37, due to Council presenting this as an alternative only to other, more pertinent, exemptions.

- 25 Council also provided some out of scope information as background material. I have only considered documents within the scope of Mr Swan's request and documents identified to be out of scope by Council in their Table of Documents have not been analysed below. The titles of the documents have been kept in accordance with the Table of Documents for ease of reference, and the gaps in numbers represent the out of scope documents not included.

### **Section 31**

- 26 As I have outlined in previous external review decisions<sup>4</sup>, it is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and their lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings<sup>5</sup>.
- 27 Section 31 of the Act recognises this rule, and 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.*

### **Document 2**

- 28 This is an email exchange between Council's Acting General Manager, Paul West, and a Director of Edge Legal, Rod Collinson, dated 2 and 3 September 2021, comprised of eight pages. It includes the Engagement Letter and signed Costs Agreement for Edge Legal to conduct the Independent Review of the General Manager Recruitment Process (the Recruitment Review). Although the correspondence is quite administrative, it is a preliminary and necessary communication for the purpose of seeking and providing legal advice and I am satisfied that it is exempt under s31.

### **Document 3**

- 29 This is an email exchange between Mr West and Council Mayor Bec Enders dated 3 September 2021, comprised of two pages. Council describes this in its Table of Documents as *Consultation on engagement of Edge to undertake the review* and the emails are in relation to the authorisation to spend funds to engage Edge Legal.
- 30 While the emails are closely linked to seeking legal advice, I am not satisfied that they are exempt under s31 as they are internal communications. I will analyse

<sup>4</sup> See *Simon Cameron and Department of Natural Resources and Environment* (January 2022) and *Clive Stott and Hydro Tasmania* (February 2021) available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision).

<sup>5</sup> See *Daniels Corporation International Pty Ltd v ACCC* 213 CLR 543 at paragraph 9-majority of the High Court, re-affirming the 'dominant purpose test' as established in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* 201 CLR 49.

them further under s35, internal deliberative information, as this exemption is more appropriate.

*Document 5*

- 31 This is an email from Mr West to Edge Legal dated 3 September 2021 regarding the Recruitment Review, comprised of 52 pages including attachments. Although some of the attachments are publicly available, I am satisfied that this communication is exempt in full under s31 as it was provided to inform legal advice sought as part of the Recruitment Review.

*Document 6*

- 32 This is an email from Mr Collinson to Mr West and Councillors dated 3 September 2021 regarding the Recruitment Review, comprised of three pages. This is exempt in full under s31 for the same reasons as above.

*Document 7*

- 33 This is the Edge Legal Report dated 14 September 2021, comprised of 24 pages. Council mainly relied upon s32 given it states in its Table of Documents it was considered by Council at its Special Meeting of 15 September, 2021. Council also relied upon ss31 and 37.
- 34 I consider that it fits best within s31, as it was created for the sole purpose of providing legal advice in relation to the management of conflicts of interest during the selection process and whether the recruitment process may have breached the *Local Government Act 1993* or any other relevant policies or procedures. Although the applicant has submitted Council could have asked a Human Resources consultant to conduct the review, the appropriateness of the decision to engage a law firm to provide advice is not a matter under consideration in this external review. Council decided to seek legal advice and the Edge Legal Report is the result. I am satisfied that Document 7 is exempt in full pursuant to s31.

*Document 7a*

- 35 These are the attachments to the Edge Legal Report, comprised of 243 pages. Although Council relied upon s32 as well as s31, I am of the view s31 most suitably applies and although some documents are publicly available, the document is exempt in full for the same reasons as Document 7.

*Document 8*

- 36 This is the cover email from a Legal Assistant at Edge Legal to Mr West dated 14 September 2021 attaching the Edge Legal report and includes the email forwarding the report to Councillors, comprised of one page. This is exempt in full under s31 for the same reasons outlined above.

*Document 11*

- 37 This is a letter from Council to Ms Inches of Red Giant dated 16 September 2021, comprising two pages, which Council states in its Table of Documents

*was referred to Edge for further legal advice and was an attachment considered in Closed Council 29 September, 2021 meeting. As it was provided to Council's law firm for further advice, it is exempt in full under s31.*

*Document !2*

- 38 This is a five page letter from Red Giant to Council dated 17 September 2021, which Council states *was referred to Edge for further legal advice and was an attachment considered in Closed Council 29 September, 2021 meeting*. I am satisfied that this document is exempt in full under s31 for the same reasons as relate to Document 11.

*Document !3*

- 39 This document consists of two emails. The first is an email from Mr Collinson to Mr West regarding Edge Legal's review of Red Giant's response to the Edge Legal Report. The second is from Mr West, forwarding Mr Collinson's legal advice to Councillors and providing a more general update. Both are dated 21 September 2021. I consider that the email from Mr Collinson to Mr West is exempt in full under s31, as it is clearly legal advice.
- 40 I am not so satisfied regarding Mr West's email to the Councillors, however, as this does not appear to be for the purpose of seeking or providing legal advice. I do not consider that it is exempt under s31, but I will consider it further in relation to my analysis of exemptions under s35, internal deliberative information, below.

*Document !3a*

- 41 This is the amended Edge Legal Report, updated after consideration of the Red Giant response, dated 21 September 2021. I am satisfied that this document is exempt under s31 for the same reasons as the original report.

*Document !4*

- 42 This is a three page email exchange between Mr West and Mayor Bec Enders dated 20 September 2021. Council said in its Table of Documents that it includes the *Intention of, and reasons for, West to engage David Morris Simmons Wolfhagen (SW) to review release of information from the Edge Legal Report*.
- 43 I am not satisfied that this email is exempt under s31, as it contains internal discussions around advice to be sought rather than actual communications with lawyers for the purpose of seeking or providing legal advice. I will consider it further in relation to my analysis of exemptions under s35, internal deliberative information, below.

*Document !5*

- 44 This is an email from Mr West to David Morris at Simmons Wolfhagen dated 20 September 2021, including attachments and totals 43 pages. Council describes it as *Instructions from West to SW to review release of information from the Edge Legal Report*. I consider that Document 15 is exempt in full under s31, as it is clearly a

communication between solicitor and client for the purpose of obtaining legal advice.

#### *Document 16*

- 45 This is a letter of advice from Simmons Wolfhagen to Council dated 23 September 2021. Again, I am satisfied that this document is exempt in full under s31.

#### **Section 32**

- 46 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.*

- 47 Subsections 32(2), (3) and (4) restrict the application of this section to information which is less than 10 years old, was brought into existence for submission to the closed meeting for consideration and is not purely factual. However, 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.
- 48 Council claimed that s32 was relevant in relation to the majority of the information it sought to exempt, but also relied upon ss31 and 37. There is only one remaining document which has not been analysed under s31 above, in relation to which Council solely relied upon s32 without any alternative exemption being proposed.

#### *Document 4*

- 49 This is an email dated 3 September 2021 from Mr West to Councillors providing an update regarding the progress of the Recruitment Review. While the email directly quotes from the minutes of a closed session of Council held on 25 August 2021 and refers to items to be discussed at a closed meeting to be held on 15 September 2021, I am not satisfied that it is exempt under s32.
- 50 Council has extensively discussed its decision, made at the 25 August 2021 meeting, to commission an external review of the recruitment process, most notably in Mayor Enders' statement to a public Council meeting on 29 September 2021 and in her media release providing the Key Findings on 30

September 2021. The agenda for the 15 September 2021 meeting is publicly available and outlines what will occur at that meeting. As it has officially disclosed these decisions and agenda items, I am not satisfied that s32 is applicable, because the content of the email does not reveal more about closed sessions of Council than Council has already made public.

- 51 I consider that s35 is more pertinent, as the email does relate to internal deliberative information, and I will consider this document further below.

### **Section 35**

- 52 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,<sup>6</sup> or
  - a record of consultations or deliberations between officers of public authorities.<sup>7</sup>
- 53 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.
- 54 The outlined exemption above does not apply to the following:
- purely factual information<sup>8</sup>;
  - a final decision, order or ruling given in the exercise of an adjudicative function<sup>9</sup>; or
  - information that is older than 10 years.<sup>10</sup>
- 55 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)*<sup>11</sup> 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.
- 56 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'.<sup>12</sup>
- 57 Section 35 is subject to the public interest test in s33 of the Act.

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<sup>6</sup> Section 35(1)(a).

<sup>7</sup> Section 35(1)(b).

<sup>8</sup> Section 35(2).

<sup>9</sup> Section 35(3).

<sup>10</sup> Section 35(4).

<sup>11</sup> *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at 14.

<sup>12</sup> *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.

- 58 Council did not seek to exempt any information pursuant to s35, but I consider that it is a more appropriate provision in relation to the potential exemption of the four documents considered below.

*Document 3*

- 59 This is an email exchange between Paul West and Council Mayor Bec Enders dated 3 September 2021, comprising two pages. Council describes this in its Table of Documents as *Consultation on engagement of Edge to undertake the review* and the emails are in relation to authorisation for the Edge Legal Costs Agreement.
- 60 I am not satisfied that these emails are exempt under s35, as they are brief, primarily factual discussions around the cost of obtaining legal advice and do not appear to be deliberative. These emails should be released in full to Mr Swan.

*Document 4*

- 61 This an email dated 3 September 2021 from Mr West to Councillors providing an update regarding the progress of the Recruitment Review. It is comprised of primarily factual information and does not appear to be deliberative.
- 62 Accordingly, I am not satisfied that this document is *prima facie* exempt under s35 and it should be released in full to Mr Swan.

*Document 13*

- 63 The second email in this document, from Mr West to Councillors dated 21 September 2021, contains an update regarding the status of legal advice requests and the review of the recruitment process.
- 64 While this email is also reasonably factual, as it is an update, I am satisfied that it contains sufficient detail of consultations and deliberations between Council officers regarding the finalisation of Council's legal position in relation to the recruitment process and information able to be disclosed following the Edge Legal review to be *prima facie* exempt under s35(1)(b).

*Document 14*

- 65 This is a three page email exchange between Mr West and Mayor Bec Enders dated 20 September 2021. Council said in its Table of Documents that it includes the *Intention of, and reasons for, West to engage David Morris Simmons Wolfhagen (SW) to review release of information from the Edge Legal Report*.
- 66 As with Document 13, I am satisfied that it contains sufficient detail of consultations and deliberations between Council officers regarding the finalisation of Council's legal position in relation to the recruitment process and information able to be disclosed following the Edge Legal review to be *prima facie* exempt under s35(1)(b).

### Section 33 – Public interest test

- 67 I now turn to the assessment of whether the disclosure of the documents I have identified above as being *prima facie* exempt under s35 should in fact be released, following the application of the public interest test. I note the public interest test requires consideration of whether it is *contrary to the public interest* to disclose the information by considering, at least, all of the matters in Schedule 1 of the Act.
- 68 The primary factors I find to be relevant and in favour of disclosure 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; and
  - (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation.
- 69 There is a high degree of community interest in this matter and deficiencies in the management of the conflict of interest during the general manager recruitment process have been acknowledged by Council and identified by the Auditor-General. The release of further information would contribute to debate on a matter of public interest and lead to enhanced scrutiny of Council's processes, though I note that the content of these three particular documents would not provide significant new information which is not already in the public domain.
- 70 The key factor weighing against disclosure is (j) – whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law. Mr Swan's request only relates to legal advice and associated communications within Council. Accordingly, I have found the majority of documents responsive to his request to be exempt under s31. The two documents remaining under consideration regarding s35 are not exempt under s31, but are closely linked as they comprise internal discussions in relation to obtaining legal advice or forwarding correspondence which includes legal advice. Legal professional privilege is a crucial legal principle which guarantees legal advice can be confidentially sought and received, and the disclosure of internal deliberative material closely connected to such advice has the potential to undermine this principle and weighs significantly against disclosure.
- 71 Overall, s35 recognises that there are circumstances in which it is appropriate not to disclose information which shows the internal 'thinking processes' of a public authority, as this can inhibit preliminary discussions or the exploration of alternative options prior to a final decision being made. This is relevant here, as the controversial nature of Council's General Manager recruitment process and intense community interest would be likely to hinder internal deliberative processes if all such information was released in full.

72 Having balanced the factors for and against disclosure, I determine that the information I found to be *prima facie* exempt under s35 in Documents 13 and 14 is exempt under s35 and it would be contrary to the public interest to disclose it.

### **Preliminary Conclusion**

73 For the reasons given above, I determine that:

- Exemptions claimed pursuant to s31 are varied;
- Exemptions claimed pursuant to s32 are varied; and
- Information is exempt pursuant to s35.

### **Conclusion**

74 As the above preliminary decision was adverse to Council, it was made available to Council on 9 June 2022 under s48(1)(a) to seek its input before finalising the decision.

75 Council advised on 27 June 2022 that it would not be making any submissions in response to the preliminary decision.

76 Accordingly, for the reasons given above, I determine that:

- Exemptions claimed pursuant to s31 are varied;
- Exemptions claimed pursuant to s32 are varied; and
- Information is exempt pursuant to s35.

**Dated:** 27 June 2022

**Richard Connock  
OMBUDSMAN**

## **ATTACHMENT I – Relevant legislative provisions**

### **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.

#### **32. Information related to closed meetings of council**

(1) Information is exempt information if it is contained in –

- (a) the official record of a closed meeting of a council; or
- (b) information proposed by an officer of a council or a councillor for the purpose of being submitted to a closed meeting of a council for consideration if the officer or councillor has contributed to the origin, subject or contents of that record; or
- (c) information that is a copy of, or a copy of part of, information referred to in paragraph (a) or (b); or
- (d) information, the disclosure of which would involve the disclosure of a deliberation or decision of a council made at a closed meeting of the council, other than information by which a decision of the council was officially published.

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

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

- (a) was submitted to the closed meeting of a council for consideration; or
- (b) is proposed by an officer or councillor to be submitted to the closed meeting of a council for consideration –  
if the information was not brought into existence for submission to the closed meeting for consideration, unless its disclosure would disclose a deliberation or decision of the closed meeting which has not been officially published.

(4) Subsection (1) does not include purely factual information unless its disclosure would disclose a deliberation or decision of the closed meeting of a council which has not been officially published.

(5) In this section –

***closed meeting of a council*** means a meeting of a council which is formally closed to the public for a purpose specified in regulations made under the *Local Government Act 1993* and includes a closed meeting of a council committee

#### **Section 35. Internal Deliberative Information**

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

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

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

### **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)

- (4) 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:** O1809-151

R2202-031

**Names of Parties:** Graham Murray and City of Hobart

**Reasons for decision:** s48(3)

**Provisions considered:** s10, s19, s31, s35, s36, s39

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### Background

- 1 The Mount Wellington Cableway Company Proprietary Limited (MWCC) is seeking approval to construct and operate a cable car on kunanyi/Mount Wellington in Hobart. The project has been contentious, with mixed views in the community regarding its merits. The City of Hobart (Council) is responsible for the assessment and approval of the proposed development.
- 2 Mr Graham Murray is a supporter of the proposed cable car development and holds concerns that those who would see the project stopped may have influence at Council.
- 3 On 22 August 2018, Mr Murray submitted a request for assessed disclosure and paid the required fee under the *Right to Information Act 2009* (the Act) to Council. His request consisted of 19 items across a range of different issues relating to the cable car project.
- 4 On 27 August 2018, Council wrote to Mr Murray explaining that the request sought ‘an enormous quantity of information’ and ‘would substantially and unreasonably divert resources away from the City [of Hobart]’. It sought to negotiate and refine the scope of his application under s19(2) the Act to prevent a refusal under s19(1) based on the volume of information.
- 5 On 28 August 2018, Mr Murray replied to Council and claimed Council had failed to consider the mandatory considerations in Schedule 3 before refusing his application under s19<sup>1</sup>. Despite this, he revised his application to slightly alter his requests and to now list his requested items in order of priority of receipt. He now sought:
  - 1) A list of all documents held in the Council’s Record Management System that reference “cable car”, “cablecar” or “cableway” (not case sensitive) in title or content from 1 January 2012 to current inclusive of dates and author.

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<sup>1</sup> This appears to be a misunderstanding by Mr Murray, as his application had not been refused under s19.

- 2) A list of all information technology hardware issued to employee K by the Council and IP addresses.
- 3) A list, and copies, of any information found on Employee K's Council issued technology hardware that relates to the Cable Car, the Cableway, or any anti cable car bodies [sic].
- 4) The full internet browser(s) history relating to Employee K's Council issued technology hardware. If internet browsing records are kept on Corporate IT hardware, a browser history list of hits to cable car or anti cable car web sites [sic], Facebook or twitter for the past 12 months.
- 5) A list of documents (on a records management system, on shared folders, on email - on any Council IT infrastructure) that reference "cable car", "cablecar" or "cableway" and have been prepared, amended, viewed or if not on logged [sic], accessible by Employee K, and a description of the method employed to complete this activity.
- 6) All information regarding all advice in forming the opinion of Council staff about the proposed cable car road that resulted in the Parks Committee recommendation on 9 August 2018.
- 7) All information that relates to policy, procedural or legal advice, opinion and/or discussion regarding the Alderman Briscoe Cable Car access motion(s) that occurred from 1 August 2018 up until the period before the Council meeting on 20 August 2018 – including any requests to or from the Chair or members about the motion(s) leading up to the tabling of the motion.
- 8) All information pertaining to my complaint regarding Employee K's attendance and involvement at the Council Committee meeting on 9 August 2018.
- 9) All Information pertaining to the open Code of Conduct submission against Ald Briscoe and Ald Reynolds.
- 10) All information pertaining to the petitions lodged on 20 August 2018 seeking removal of Ald Briscoe and Ald Reynolds from any decision making regarding the cable car proposal.
- 11) A copy of any Request for Information requests relating to the Cable Car or Company submitted to Council in the past four years, and the associated materials that were released.
- 12) Any conflict of interest declarations from any Alderman or any Council employees with respect to the Mt Wellington Cable Car project or company.
- 13) The investigation report regarding the 2014 leak of confidential cable car information.
- 14) All emails received or sent pertaining to the cable car (cableway), cable car project, proposed McRobies Gully Road or Alderman Briscoe Cable Car access motion(s) (Agenda 20 August 2018) received by or sent from Aldermen's official

*Council email accounts for the period 1 – 21 August 2018 for the following Alderman; Briscoe, Reynolds, Burnett and Harvey.*

- 15) Every document held by Council within its record management system or on Council Infrastructure, including but not limited to emails, file notes, correspondence, advice, internal working documents CONTAINING the words “Cable Car”, “Cablecar” or “Cableway” REGISTERED on or after 1 January 2012 (not case sensitive).
  - 16) Any supporting information in connection or in reference to the 2014 leak of confidential cable car information.
  - 17) Any information in connection to or in reference to the 2018 Respect the Mountain “Dear kunanyi” exhibition and/or grant.
  - 18) Any conflict of interest declarations from any Alderman or any Council employees with respect to The Springs development.
  - 19) The details of any finance system project/cost centre set up to manage costs associated with Cable Car work, including a list of transactions that have been tracked since 1 July 2016, or any other financial record information that itemises expenses associated with Council work relating to the Cable Car or Cableway Company.
  - 20) The Aldermanic register of interests held by the General Manager under the Local Government Act.
- 6 On 27 September 2018, Mr Nick Heath, Principal Officer of the Council, released a decision to Mr Murray. This decision related to all items in Mr Murray's request, except items 4 and 14 as consultation under s36(2) was occurring in relation to those items, as they included the personal information of persons other than Mr Murray. Council located a large volume of information responsive to Mr Murray's request and released the majority in full to him.
- 7 Council claimed 324 pages were exempt pursuant to the following provisions of the Act:
- Section 10 – the information in an electronic form and not able to be reproduced;
  - Section 31 – legal professional privilege;
  - Section 35 – internal deliberative information;
  - Section 36 - personal information; and
  - Section 39 – information obtained in confidence.
- 8 Where relevant, the decision held that it was contrary to the public interest to release the information.

- 9 On 24 October 2018, Ms Heather Salisbury, acting Principal Officer of the Council, released a second decision to Mr Murray in relation to items 4 and 14.
- 10 In relation to Item 4, the decision noted that consultation had occurred under s36(2) and that relevant information could not be released until it was established a request for review would not be made by the third party or such a request was finalised.
- 11 In relation to Item 14, Council determined that, after consultation under s36(2) and further consideration, that the volume of documents responsive to this part of the request was excessively large and to assess it would be a substantial and unreasonable diversion of its resources from its other work. Accordingly, this part of the request was refused under s19.
- 12 On 9 November 2018, Mr Heath released Council's final decision in relation to Item 4. Council had concluded its consultation process and determined it would release Employee K's full internet browser history regarding hits to Facebook and Twitter during the period 1 September 2017 until 20 September 2018. It refused the remainder of this part of Mr Murray's request, as it said that there is no recognised list of 'cable car or anti cable car websites' and this information was consequently not able to be provided.
- 13 As all of Council's decisions were made by its Principal Officer, no avenue of internal review was available under the Act.
- 14 Mr Murray requested external review of Council's decision on 27 September 2018, the same day the first decision was issued, and subsequently confirmed that he wished to seek external review regarding any information not provided following the findings in the 28 October and 9 November 2018 decisions of Council.
- 15 Mr Murray's application for external review was accepted under s45(1)(a) on the basis that Mr Murray was in receipt of decisions made by a Principal Officer and it was submitted to this office within 20 working days.
- 16 On 2 February 2022, following a request from my Senior Investigation and Review Officer on 16 November 2021, Council provided a schedule of the information not released to Mr Murray which indicated which exemption under the Act it had applied to each document.

### **Issues for Determination**

- 17 I must determine whether information has been validly refused under ss10 and 19.
- 18 I must also determine whether the information is eligible for exemption under any of ss31, 35, 36 or 39.
- 19 As ss31, 35, 36 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.

### **Relevant legislation**

- 20 Council has relied on ss10, 19, 31, 35, 36 and 39 in its decision. I attach a copy of these sections to this decision at Attachment 1.
- 21 Copies of s33 and Schedules 1 and 3 of the Act are also attached.

### **Submissions**

- 22 Mr Murray made the following submission with his request for external review:

*I applaud the City of Hobart Council officers for providing me with a substantial set of documents relating to my application.*

*As a supporter of the concept of a Cable Car, I have become increasingly angry at my perception of the lack of integrity displayed by the Hobart Council around this proposal. Also of considerable concern is the fact that the spokesperson for an anti-cable car group is a Council employee. This in itself should not be an issue if managed correctly. However, when that group is actively engaging in attached on certain Alderman [sic], and is active [sic] engaging in election activities (during work hours), it must be ensured that this activity is beyond reproach.*

*Regarding the materials requested but denied. I consider them all strongly in the public interest. For example,*

- *A public leak of confidential information in 2014 (the abc [sic] article has a quote from the anti-cable group spokesman/CoH [City of Hobart] employee) does not contain any investigation material and the substance has been denied.*
- *The claim of too much work against searching 40 PCs for content either shows a lack of understanding of the question or an unnecessary complication of the issue.*
- *An inability to link Records Management content to a user is disturbing. This appears to indicate that there is no way to audit a user's access to a document. How do you track down "browsing" in this case? I envisage that the issue was with the question posted to IT rather than what they can achieve. Even if true, simply run two lists and compare based on a joining criteria. A skilled SQL/Excel person could knock this over in minutes.*
- *There has been information published by an anti-cable car campaigner that there was a coordinated effort, led by the Committee Chair, Anna Reynolds (<https://www.mtwellingtoncablecar.org/the-trojan-horse>) to hijack the 9 August Committee process, and use it as a way of creating a Trojan horse – ie [sic] Council officers had recommended that the*

*MWCC [Mount Wellington Cableway Company] go through a process and that this was used to “entrap” (my word) the MWCC into a substitute motion that forbade it from having access to any land forever. It is claimed that Council employees were involved in this secondary process. I am attempting to get to the truth of what actually occurred and the legal documents are required to do this.*

*I am seeking a full review of any documents denied during this process, plus a review of the legitimacy of documents where it is claimed that they cannot be retrieved, or that it is too costly to retrieve. I would also like opinion as to the method of handling the request to an employee to review his activities using work equipment during work time.*

- 23 Council did not make additional submissions beyond the reasoning contained in its decisions. This will be discussed in the relevant parts of the following analysis.

## **Analysis**

- 24 The majority of the information sought by Mr Murray was provided to him and I commend the Council for facilitating the provision of such a significant amount of information.
- 25 Due to this, Items 2, 8-12 and 17-20 of Mr Murray’s request are not required to be further analysed as the relevant information was released in full. The remaining Items were either refused or claimed to be fully or partially exempt. I will discuss them in turn as follows.

## **Section 10 – Electronic Information**

- 26 Council relied on s10 to refuse to provide information relating to Items 3 and 5 of Mr Murray’s request.
- 27 Information can be refused under s10 if it cannot be produced using normal hardware and software and doing so would require a substantial and unreasonable diversion of resources from Council’s usual operations. Council must also have regard to the matters set out in Schedule 3.
- 28 A refusal pursuant to s10 is not a matter that I am able to review under the Act for the reasons that follow.
- 29 Mr Murray’s request for external review was accepted under s45(1)(a) on the basis that the original decision maker was the principal officer.
- 30 Section 45(1)(a) provides that an external review can be sought if an internal review pursuant to s43 could otherwise have been sought had the decision maker not been the principal officer.
- 31 Section 43 relevantly provides that an internal review can only occur where the public authority has made a decision to which s22 applies. Section 22 provides that reasons are to be given in the following circumstances:

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

- (a) that the applicant is not entitled to the information because it is exempt information; or*
- (b) that provision of the information be deferred in accordance with section 17; or*
- (c) that provision of the information be refused by virtue of section 19 or 20 –*

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

- 32 A decision is therefore only reviewable under the Act, both internally or externally, if it is one of the three types of decision referred to in s22, and this does not include a refusal under s10.
- 33 While I do not have the power to formally review Council's decisions under s10, I note that it does appear to have considered the required matters in Schedule 3 and reached reasonable conclusions regarding the diversion of Council resources to respond to these parts of Mr Murray's request.

### **Section 19 – Unreasonable diversion of resources**

- 34 In its first supplementary decision of 24 October 2018, Council applied s19 to refuse the information responsive to Item 14.
- 35 For a request for information to be refused under s19, the public authority in possession of the information must be satisfied that the work involved in providing the information would be a substantial and unreasonable diversion of its resources from its other work. It must also have regard to the matters in Schedule 3.
- 36 Section 19(2) requires that, before making such a determination, the applicant is to be given a reasonable opportunity to revise the scope of their request with the aim to remove the public authority's ability to rely on this ground of refusal.
- 37 I am satisfied that Council did give Mr Murray a reasonable opportunity to refine the scope of his application when it wrote to him on 27 August 2018 and he declined to do so in any substantive way.
- 38 Council was satisfied that the work required to process the 6,375 emails it had found to be responsive to Item 14 would be a substantial and unreasonable diversion of its resources.
- 39 In its decision, Council demonstrated a reasonable consideration of the matters in Schedule 3. Most notably in relation to the substantial and unreasonable impact on its resources, Council claimed it would take 743 hours to process the 6,375 emails responsive to the request or more than 21 weeks of an officer working on the matter full time.

- 40 Council reached this estimate by applying a time period of seven minutes per email to assess each document against the Act, adopting the method used by the Australian Information Commissioner and used in previous decisions I have made.<sup>2</sup> However, this assessment usually uses a time allocation of seven minutes per page rather than per email and I note that Council's use here may lead to some level of inaccuracy, as emails are often less than one page in length. I do agree, though, that even if the figure were slightly lower, the total time would still be significant and a major diversion from Council's other work.
- 41 In my view, this is a case where it would be reasonable to apply s19 and I determine that Council's decision to refuse to provide the 6,375 emails responsive to Item 14 is appropriate.

### **Section 31 – Legal Professional Privilege**

- 42 Council originally said that it relied upon s31 to exempt information relating to Items 5-7, 13, 15, and 16 of Mr Murray's request. It later clarified in its schedule that its decision of 26 September 2018 referenced s31 in relation to Items 5 and 7 in error, as no information was collated for either of these parts of Mr Murray's request.
- 43 Information can be exempt under s31 if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
- 44 Legal professional privilege, also known as client legal privilege, is a common law principle. It protects the confidentiality of communications made between a lawyer and their client if brought into existence for the purpose of giving or obtaining legal advice.
- 45 Australia uses the dominant purpose test to determine whether or not legal professional privilege applies. This means that information can be privileged if it consists of legal advice or advice in relation to litigation or possible litigation. It does not attach to documents as such, but to communications that are for the giving or seeking of legal advice.<sup>3</sup>
- 46 It should be noted that this may also extend to in-house lawyers giving advice to the organisation by whom they are employed.<sup>4</sup>
- 47 Section 31 is not subject to the public interest test.

#### *Item 6.8*

- 48 This consists of two emails and an attachment, which are claimed by Council to be exempt under s31.

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<sup>2</sup> See *Carlo di Falco and Tasmania Police* (August 2020) and *Damien Matcham and Brighton Council* (January 2018), available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision)

<sup>3</sup> *Esso Australia Resources v Commissioner for Taxation* (1999) 201 CLR 49; [1999] HCA 67 at [35]; *Re Waterford v The Commonwealth* (1987) 163 CLR 54 at [64]-[65].

<sup>4</sup> *Archer Capital 4A v Sage Group (No 2)* [2013] FCA 1098.

- 49 The first document is an email chain consisting of two emails. The following two pages contain an attachment to the emails in the first document.
- 50 The first email is from one Council employee to another providing a copy of the attachment, the second email then provides the attachment to a lawyer engaged by Council.
- 51 I am satisfied that these documents are part of a flow of information between Council and its lawyers as part of obtaining ongoing legal advice in relation to the cable car development.
- 52 I determine Item 6.8 is exempt under s31.

*Items 13 and 16*

- 53 Council dealt with Items 13 and 16 jointly, as it exempted the same information in relation to both requests as they both related to the '2014 leak of confidential cable car information'.

*Item 13.5/16.5*

- 54 Item 13.5/16.5 is an email chain between several Council staff that is ultimately forwarded to Council's law firm.
- 55 In this instance, the information appears to have been forwarded for the information of the law firm only and there is no indication that it relates to the provision of legal advice. The email body is blank and merely forwards a memorandum and two audio files recorded from an interview with the then Lord Mayor and Leon Compton from ABC Radio, with the email title indicating it was originally 'for Aldermen'.
- 56 I determine s31 does not apply to this information and it should be released to Mr Murray.

*Items 13.7/16.7 and 13.8/16.8*

- 57 These pages consist of two email chains between Council and its lawyers. In both, Council has explicitly provided information and sought advice from its lawyers. The responses clearly provide legal advice in response to these requests.
- 58 I am satisfied that s31 applies and I will not analyse the information further as to do so may reveal exempt information.
- 59 I determine Items 13.7/16.7 and 13.8/16.8 are exempt in full under s31.

*Item 15*

- 60 Item 15 of Mr Murray's request relates to every document containing the words 'cable car' 'cablecar' or 'cableway' on Council's systems and is consequently the largest tranche of information not released to Mr Murray. Council has split the documents responsive to Item 15 into parts and claimed 16 of these to be exempt from disclosure under s31.

*Item 15.1*

- 61 This is a group of documents which do not appear to be connected, other than in their relationship to the cable car project.
- 62 The first document is an email between Council officers regarding rockfall risks associated with the proposed development dated 27 April 2018. It attaches a 27 page Department of State Growth report entitled *Mt Wellington Rockfall 2014*.
- 63 It is unclear why this would be exempt under s31, as it does not appear to have any connection to the provision of legal advice. The email does not reference any legal advice, nor is it sent to or from a legal practitioner. The 27 page report is publicly available online, so would not be exempt under any part of the Act, and the Department has not provided any rationale to apply an alternative exemption to the remainder. This document is not exempt and is to be provided to Mr Murray.
- 64 The second document is correspondence dated 30 August 2018 from Council to an external legal practitioner providing documents as part of ongoing legal advice being provided in relation to the project. It is exempt under s31.
- 65 The third document is an email between a Council officer and a staff member at the Wellington Park Management Trust<sup>5</sup> (the Trust) dated 23 March 2018 setting out the outcomes of a meeting regarding the proposed development held that day. There is no obvious connection to any legal advice and I am not satisfied that the Council has discharged its onus under s47(4) of the Act to show why this document should be exempt. It should be released to Mr Murray.
- 66 The fourth document is a Council Memorandum dated 21 August 2018 regarding the Open Space Planning Team at Council and actions agreed upon to avoid a potential conflict of interest. Again, there is no indication as to why s31 (or any other section of the Act) has been relied upon to exempt this information and I am consequently not satisfied that it should be exempt from disclosure. It is to be released to Mr Murray.
- 67 The fifth document is undated and its author is not identified. It is a table which appears to contain legal advice regarding the terms of a draft legislative bill relating to land acquisition for the proposed development. Despite its unclear origins, Council has sought to exempt it under s31 and the contents clearly appear to be legal advice provided to Council. I am satisfied that this document is exempt under s31 and is not required to be provided to Mr Murray.
- 68 The sixth set of documents is five pages of title search documents obtained from the Land Information System Tasmania (the LIST), operated by Land

<sup>5</sup> This is a body established under the *Wellington Park Act 1993* which includes members from the Hobart and Glenorchy City Councils, Parks and Wildlife Service, Department of Natural Resources and Environment Tasmania and Tourism Tasmania. It seeks to represent their collective interests in managing the Wellington Park reserve.

Tasmania at the Department of Natural Resources and Environment Tasmania. It is unclear why Council sought to exempt these documents, as they are freely available on payment of a fee to any member of the public.

- 69 Accordingly, I determine that this information is not exempt under s31, but that Council can validly refuse to provide it to Mr Murray under s9 as it is otherwise available.

*Item 15.2*

- 70 Two separate documents are included under this part.
- 71 One is an email chain, with the first email dated 1 April 2014 being sent by an Executive Director at MWCC to Mr Heath at Council regarding consent for non-exclusive use of Council land for the project. The second email is an internal request for the first to be filed.
- 72 The other is a formal document dated 1 April 2014 co-signed by an Executive Director of MWCC and the Chairman of Bullwheel International Cable Car Corporation, a former financial backer of the project, requesting landowner consent to enable them to prepare and submit a development application for the project.
- 73 Again, it is unclear why Council has sought to exempt these documents under s31 as they do not appear to contain any privileged information. With the exception of the internal email regarding filing (which I am not satisfied is exempt under any part of the Act and is to be released to Mr Murray), these documents are analogous to other information sought to be exempted under s39 and will be assessed further in my analysis of that section below.

*Items 15.3-15.7, 15.27, 15.32, 15.35-15.36, 15.38, 15.40-15.42 and 15.49*

- 74 Council has claimed that the documents responsive to the above Items are exempt under s31. I have reviewed all of these documents and am satisfied that they are requests by Council for legal advice and responses from its lawyers providing such advice. This information is exempt under s31 and is not required to be provided to Mr Murray.

**Section 35 – Internal deliberative information**

- 75 For information to be exempt under s35(1) it must consist of
- (a) An opinion, advice, or recommendation, or
  - (b) A record of consultations between officers of public authorities, or
  - (c) A record of consultations or deliberations between offices 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.*
- 76 This does not apply to information older than 10 years or purely factual information.

- 77 Council did not provide any specific reasoning for its application of this section to parts of the information, beyond listing the essential requirements set out above and asserting that these were met.
- 78 Council stated in its decision of 26 September 2018 that it relied on s35 to exempt information contained in Items 6 and 15. However, the schedule of information not released provided on 2 February 2022 does not indicate that any document in Item 6 was exempted under s35. I will consequently only review the application of s35 in relation to Item 15.

*Item 15.21*

- 79 The first information sought to be exempted under s35 is at Item 15.21. It is a file note of a meeting held between the relevant Minister, five councillors and senior Council employees in May 2017 regarding the State Government's proposal to introduce legislation to facilitate the development of the cable car on kunanyi/Mt Wellington. There is also a site plan map attached to the file note.
- 80 I am satisfied that this document and its attachment are *prima facie* exempt under s35(1)(c), as a record of consultations between officers of Council and a Minister as part of a deliberative process. While it contains some factual information, this is interwoven with the other information and cannot be said to be purely factual information.

*Item 15.22*

- 81 This is an email chain from April 2018, commencing with an email from an external party opposed to the cable car development and followed by emails between Council officers regarding the drafting of a response. The final email contains a lengthy proposed response in draft form.
- 82 I am not satisfied that the first email in the chain is exempt under s35, as it is from an external party and clearly does not contain internal deliberative material.
- 83 The remainder of the correspondence is legitimately exempt as internal deliberative information, however, as it contains consultations between officers regarding the finalisation of draft correspondence and is clearly part of the 'thinking process' of the Council. It is *prima facie* exempt under s35(1)(b), subject to consideration of the public interest test.

*Item 15.23*

- 84 This is an email chain between two Council officers (copying in five more) in April-May 2018 and relates to obtaining further detail, as qualified legal advice had been received with further information being needed. The emails contain opinion, advice and recommendations regarding environmental assessments and I am satisfied that they relate to an internal deliberative process of Council.
- 85 These emails are *prima facie* exempt under s35(1)(a), subject to consideration of the public interest test.

*Item 15.26*

- 86 This is the email chain at Item 15.23 but includes two further emails between the relevant officers. For the same reasons, these emails are *prima facie* exempt under s35(1)(a).

*Item 15.28*

- 87 This is an email chain in June-July 2018, commencing with an email from a representative of an external body opposed to the cable car development in which a question about the project is asked. That question is then answered by a Council employee and there follows two internal emails regarding the filing of that email.
- 88 The first two emails are clearly not internally deliberative, as they are an exchange between an internal and external party. The second two emails are internal but relate only to filing and I am not satisfied that they are in the course of a deliberative process. Accordingly, I do not consider that any of the information responsive to Item 15.28 is exempt under s35 and should be released to Mr Murray, subject to any other exemption I may find applicable.

*Item 15.29*

- 89 This is an email exchange in March 2018 between a Council employee and an employee at the Trust, which is also a public authority under the Act. It involves consultations and deliberations regarding potential protest scenarios connected to the cable car development under consideration by Council and I am satisfied that the emails are *prima facie* exempt under s35(1)(b).

*Item 15.30*

- 90 This is the same email as appears first in the email chain at Item 15.23, then a further email from a different Council officer providing advice about risks. For the same reasons as for Item 15.23, I am satisfied that these emails are *prima facie* exempt under s35(1)(a).

*Item 15.31*

- 91 These are the same two emails as first appear in the email chain at Item 15.23. They are also *prima facie* exempt under s35(1)(a).

*Item 15.33*

- 92 This is an email chain from May 2018 between Council employees regarding meetings between Council, the Department of State Growth and the Trust. I am satisfied that it is a record of consultations between officers of public authorities regarding a deliberative process and the information is *prima facie* exempt under s35(1)(c).

*Item 15.34*

- 93 This is an email chain between Council employees in February 2018 regarding outcomes of a meeting between Council, the Department of State Growth and

the Trust and recommendations for a suggested Council position. I am satisfied that the emails contain records of deliberations between officers of a public authority and are *prima facie* exempt under s35(1)(b).

*Item 15.37*

- 94 This is an email in June 2018 from a representative of an external group opposed to the cable car development to Council, which is then forwarded for internal Council consideration as to whether legal advice should be sought. It contains an attachment, which is a letter sent from the group to MWCC raising concerns about site impacts which might be caused by the development.
- 95 I am not satisfied that the external email and attached letter are exempt under s35, as they clearly do not contain internal deliberative information. They are to be released to Mr Murray, subject to any other applicable exemption I may find.
- 96 The internal email regarding legal advice is *prima facie* exempt under s35(1)(b), as it contains consultations regarding an internal deliberative process.

*Item 15.39*

- 97 This is an email chain commencing with an emailed letter from an external group opposed to the cable car development, it is then forwarded to Council employees to formulate a response and the remaining emails suggest details to be included in that response.
- 98 While the first email is clearly not exempt under s35 as it was sent by an external party, the remainder are *prima facie* exempt under s35(1)(b) as consultations between public officers regarding an internal deliberative process. The first email should be released to Mr Murray, subject to any other exemption I may find applicable.

*Items 15.43-45*

- 99 These items consist of memoranda from 2018 from a Council employee to the councillors regarding various concerns connected to the cable car proposal. They all consist of advice from a public officer of a public authority in relation to a deliberative process and I am satisfied that they are *prima facie* exempt under s35(1)(a), subject to consideration of the public interest test.

*Items 15.46-47*

- 100 These documents consist of a further memorandum and handwritten notes, which either restate legal advice received or discuss further legal advice to be obtained. While Council has sought to exempt the documents under s35, I consider that they are exempt under s31, as they are subject to legal professional privilege and are not required to be disclosed to Mr Murray.

*Item 15.48*

- 101 This is a duplicate of Item 15.34 and I reiterate my assessment above.

*Item 13.9/16.9*

102 This is a memorandum in two parts dated 7 July 2014 from the General Manager of Council to the elected councillors. It was not claimed to be exempt by Council under s35 but under s39 – information obtained in confidence. While marked confidential, it is not communicated in confidence to the Council as it was generated by it. Because this is an internal document, it is not susceptible to exemption under s39, but because it contains detailed information regarding deliberations undertaken during the Council's investigation regarding the alleged leaking of documents, I am satisfied that it is *prima facie* exempt under s35(1)(b).

*Items 15.9-15.16 and 15.18*

103 These are meeting notes of the Mount Wellington Cable Car Facilitation Act Senior Issues Group from 1, 9 and 29 May 2018, 12 and 19 June 2018, 17 and 31 July 2018 and 14 August 2018. Again, this information was not claimed to be exempt under s35 but under s39. As all members of this group are Council staff, however, it is unclear why this information was claimed to be exempt under s39 by Council; again, it was information not communicated in confidence to Council, it was generated by it.

104 Despite this, I am satisfied that the information is *prima facie* exempt under s35(1)(b), as it does appear to be a record of consultations and deliberations between officers of a public authority in relation to the deliberative process of assessing issues regarding the proposed development.

*Public interest test*

105 As s35 is found in Division 2 of Part 3 of the Act, the public interest test outlined in s33 must be considered before making a determination on any of the information I have found to be *prima facie* exempt above.

106 When considering the where the public interest lies regard must be had, at least, to the matters recited in Schedule 1 of the Act.

107 Council considered that matters (a), (c) and (d) in Schedule 1 favoured disclosure and that (b), (h), (m) and (n) weighed against it. It provided no indication of the particular weighting of each factor and made a global public interest assessment covering exemptions claimed under all of ss35, 36 and 39, stating that it was contrary to the public interest to disclose all of the information it sought to exempt.

108 I agree that (a), the general public need for information to be accessible, weighs in favour of disclosure but disagree in relation to (b), whether the disclosure would contribute to or hinder debate on a matter of public interest. Council asserts that any disclosure would hinder debate but I am not persuaded of this. There is a high degree of community interest in this project and I cannot see that the release of additional information into the public domain would hinder such debate, rather than encourage further discussion. I consider (b) weighs in favour of disclosure.

- 109 I agree with Council that (c) and (d) also weigh in favour of release, as the disclosure of further information would provide additional reasoning and contextual information to allow the public to better understand Council's decision-making and internal deliberations on this topic.
- 110 I am unsure of the rationale for Council saying that factors (m) and (n) weighed against disclosure, as they do not appear to be particularly relevant to the public interest assessment in the context of s35. In the absence of further explanation by Council as to why they are applicable, I will not give any weight to these matters.
- 111 Overall, s35 recognises that there are circumstances in which it is appropriate not to disclose information which shows the internal 'thinking processes' of a public authority, as this can inhibit preliminary discussions or the exploration of alternative options prior to a final decision being made. This is particularly relevant here, as the polarising nature of the proposed development and intense community interest would be likely to hinder internal deliberative processes if all such information was released in full.
- 112 It is a difficult but important balance to strike, and I consider that Council has largely applied s35 in a reasonable and appropriate manner. Accordingly, I am satisfied that Items 13.9/16.9, 15.9-15.16, 15.18, 15.21-15.23, 15.26, 15.30-15.34, 15.37, 15.39 and 15.45 are exempt under s35 and should not be released to Mr Murray.
- 113 However, I do not consider that Council has discharged its onus under s47(4) to show that it would be contrary to the public interest to disclose Items 15.29, 15.43 and 15.44 and this information should be released in full to Mr Murray.

### **Section 36 – Personal information**

- 114 On 17 August 2020, my office contacted Mr Murray to confirm whether he sought the personal information of other persons which might be included in the information responsive to his request and which the Council had sought to exempt under s36.
- 115 In Mr Murray's reply of 19 August 2020, he advised that he only sought the personal information related to:
- Council staff (past or current);
  - Council elected representatives (past or current); and
  - persons writing under the hand of either Respect the Mountain or Residents Opposed to the Cable Car (ROCC).
- 116 Mr Murray specifically did not seek the personal information of any private citizen, business, or government entity not explicitly included above.

I117 Council has claimed two documents responsive to Item 15 of Mr Murray's request are exempt under s36. These are both pieces of correspondence from private citizens expressing personal opinions about the cable car project.

I118 As Mr Murray has specifically indicated that he does not seek such information, it is not required to be further analysed or released to Mr Murray.

I119 Accordingly, I determine that Items 15.19 and 15.20 are exempt under s36.

### **Section 39 – Information obtained in confidence**

I120 For information to be exempt under s39, it must be information that was communicated in confidence to a public authority or Minister.

I121 The confidential communication of information can be actual or implied<sup>6</sup> and this will be determined based on the facts of the particular case.<sup>7</sup> Factors to consider when determining the question include:

- what the intentions of the person providing the information were;
- to what extent the information has been otherwise circulated; and
- the likely consequences of disclosure.<sup>8</sup>

I122 If it is determined that the information was communicated in confidence, it can only be exempt if it also would have been exempt if generated by a public authority or Minister, or if the disclosure would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future. The Council has only relied on the latter, claiming that the disclosure of the relevant information would be reasonably likely to impair its ability to obtain similar information in the future.

I123 Council has indicated that it exempted information responsive to Items 6, 13, 15 and 16 pursuant to s39. It provided no additional explanation for its reliance on the exemption for any individual documents, but merely set out the elements of s39 and asserted that they were applicable to all relevant documents.

I124 Again, Council dealt with Items 13 and 16 jointly, it exempted the same information in relation to both requests as they both related to the '2014 leak of confidential cable car information'.

#### *Items 6.1, 6.2 and 6.4*

I125 Item 6.1 is a covering email from MWCC to Council dated 20 July 2018 and an attached letter dated 19 July 2018 seeking permission to access Council land and a map marking where access was sought. It is specifically identified that it is confidential in the subject line of the email and in a watermark on the map.

<sup>6</sup> *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279.

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

<sup>8</sup> Moira Paterson, *Freedom of Information and Privacy in Australia – 2<sup>nd</sup> Edition*, LexisNexis Butterworths, Australia, 2015 at 7.97.

126 Items 6.2 and 6.4 are a letter and email from MWCC to Council dated 10 July 2018 also discussing permission to access Council land.

127 I am satisfied that the documents were communicated in confidence and their disclosure would divulge information communicated confidentially. Given they relate to negotiations and preliminary ideas regarding an unapproved development proposal, I am also satisfied that there is a reasonable likelihood of a 'cooling effect' on negotiations between Council and developers if all such discussions could be disclosed.

128 Accordingly, I consider that these documents are *prima facie* exempt under s39(1)(b), subject to consideration of the public interest test.

*Item 13.6/16.6*

129 This is an email from an alderman making a request for information in relation to the leak of information to Council under the Act dated 18 May 2014. It is marked 'Private and Confidential not for publication.'

130 I am satisfied that the email was sent in confidence and its disclosure would reveal information communicated confidentially. I am also satisfied that the disclosure of a Right to Information request made confidentially by a councillor referencing information obtained in the course of their employment would be reasonably likely to impair the ability of Council to obtain similar information in future.

131 Accordingly, I consider that this document is *prima facie* exempt under s39(1)(b), subject to consideration of the public interest test.

*Item 13.10/16.10*

132 This is a letter from the Lord Mayor to an executive director of MWCC dated 23 January 2014. It is not exempt under s39 as it was not communicated to the Council but generated by it. Unlike Item 13.9, it is not internally deliberative or potentially exempt under s35 as it was communicated to an external party.

133 Council has provided no specific explanation as to why it considers s39 or any other exemption applies to this particular document, so I cannot be satisfied that it has discharged its onus under s47(4) to show why it should not be disclosed. Accordingly, it should be released in full to Mr Murray.

*Other documents*

134 In addition to those detailed in Council's schedule, four additional documents are included in the information found to be responsive to this part of Mr Murray's request but are not addressed individually. These are:

- A letter from Council's General Manager to a Parliamentary Advisor dated 21 September 2017 seeking to clarify some points following a Council briefing to the Legislative Council;
- A Council media release regarding the 'leak' dated 7 July 2014;

- A letter from a Council alderman to the Minister for State Growth dated 5 April 2017 seeking to clarify whether Council had delayed the proposal; and
- A letter from Council's General Manager to an Executive Director of MWCC dated 25 February 2014 advising of the outcome of Council's consideration of his proposal at a meeting the previous day.

135 None of these documents appear to contain confidential information, they are primarily restatements of information already on the public record. Council has provided no specific justification for their exemption and I am again not satisfied that it has discharged its onus to show why they should not be disclosed. They are to be released in full to Mr Murray.

*Item 15.2*

136 These documents are discussed above in my analysis of s31, with the Council apparently seeking to exempt them as privileged legal communications in error, rather than pursuant to s39.

137 I am satisfied that the MWCC email dated 1 April 2014 regarding consent for non-exclusive use of Council land for the project and the letter dated 1 April 2014 co-signed by an Executive Director of MWCC and the Chairman of Bullwheel International Cable Car Corporation, are *prima facie* exempt under s39(1)(b). These are initial representations to Council by the developers and I am satisfied these were made in confidence and there is a reasonable likelihood that there would be a reluctance to make such approaches if they were routinely disclosed under the Act.

*Item 15.8 and 15.24*

138 These are the notes of a meeting between MWCC and Council on 17 July 2018. It is watermarked confidential and has a subheading of *Commercial in Confidence*. It is repeated at 15.24.

139 Given the markings of confidentiality and references to confidentiality in the content of the document, I am satisfied that the information provided in the meeting by MWCC was communicated in confidence.

140 As the discussions recorded in the notes relate to negotiations and preliminary ideas regarding an unapproved development proposal, I am also satisfied that there is a reasonable likelihood of a 'cooling effect' on negotiations between Council and developers if all such discussions could be disclosed.

141 Accordingly, this document is *prima facie* exempt under s39(1)(b), subject to consideration of the public interest test.

*Item 15.17*

142 This is a memorandum from an officer of Council to the elected councillors dated 15 June 2018. While this is an internal document, it relates to a letter received on behalf of the group Residents Opposed to the Cable Car (ROCC)

and its disclosure would divulge this information. It is far from clear, however, that this letter was communicated in confidence or if there would be any issue obtaining such information in future. An action group which is vocally opposed to a development and sends correspondence to all elected members of a municipal council to express its concerns is not likely to refrain from raising concerns if details of its communications were released under the Act.

143 Accordingly, I am not satisfied that Council has discharged its onus to show that this memorandum is exempt under s39. I do accept, however, that paragraphs three and four of the memorandum are exempt under s31 as they detail a request for legal advice and a summary of that advice. The remainder is not exempt and should be released to Mr Murray.

*Item 15.25*

144 This is a file note dated 23 May 2018 of a meeting on 22 May 2018 between Council, MWCC and a representative of a construction company, detailing discussions and negotiations concerning preliminary issues with the project. For the same reasons as the similar meeting notes at Item 15.8/15.24, this document is *prima facie* exempt under s39(1)(b).

*Public interest test*

145 The public interest test applies to s39 and to the information I have found to be *prima facie* exempt pursuant to it. I must have regard to, at least, the matters set out in Schedule 1 of the Act.

146 Council has provided a global assessment of the public interest test covering all information claimed to be exempt under ss35, 36 and 39. It says that matters (a), (c) and (d) favour disclosure and that matters (b), (h), (m) and (n) weigh against it. It determined that the release of all information it had found provisionally exempt under these sections would be contrary to the public interest test. It did not make any comment on the weighting of any particular factor or the specific circumstances of this matter.

147 I agree that the matters identified by Council in favour of disclosure are relevant, though I do not agree that factor (b) weighs against disclosure and that the disclosure of additional information would hinder debate on a matter of public interest. I consider the opposite, that additional information would contribute to debate on this issue which remains the subject of significant public debate.

148 I also consider that matters (f) and (g) weigh in favour of release, as the release of the information would provide the opportunity for additional scrutiny of government decision-making and administrative processes in relation to negotiations with developers.

149 In favour of exemption, I do not agree with Council that factors (h) or (m) weigh particularly against the release of the information. Release of information under the Act, where this has been found not to be contrary to the public interest, does not expose a corporation to any inequity or unfair treatment in

its dealings with government. As I have previously noted in my recent decision in *Cassy O'Connor MP and the Department of Natural Resources and Environment Tasmania*<sup>9</sup>, it is effectively the price of seeking to do business in a public reserve that greater scrutiny is applied and communications have the potential to be released under the Act.

150 I accept, however, that in relation to Item 13.6/16.6, the request for information under the Act from an alderman, there is potential to hinder equity and fair treatment of a person in their dealings with government as there is a reasonable expectation of some degree of confidentiality in such an interaction. According, this factor weighs overall slightly against disclosure.

151 In relation to factor (m), it is not apparent that harm to the interests of an individual or group of individuals following the release of this information would be likely. The primary identifiable individuals or groups of individuals would be members of the public who support or oppose the proposed development and their interests would appear to be advanced by the disclosure of additional information. The only exception is, again, in relation to Item 13.6/16.6 and I accept that the interests of that alderman would be potentially harmed to a degree by the release of their request for information under the Act.

152 I also consider that factor (s), whether the disclosure would harm the business or financial interests of an organisation, is relevant and weighs against disclosure. MWCC is a commercial venture and the disclosure of negotiations and submissions made to Council regarding preliminary aspects of a major development proposal have the potential to harm its business and financial interests. As the details of the project are primarily public, however, due to the nature of the project and statements from MWCC, this factor is not of major weight.

153 Overall, there is clearly a significant public interest in this information being publicly available. However, there are also a number of factors that do not support the disclosure of the information.

154 Of the information I agreed was *prima facie* exempt under s39, I am satisfied Council correctly assessed that it would be contrary to the public interest to release these documents. Accordingly, Items 6.1-6.2, 6.4, 13.6/16.6, 15.2, 15.8 and 15.25 are exempt under 39 and not required to be released to Mr Murray.

## Preliminary Conclusion

155 For the reasons set out above, I determine:

- I have no power to review Council's decision under s10 and it remains unchanged;
- Council's use of s19 is affirmed;

<sup>9</sup> External review R2202-021, March 2022, available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions).

- Council's use of section 31 is varied;
- Council's use of s35 is varied;
- Council's use of s36 is affirmed; and
- Council's use of s39 is varied.

### **Submissions to the Preliminary Conclusion**

156 The above preliminary decision was made available to Council on 12 May 2022 under s48(1)(a) of the Act, to seek its input before finalising the decision.

157 On 7 June 2022, submissions were received from Ms Kelly Grigsby, Chief Executive Officer of Council and its principal officer under the Act.

158 Ms Grigsby indicated that she would not be making any submissions regarding the substantive parts of the external review but wished to raise concerns about the use of a Council officer's name in my decision.

159 While the employee's name was used by the applicant in his request and by Council in its decisions, Ms Grigsby referenced the extensive debate and coverage of the proposed development and raised concerns that naming the employee in my decision:

*could invite an amount of scrutiny of their personal life which is grossly disproportionate to the level of responsibility expected of them in the course of their employment with the City [of Hobart].*

160 She requested the employee's name be removed from the decision and replaced with 'a specific council officer' or similar reference.

161 I do not consider that the inclusion of the relevant employee's name would aid the understanding of my decision and accept Ms Grigsby's submissions and concerns that it may cause a negative impact on the named person. Accordingly, I have substituted Employee K for the relevant Council officer's name in this decision.

### **Conclusion**

162 For the reasons set out above, I determine:

- I have no power to review Council's decision under s10 and it remains unchanged;
- Council's use of s19 is affirmed;
- Council's use of section 31 is varied;
- Council's use of s35 is varied;
- Council's use of s36 is affirmed; and
- Council's use of s39 is varied.

163 I apologise to the parties for the inordinate delay in providing this decision.

**Dated:** 10 June 2022

**Richard Connock**  
**OMBUDSMAN**

## **Attachment I**

### **Relevant Legislation**

#### **Section 10 – Electronic information**

- (1) If information is stored in an electronic form, a Minister or public authority may refuse an application under section 13 if –
  - (a) the information cannot be produced using the normal computer hardware and software and technical expertise of the public authority; and
  - (b) producing it would substantially and unreasonably divert the resources of the public authority from its usual operations, having regard to the factors in Schedule 3.
- (2) A person is not entitled to information contained in back-up systems, or information that has been disposed of in compliance with an approved disposal schedule issued under the Archives Act 1983.

#### **Section 19**

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

having regard to –

- (c) the matters specified in Schedule 3 –

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

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

#### **Section 31 – Legal professional privilege**

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

## **Section 35 – Internal Deliberative Information**

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

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

- (2) Subsection (1) does not include purely factual information.
- (3) Subsection (1) does not include –
  - (a) a final decision, order or ruling given in the exercise of an adjudicative function; or
  - (b) a reason which explains such a decision, order or ruling.
- (4) Subsection (1) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

## **Section 36 – Personal information of a person**

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

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

- (d) notify that person that the public authority or Minister has received an application for the information; and
- (e) state the nature of the information that has been applied for; and

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

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.

## **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.

## **SCHEDULE 3 - Matters Relevant to Assessment of Refusing Application**

- I. The following matters are matters that must be considered when assessing if the processing of an application for assessed disclosure of information would result in a substantial and unreasonable diversion of resources:
- (a) the terms of the request, especially whether it is of a global kind or a generally expressed request, and in that regard whether the terms of the request offer a sufficiently precise description to permit the public authority or Minister, as a practical matter, to locate the document sought within a reasonable time and with the exercise of reasonable effort;
  - (b) whether the demonstrable importance of the document or documents to the applicant might be a factor in determining what in the particular case are a reasonable time and a reasonable effort;
  - (c) more generally whether the request is a reasonably manageable one, giving due, but not conclusive, regard to the size of the public authority or Minister and the extent of its resources available for dealing with applications;
  - (d) the public authority's or Minister's estimate as to the number of sources of information affected by the request, and by extension the volume of information and the amount of officer-time, and the salary cost;
  - (e) the timelines binding the public authority or Minister;
  - (f) the degree of certainty that can be attached to the estimate that is made as to sources of information affected and hours to be consumed, and in that regard importantly whether there is a real possibility that processing time might exceed to some degree the estimate first made;
  - (g) the extent to which the applicant has made other applications to the public authority or Minister in respect of the same or similar information or has made other applications across government in respect of the same or similar information, and the extent to which the present application might have been adequately met by those previous applications;
  - (h) the outcome of negotiations with the applicant in attempting to refine the application or extend the timeframe for processing the application;
  - (i) the extent of the resources available to deal with the specified application

# OMBUDSMAN TASMANIA

## DECISION

**Right to Information Act Review**

**Case Reference:** O1906-102

R2202-016

**Names of Parties:** H and Department of Police, Fire and Emergency Management

**Draft reasons for decision:** s48(3)

**Provisions considered:** s30

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### **Background**

- 1 A Family Violence Order (FVO) was put in place for H's protection following her ex-husband's conviction for a family violence offence against her.
- 2 H attended a public event in Hobart and encountered her ex-husband. H approached Tasmania Police officers who were present at the event to report the apparent breach of the FVO. Tasmania Police did not charge H's ex-husband with breaching the FVO and H was unsatisfied with the police response to her complaint about the handling of the issue.
- 3 On 13 May 2019, H applied for assessed disclosure of information under the *Right to Information Act 2009* (the Act) to the Department of Police, Fire and Emergency Management (the Department). H requested a copy of guidelines or protocols that Tasmania Police use with regards to breaches of Family Violence Orders. Specifically, H requested a document she referred to as the '*Safe at Home Protocols – Southern Family Violence Unit*'. The document had been referred to by Detective Inspector Smith of the Hobart Criminal Investigation Branch (CIB) in a letter to H's legal representative dated 7 May 2019.
- 4 On 21 May 2019, a decision was released to H by Sergeant Lee Taylor, a delegated officer under the Act. Sergeant Taylor found a two page extract of the Tasmania Police *Family Violence Manual* to be responsive to H's request. Sergeant Taylor found that all of these two pages were exempt from release pursuant to s30(1)(c) of the Act, being information related to enforcement of the law.
- 5 Sergeant Taylor stated:

*The information assessed includes information contained within an internal Tasmania Police document (*Family Violence Manual*) which provides guidance to officers concerning the methods and procedures used to prevent, detect, investigate and deal with matters of family violence and the breach of family violence orders.*

*I am satisfied that disclosure of the aforementioned methods and procedures would be reasonably likely to compromise their effectiveness in the future if disclosed and therefore, an exemption pursuant to Section 30(1)(c) of the Act has been applied to that information.*

- 6 Sergeant Taylor also assessed information referred to in the *Tasmania Police Manual* and the *Safe Homes, Safe Families – Tasmania's Family Violence Action Plan 2015-2020*. He determined that, as these documents were publicly available, he was entitled to refuse to provide them pursuant to s12(3)(c)(i). He provided a link to these documents and two others on the Department's website and that of the Department of Premier and Cabinet.
- 7 Sergeant Taylor also advised that the phrase *Safe at Home Protocols* is a generic term and does not relate to any one document produced or used by Tasmania Police. He indicated that it is a group of principles produced in various documents by a number of agencies and used by Tasmania Police.
- 8 On 28 May 2019, H requested an internal review of the decision pursuant to s43(1) of the Act. H, though her legal representative, raised the following concerns:

*The application was refused on seemingly contradictory grounds. Firstly, to allow [H] access to the protocol documents in question would be reasonably likely to prejudice their effectiveness, and secondly because the protocols are already available in publicly available documents.*

*[H] is not satisfied with the answer – there has been a clear breach of her Family Violence Order by [her ex-husband] which Tasmania Police refused to enforce at the time of its commission and apparently, given the breach occurred on 21 February 2019, remain reluctant to enforce today. As far as I am aware, [H]'s ex-husband] has still not been charged with a breach of a Family Violence Order by Tasmania Police. Not unreasonably, the victim of that breach would like to know why that is, and specifically would like to know what particular guidelines or protocols Tasmania Police are purporting to use to investigate her own particular complaint so she can see for herself if Tasmania Police have acted appropriately in relation to her complaint. As a victim of this breach, [H] fails to see how giving her access to these documents could possibly prejudice their effectiveness.*

- 9 On 11 June 2019, Commander D J Williams, a delegate of the Department under the Act, released an internal review decision to H. Commander Williams came to the same conclusion as Sergeant Taylor, that the two pages were exempt pursuant to s30(1)(c) of the Act. Commander Williams stated:

*I have examined the nature of the information that has been categorised within this exemption provision and have established that it falls within the category of information relating to enforcement of the law. As the legislation precludes such information from being released, I agree that*

*the original decision by Sergeant Taylor not to release the Tasmania Police Manual was correct pursuant to Section 30(1)(c) of the Act.*

- 10 Commander Williams was clear that she could not provide advice regarding whether or not charges should have been laid in relation to this matter, she indicated her review was confined to the appropriateness of the reliance on s30(1)(c).
- 11 On 17 June 2019, H wrote to this office and requested an external review. The application was accepted on the basis that H was in receipt of an internal review decision, had lodged an application for external review within 20 working days of that decision and that the fee had been paid.
- 12 H made submissions in her request for review, raising concerns that Commander Williams and Sergeant Taylor had failed to identify how disclosing these two pages of the *Family Violence Manual* to H would, or would be reasonably likely to, prejudice the effectiveness of law enforcement methods and procedures.

### **Issues for Determination**

- 13 I must determine whether the information is eligible for exemption under s30, or any other relevant section of the Act. I have attached a copy of s30 to this decision.

### **Analysis**

- 14 Before determining that information is exempt pursuant to s30(1)(c), I must be satisfied that:
  - its release would disclose methods or procedures for preventing, detecting, investigating or dealing with matters arising out of breaches or evasions of the law; and
  - that disclosure would or would be reasonably likely to prejudice the effectiveness of those methods or procedures.
- 15 In making my assessment, I am not permitted to give consideration to any public interest factors, as this exemption is listed under Part 3, Division 1 of the Act and is not subject to the public interest test.
- 16 Disclosure of relevant methods or procedures would be reasonably likely to prejudice their effectiveness if, on reasonable grounds, it is found that there is a real risk of such prejudice.<sup>1</sup> There must be a real risk of prejudice; more than a mere possibility.<sup>2</sup>
- 17 Therefore, even if I am satisfied that the release of information would disclose relevant methods or procedures, unless I am also satisfied that the disclosure

<sup>1</sup> *Re Timothy Edward Anderson and Australian Federal Police* [1986] AATA 79, [38] (*Anderson and AFP*).

<sup>2</sup> *Re Timothy Edward Anderson and Department of Special Minister of State (No 2)* [1986] AATA 81, [66]-[68].

would have a real risk of prejudicing the effectiveness of those methods or procedures, the information is not exempt.

- 18 I am satisfied that the release of the *Family Violence Manual* extract would disclose relevant methods or procedures described in the first limb of the statutory test. I consider this to be non-contentious. Therefore, whether the information is exempt or not will be determined by whether there is a real risk of prejudice to the effectiveness of those methods and procedures if it is released.
- 19 The Department referred to the two relevant pages of the *Family Violence Manual* as a ‘sensitive internal document’ only used by members of Tasmania Police for operational purposes regarding family violence.
- 20 The relevant pages contain details of the operational police response model. It provides some generic and specific prompts for police officers who are responding to family violence related matters. The model sets out general methods and procedures for investigating family violence matters which would be expected by a reasonable member of the public and align with the publicly available Tasmania Police Manual<sup>3</sup>. Potential information sources, risk assessment prompts, due diligence checks and possible responses are outlined in the extract.
- 21 Prejudicing the effectiveness of law enforcement methods and procedure is more likely to arise where the disclosure of a document would disclose covert, as opposed to overt or routine methods or procedures.<sup>4</sup> The relevant methods contained in the *Family Violence Manual* are routine in nature and do not differ from methods adopted in other Australian and international jurisdictions. The specific and general avenues of inquiry that police may utilise to establish family violence offences are already well known within the community. For example, Victoria Police has produced and publicly published a document entitled *Code of Practice for the investigation of family violence* which outlines almost identical processes.<sup>5</sup>
- 22 The specific prejudice envisaged when relying on s30(1)(c) is usually that those who may seek to breach or evade the relevant law would become aware of the methods or procedures to prevent, detect or investigate their behaviour. This could enable police action to be anticipated and countered, thereby prejudicing the effectiveness of the law enforcement methods or procedures currently adopted. In this case, however, while disclosure of the two page extract of the *Family Violence Manual* would disclose lawful methods and procedures for detecting breaches or evasions of the law, it is not apparent that there is any real risk to the effectiveness of those methods and procedures posed by such disclosure. The document is simply a description of uncontroversial policing methods and procedures.

<sup>3</sup> Available at [www.police.tas.gov.au/information-disclosure/routine-information-disclosure](http://www.police.tas.gov.au/information-disclosure/routine-information-disclosure)

<sup>4</sup> See Anderson and AFP at paragraph [38] above at Note 1.

<sup>5</sup> See [www.police.vic.gov.au/code-practice-investigation-family-violence](http://www.police.vic.gov.au/code-practice-investigation-family-violence).

- 23 In determining a matter brought by an applicant, the Department has the onus to show that the information should not be disclosed. It is open to me pursuant to s47(4) of the Act to determine the outcome of this review on the basis that the onus is not discharged.
- 24 I am not satisfied that the mere assertion of the applicability of the s30 exemption as information relating to enforcement of the law, without substantive reasoning or argument by Tasmania Police as to its application to this particular information, discharges that onus. It is not otherwise apparent why the release of this information would be likely to prejudice the effectiveness of methods or procedures for preventing, detecting or investigating family violence in Tasmania.
- 25 Accordingly, this information is not exempt under s30(1)(c) and should be released to H.

### **Preliminary Conclusion**

- 26 For the reasons given above, I determine that exemptions claimed pursuant to s30(1)(c) are not made out.

### **Submissions to the Preliminary Conclusion**

- 27 As the above preliminary decision was adverse to Tasmania Police, it was made available on 4 October 2022 under s48(1)(a) to seek its input before finalising the decision.
- 28 Ms Ashleigh Constance, Legal Officer at Tasmania Police, provided input on 3 November 2022. She made submissions about a small section of the information responsive to H's request only, the words between 4. *Initiate Response* and *Actions*, and the first two dot points under *Actions* in the *RDS Response Model* section. No further claim for exemption was maintained over any other part of the relevant information.
- 29 Ms Constance submitted that the disclosure of this particular subset of the information would, or would be reasonably likely to prejudice to the effectiveness of methods of police investigation around family response incidents. She indicated how the description of a specific part of the standard procedure around incident response could provide family violence offenders with insights which could cause consequences which *may include jeopardising the safety of family violence victims, witnesses, attending police officers, and family violence offenders*.
- 30 I considered Ms Constance's reasoning to be appropriate and am satisfied that the risks she described, which I unfortunately cannot set out without revealing the relevant investigation procedure, would create a genuine chance of prejudice to methods or procedures for preventing, detecting or investigating, or dealing with matters arising out of, breaches or evasions of the law.

31 Accordingly, I determine that this part of the information is exempt from disclosure pursuant to s30(1)(c). The remainder of the document is not exempt and should be released to H.

### **Conclusion**

- 32 For the reasons given above, I determine that exemptions claimed pursuant to s30(1)(c) are not made out, except for the specified parts of the *RDS Response Model* section of the information which are exempt pursuant to s30(1)(c).
- 33 I apologise to the parties for the inordinate delay in finalising this decision.

**Dated:** 4 November 2022

**Richard Connock**  
**OMBUDSMAN**

## **Attachment I – 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

# OMBUDSMAN TASMANIA

## DECISION

**Right to Information Act Review**

**Case Reference:** O1808-132

**Names of parties:** Lawrence Archer and Dorset Council

**Reasons for decision:** s48(3)

**Provisions considered:** s12, s20(b)

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### Background

- 1 Mr Lawrence Archer was elected as a councillor of the Dorset Council in 2014. Mr Archer is no longer a councillor and it is apparent that he has a long-running dispute with Council's Mayor and General Manager.<sup>1</sup>

*The initial application for information and request for fee waiver*

- 2 On 16 June 2018, Mr Archer applied for information from Council under the Right to Information Act 2009 (the Act). He sought, firstly, *a list of the monthly allowances and expenses incurred by individual Dorset elected members of Council for the period 1 July 2017 to 31 May 2018*. Mr Archer asked Council, *under expenses please include travel, accommodation, meals etc booked and or paid for by the Council*.
- 3 Mr Archer added, *Also please provide copies of bank statements for Council credit cards used by the Mayor and General Manager*.
- 4 Mr Archer requested that his application be treated as both a request for active disclosure and also assessed disclosure.<sup>2</sup> He also requested the application fee be waived on the basis of the public interest test. Mr Archer used his personal (rather than his Council) email address and gave his home address.

*Council's first determination: 22 June 2018*

- 5 On 22 June 2018, Mr John Marik, a delegated officer of Council under the Act, sent Mr Archer a letter which set out his determination by listing the following points:
  - *This request does not come under active disclosure.*
  - *Note that the guidance papers through the ombudsmen [sic] suggest that just because the public might be interested in the information does not constitute that information being in the public interest.*

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<sup>1</sup> [dorset.tas.gov.au/mayor-and-councillors](http://dorset.tas.gov.au/mayor-and-councillors)

<sup>2</sup> Section 5 defines active disclosure as *a disclosure of information by a public authority or a Minister in response to a request from a person made otherwise than under Division 2 of Part 2*. That Division of the Act deals with the process for assessed disclosure, commencing with s13.

- *With this in mind this request comes under assessed disclosure under the fAct].*
- *Therefore there will be no waiving of the fees on the grounds that the information sought is in the public interest.*
- *Currently your application does not comply with the fAct] and Right to Information Regulations 2010.*
- *We require you to fill in a Request for Information form, or ensure your written application is compliant with the Right to Information regulations fsic] 2010, with the fee applicable being \$38.75 if paid by the 30<sup>th</sup> June 2018. An application form can be found on the Dorset website.*
- *The Request fsic] needs to comply with the requirements of section 4 of the Right to Information Regulations 2010. Your application is missing the following:*
  - *Section 4(c) The daytime contact details of the applicant*
  - *Section 4(f) Details of any effort undertaken by the applicant, before the application was made, to obtain the information sought.*
  - *Section 4(h) The signature of the applicant.*

Mr Marik concluded, *If I can assist you in any way please do not hesitate to contact me.*

- 6 On 26 June 2018 Mr Archer asked Council for the name of its Information Officer under the Act. On 27 June Mr Marik replied that he was Council's RTI Officer and referred to his determination made on 22 June.

#### *Application of 27 June 2018, fee paid seeking waiver and refund*

- 7 On 27 June 2018 Mr Archer submitted an application for assessed disclosure to Council seeking the same information described earlier but on Council's Right to Information Act 2009 Application for Assessed Disclosure form.
- 8 On 29 June 2018 Mr Archer emailed Mr Marik to advise that he had lodged an application for disclosure with the necessary fee, but asked that the fee be refunded as he intended using the information to inform the general public. Mr Archer referred to clauses 4.5 and 5 of the Ombudsman's *Guideline in relation to charges for information*.<sup>3</sup> He also sought the reasons for Mr Marik's determination that the application fee would not be waived because Mr Archer's request was not in the public interest and did not come under active disclosure.
- 9 On 6 July 2018 Mr Marik replied to Mr Archer, declining to waive the RTI application fee, giving reasons to which I will return.

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<sup>3</sup> [Guideline 1/2012 - Guideline in relation to charges for information - 21 April 2012 \(PDF, 80.1 KB\)](http://www.ombudsman.tas.gov.au/right-to-information/rti-publications) at [www.ombudsman.tas.gov.au/right-to-information/rti-publications](http://www.ombudsman.tas.gov.au/right-to-information/rti-publications)

*Council's second determination: 25 July 2018*

- 10 On 25 July 2018 Mr Marik made what I will call Council's second determination. An internal review decision by Mr Rohan Willis, a delegated officer under the Act and Council's Director of Community and Development, would later refer to it as the *Original Determination*. Mr Marik addressed in two parts Mr Archer's application of 27 June. Mr Marik refused to release any information, for reasons to which I return.
- 11 On 30 July 2018 Mr Archer sought internal review of Council's determination(s) of his application of 27 June 2018. Mr Archer cited ss3(3), 3(4)(b) and 20(b).
- 12 On 7 August 2018 Mr Archer received a letter from Mr Marik dated 3 August 2018. Mr Marik advised that he would *not be proceeding with any further review*. Mr Marik added that, under s43(1), the request for (internal) review of (his) decision *must be made by applying to the principle [sic] officer of the public authority – this being the General Manager*.
- 13 On 14 August 2018, this office received Mr Archer's first application for review regarding the information he had sought from Council, and wrote to Mr Archer and Council advising both parties in relation to Mr Marik's position that there would be no further review. That letter, to Council's General Manager, Mr Tim Watson, included the following:

*Mr Marik is correct in pointing out that s43(1) does provide that a request is to be addressed to the principal officer of the public authority. I note Mr Archer was not told in the decision to address his request to the principal officer, nor did the decision have to as per s22. Mr Archer has made a request to Council, through Mr Marik, seeking an internal review of the original decision.*

*I have raised this issue with the Ombudsman and we are both of the view that the appropriate and requisite mechanism for a valid request for internal review is that it is made within 20 working days of receipt of an original decision, is made to the relevant public authority, and requests an internal review of the original decision. Mr Archer has complied with these requirements.*

*Council's internal review decision (its third determination, by Mr Willis, 21 August 2018)*

- 14 On 21 August 2018 Mr Willis made an internal review decision. Given the two prior determinations by Mr Marik, this was Council's third determination.
- 15 The internal review decision of Mr Willis divided Mr Archer's application into Part 1 (which I have further subdivided) and Part 2.
- 16 In Part 1, Mr Archer sought *a list of the monthly allowances and expenses incurred by individual Dorset elected members of Council*. Mr Willis separated this aspect of Mr Archer's application into components I describe as:
  - Part 1(a) legislatively prescribed allowances; and
  - Part 1(b) expenses incurred by individual Dorset councillors.

Mr Archer had also asked that under expenses Council include travel, accommodation, meals etc booked and or paid for by the Council, which I refer to as Part 1(c).

17 Part 2, was where Mr Archer added, *Also please provide copies of bank statements for Council credit cards used by the Mayor and General Manager.*

18 The major findings of the internal review decision follow later in this decision.

#### *Application for external review*

19 On 23 August 2018 this office received a second application for review from Mr Archer with more detail, noting on its second page that *information was sent to you in a premature application dated 13.8.18 (1808-075) I hope that will suffice.*

20 In combination, Mr Archer's review applications contained Council's determinations described above, through to the internal review decision made on 21 August 2018.

21 On 27 August 2018 this office wrote to Mr Watson, advising that Mr Archer's application for external review had been accepted under s44(1)(b)(i) on the basis that Mr Archer was in receipt of an internal review decision and had submitted his external review application within the statutory timeframe.

22 The letter advised that Council had primarily relied on s20(b), and also noted that Mr Archer had provided all relevant material required for the review process to begin.

#### **Issues for determination**

23 There are three issues for determination:

- (1) Does the Ombudsman have jurisdiction to externally review whether the information responsive to Parts 1(a) and 1(b) of Mr Archer's application, refused by Council under s12(3)(c)(i), was otherwise available to Mr Archer?
- (2) Should Council answer the balance of Part 1 of Mr Archer's application, if necessary by extracting the information requested pursuant to s18(3)?
- (3) Does Part 2 of Mr Archer's application for Council credit card statements of the Mayor and General Manager constitute a vexatious application for the purposes of s20(b), having regard to the matters contained in Guideline No. 2/2010<sup>4</sup>?

#### **Relevant legislation**

24 The two sections of the Act most relevant to this matter are ss12 and 20. Also relevant is Guideline No. 2/2010<sup>5</sup> issued under s49(1)(b) of the Act. Copies of

<sup>4</sup> [Guideline 2/2010 - Guideline in relation to refusal of an application for assessed disclosure under the Right to Information Act 2009, s 20 - 1 July 2010 \(PDF, 1.4 MB\)](http://www.ombudsman.tas.gov.au/right-to-information/rti-publications) at [www.ombudsman.tas.gov.au/right-to-information/rti-publications](http://www.ombudsman.tas.gov.au/right-to-information/rti-publications)

<sup>5</sup> *Ibid.*

these sections and the Guideline are attached to this review decision. Also relevant is s18(3), set out in this decision.

### **Submissions between the parties**

- 25 As noted, on 22 June 2018, Mr Archer made his initial application to Council. Mr Marik replied to Mr Archer on 6 July 2018.
- 26 Mr Marik's reasons for his second determination of 25 July 2018 included, amongst other matters, mention of the following:
  - the Ombudsman's guidelines for assessing applications for assessed disclosure;
  - the Tasmanian Audit Office (TAO)'s probity examination of credit card statements, processes and procedures and policy;
  - TAO audit recommendations leading to Council's updated credit card policy being resolved by Council on 18 December 2017;
  - credit card statements being reviewed in quarterly audit panel meetings as part of '*Council active disclosure*' – and *this information is made available to all Councillors*;
  - Mr Archer's request *first needs to be assessed as to whether the request is vexatious*, and a claim that, *As it targets only the General Manager and Mayor on the surface, the request appears vexatious*.
  - a reference to s20 of the Act, and the Ombudsman's Guideline; and
  - that Mr Marik had consulted with the General Manager who had lodged a Code of Conduct complaint against Mr Archer - *the request forms part of a broader pattern of behaviour and is therefore vexatious in nature. The request is therefore refused in accordance with Section 20 (b) of the Act.*
- 27 When Mr Archer wrote to Council on 30 July 2018 seeking a review of Mr Marik's determination(s), Mr Archer cited the following provisions of the Act:

s3(3) *This object [to improve democratic government in Tasmania]<sup>6</sup> is also to be pursued by giving members of the public the right to obtain information about the operations of government; and*

s3(4)(b) *[Parliament's intention] 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.*
- 28 I consider these provisions later under the heading *Analysis*.
- 29 In response to Mr Marik's second determination insofar as it concerned Part I of his application, Mr Archer said that he had lodged his application as a member

<sup>6</sup> Section 3(1) of the Act.

*of the public using [his] personal address, and his request for information should not be seen as linked to [his] role as a councillor.*

- 30 Mr Archer explained his reasons for this as follows:

*Information available to Councillors is not necessarily available to the public hence my original request under the RTI Act which is about making information available to the public.*

- 31 Mr Archer submitted that the *information provided to councillors via the Audit Panel provides only a small part of the information I requested and is not publicly available.*

- 32 Mr Archer also said:

*I have perused the Audit panel agendas and attachments available to Councillors and there are no credit card statements relevant to my request. Regardless of that fact, I reiterate that my request should not be seen as linked to my role as a Councillor and that the RTI Act, and my request, is about information being publicly available.*

- 33 On 27 August Mr Archer received an internal review decision from Council – its third determination, the one made by Mr Willis. Details concerning that decision, and Mr Archer's further submissions to this office, are discussed in the analysis immediately below.

## **Analysis**

- 34 Firstly, I should make clear the parameters of this decision; it is limited to the external review of Council's internal review decision on Mr Archer's application to it for assessed disclosure of information. Background disputes between him and Council's General Manager and, it would seem, also between Mr Archer and the Mayor, and associated allegations fall outside this decision, unless it becomes necessary to consider them in order to determine if Mr Archer's application was vexatious under s20(b) as Council claimed.
- 35 Jurisdictional constraints relevant to components of Part I of Mr Archer's application are considered later below.

### *Application fee and the public interest*

- 36 I note early correspondence between the parties regarding the fee for the application for assessed disclosure of information. The public interest, a concept which will assume some relevance later, was contested here.
- 37 Section 16(2)(c) of the Act provides that the *application fee may be waived if – ... the applicant is able to show that he or she intends to use the information for a purpose that is of general public interest or benefit.*
- 38 On 29 June 2018 Mr Archer paid the fee for his application. However, he also submitted that the fee for the disclosure of information ought to be refunded as he intended using the information to inform the general public.

- 39 Mr Archer referred to the Ombudsman's Guideline in relation to charges for information.<sup>7</sup> He also asked for Council's reasoning as to why it did not consider his request to be in the public interest and why it did not come under active disclosure. I interpolate here, that for the purposes of the waiver of the fee, the test is not whether the request is in the public interest, but whether the use to which the applicant proposes to put the information responsive to it is.
- 40 On 6 July 2018, Mr Marik emailed Mr Archer regarding the guideline in relation to charges.<sup>8</sup> Mr Marik decided not to waive the application fee and decided the information was not in the general public interest or benefit. He stated:

*The expression “for a purpose that is of general public interest or benefit” is taken to mean “for a purpose that is of general interest or benefit to the public”.*

*The word “general” here emphasises that the purpose is not of interest or benefit to a narrow or special interest group only.*

*Therefore the RTI application fee will not be waived in this case as I deem the information not to be in the general public interest or benefit.*

- 41 The Act does not provide the Ombudsman with jurisdiction to review a refusal to waive an application fee, though such a refusal may form the basis for a complaint under the Ombudsman Act 1978. In any event, in the circumstances, Council's decision on the fee appears to have been reasonably open to it, although it could have decided to waive the fee pursuant to ss16(2) and 3(4)(b).

#### *Council's substantive decisions*

- 42 I now turn to the substance of Council's decisions. Mr Marik's second decision of 25 July 2018 was referred to as the *Original Determination* in the internal review decision. Both it, and the internal review decision of Mr Willis dated 21 August 2018, refused to provide Mr Archer with any of the information he sought.
- 43 In his internal review decision, Mr Willis considered Part 1 and then Part 2 of Mr Archer's application. For each part, he first summarised the determination of 25 July 2018 and then made his *Fresh Determination*, as required by s43(4)(b). Under s44, my review is of the internal review decision, so I will focus on its *Fresh Determinations* regarding Parts 1 and 2 of Mr Archer's application.

#### *Part 1 of application – Information on councillor allowances and expenses for 11 months: Information refused on internal review*

- 44 Council's third determination refused Part 1 of Mr Archer's application, which sought specified financial information on councillor allowances and expenses for an 11 month period. Mr Willis did so in three separate components of his *Fresh Determination*, after quoting from what he called Mr Marik's *original determination* of 25 July 2018, relevant extracts of which I paraphrased earlier.

<sup>7</sup> [Guideline 1/2012 - Guideline in relation to charges for information - 21 April 2012 \(PDF, 80.1 KB\)](https://www.ombudsman.tas.gov.au/right-to-information/rti-publications) at [www.ombudsman.tas.gov.au/right-to-information/rti-publications](http://www.ombudsman.tas.gov.au/right-to-information/rti-publications)

<sup>8</sup> *Ibid.*

- 45 I refer to these as Parts 1(a), 1(b) and 1(c) of Mr Archer's application, as explained earlier, and address them consecutively below.

*Part 1(a) – Legislatively prescribed allowances: refused on internal review under s12(3)(c)(i)*

- 46 Firstly, Mr Willis concurred with the original determination that Councillor allowances are legislatively prescribed and are therefore available via active disclosure. Mr Marik's determination of 25 July 2018 came to the same conclusion, expressed in the same terms.
- 47 Legislatively prescribed maximum councillor allowances are otherwise available to the public, so were legitimately refused under s12(3)(c)(i). That refusal is not one I have jurisdiction to review, for reasons I will explain below.<sup>9</sup> In any event, one would have expected Mr Archer, as a then councillor, to have known, or been able to obtain, the maximum prescribed allowances available to him and other councillors. Hence, the decision on that part of the internal review was open to Council and I do not quarrel with it.

*Part 1(b) – Information available to Mr Archer via the Audit Panel papers: refused on internal review under s12(3)(c)(i)*

- 48 Mr Willis continued, in relation to what he treated as this separate component of Mr Archer's application, which I label Part 1(b):

*I have also reviewed the information available to all Councillors via the Audit Panel minutes. With regard to Councillor allowances and reimbursed expenses I concur with the original determination that as this information is available to yourself via the Audit Panel agenda, it is therefore "otherwise available" under active disclosure.*

- 49 Mr Marik's previous determination had noted, amongst other matters:

*The only additional allowances paid for the period in question is in regards to travel allowances and are available to Councillors via the last Audit Panel – minutes and attachments are distributed or made available to all Councillors. Part 1 refused under S12 3 c fie, s12(3)(c)] as is otherwise available to Councillor Archer under active disclosure.*

- 50 It appears to me that the decision of Mr Willis in this regard was either erroneous, or no longer applies now that Mr Archer is not a councillor. My reasons for this follow.
- 51 Firstly, Mr Willis did not expressly cite s12 in the Fresh Determination component of his decision. He did, however, quote Mr Marik's reference to s12(3)(c) and use the phrase "otherwise available" under active disclosure. I take this phrase as a reference to s12(3)(c)(i), hence little turns on this point.
- 52 Secondly, s12 encourages in both its heading and substantive provisions the provision of information (*including exempt information*).<sup>10</sup> In that context, I am not

<sup>9</sup> See also past decisions at [ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://ombudsman.tas.gov.au/right-to-information/reasons-for-decisions) under s12, for example, Clive Stott and Hydro Tasmania (February 2021) O1702-115.

<sup>10</sup> Section 12(1).

convinced that the words "otherwise available" in s12(3)(c)(i) apply now to the Part (1)(b) information, which was not available to the public.

- 53 Mr Willis said this information was available to Mr Archer via the Audit Panel agenda. This office put that to Mr Archer. He replied on 31 May 2020, in part:

*As I now understand the matter, part of my request for information which was denied me by the Dorset Council, because it was available elsewhere, may not be reviewable by the Ombudsman.*

*I would like to point out that at that time I was a councillor and I believe the Council was referring to the fact that I had access to documents which were part of Council's Audit Panel agenda/minutes.*

*While it is correct that I was able to view those documents, if I had chosen to do so via the councillors' portal and ipad [sic], I could not access hard copy of those papers. It is also my understanding that any information available to me from the Audit Panel was bound by [s338A(1)(a)] of the Local Government Act and I would not be able to disclose it to any other person. This would defeat the whole purpose of my request. As I made it clear to the Council that I was seeking the information as a private citizen, and not in my role as a councillor, it should have been obligatory for the Council to assist me by explaining where I might legitimately find the information if it really was available to me elsewhere.*

- 54 It seems to me that Mr Archer makes a strong point in view of the offence provisions in [s338A](#) of the [Local Government Act 1993](#). Mr Archer could have committed an offence had he disclosed confidential information obtained from the Audit Panel papers. Hence, his application under the Act seems appropriate, a matter to which I will return in considering Part 2 of his application. It is now unlikely that information responsive to Part 1 is available to Mr Archer at all, since he is no longer a current Dorset councillor.
- 55 Thirdly, s12(3)(c)(ii) is limited to a forthcoming *required disclosure* or *routine disclosure*, both of which involve *public disclosure*.<sup>11</sup> This suggests that s12(3)(c)(i) was also only intended to allow refusal of information that was otherwise available to the public.
- 56 Fourthly, the intention of Parliament expressed in s3(4)(a) also supports an interpretation of s12(3)(c)(i) which limits it to refusal of information otherwise available to the public.
- 57 Fifthly, given that Mr Archer is no longer a Dorset councillor, it seems unlikely he would still be able to access – afresh, at the current time – the Audit Panel minutes and attachments to which Mr Marik and, by implication, Mr Willis referred. If that is correct, this change in circumstances would entitle Mr Archer to lodge a fresh application under s13 for the information denied to him on the basis of s12(3)(c)(i).

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<sup>11</sup> See the definitions of *required disclosure* and *routine disclosure* in s5(1).

- 58 Sixthly, Mr Archer could ask anybody not entitled to that information to apply for it under s13. The fact that Mr Archer could have asked this of someone else at any time highlights the absurdity of the result if the interpretation of s12(3)(c)(i) applied by Council in its decisions is correct.
- 59 I therefore encourage Council to release the Part 1(b) information to Mr Archer as active disclosure to which it referred and relied upon. I will not, however, direct it to do so, given the constraints on my jurisdiction to review decisions made by a public authority under s12(3)(c).

*Does the Ombudsman have jurisdiction to externally review whether information responsive to Part 1, refused by Council purportedly under s12(3)(c)(i), is otherwise available?*

- 60 I qualify my reasoning and encouragement to Council above with an over-riding proviso. I am seized of this review by virtue of Council's refusal of Part 2 of Mr Archer's application under s20(b). I do not, however, consider that I have jurisdiction to decide whether or not its refusals of the components I have referred to as Parts 1(a) and 1(b) were correct, because Council made those refusals purportedly under s12(3)(c)(i). My reasoning for this is as follows.
- 61 I only have jurisdiction to externally review decisions under s44 and s45. Section 45 is not relevant to this review.
- 62 Section 44(1) enables an applicant for internal review to subsequently apply to the Ombudsman for external review in specified circumstances. It provides:
- (1) *A person or external party may apply to the Ombudsman under this section for a review of a decision in relation to which section 43(1), (2) or (3) applies if –*
- (a) *the person or external party has made an application for internal review under section 43(1), (2) or (3) in relation to the decision; and*
- (b) *either –*
- (i) *the person or external party has been informed of the result of the review; or*
- (ii) *15 working days have elapsed since the application was made.*
- 63 The elements of ss44(a) and (b)(i) are met here, at least ostensibly, in that Mr Archer made an application for internal review, then was informed of its result by way of the decision of Mr Willis. However, the first limb of s44(1) limits the section to a review of a decision in relation to which section 43(1), (2) or (3) applies.
- 64 Section 43 governs internal review. Section 43(1) provides:
- (1) *If a decision in respect of an application made to a public authority for information has been made by a delegated officer, the applicant may, within 20 working days after notice of the decision is given to the applicant in accordance with section 22, apply to the principal officer of the public authority for a review of the decision.*

65 Section 43(1) thus only extends the right to an internal review to where notice of a decision is given to the applicant by the public authority *in accordance with s22*.

66 Section 22(1) requires that reasons are to be given in the following circumstances:

- (1) *If, in relation to an application for information made to a public authority or Minister, the public authority or Minister decides –*
    - (a) *that the applicant is not entitled to the information because it is exempt information; or*
    - (b) *that provision of the information be deferred in accordance with section 17; or*
    - (c) *that provision of the information be refused by virtue of section 19 or 20 –*
- the public authority or Minister must give the applicant written notice of the decision.*

67 Section 22(1) thus only applies to the three types of decisions referred to in paragraphs (a), (b) and (c), which do not include a decision to refuse to provide information under s12(3)(c). To the extent to which [as in this case] notice is given of a decision made in reliance upon s12(3)(c), such notice will not be a notice for the purposes of s22. It will, therefore, not give rise to any right of internal review under s43.

72 Consequently, insofar as Council's decision relied on s12(3)(c), it was not, as required by s44(1), *a decision in relation to which section 43(1), (2) or (3) applies*. The applicant did not, therefore, accrue a right to external review by the Ombudsman of those components of the decision. External review of Parts 1(a) and 1(b) of the application for information, refused by Mr Willis pursuant to s12(3)(c)(i), is therefore outside the ambit of the Ombudsman's jurisdiction.

*Part 1(c) – Expenses outside the Audit Panel papers which Mr Willis said were not possible for Council to provide accurately*

73 Mr Willis concluded his consideration of Part 1 of the application as follows:

*I do however note your comments that the "information provided to Councillors via the Audit Panel provides only a small part of the information I requested." I have reviewed the listing provided to Councillors via the Audit Panel papers and confirm that it only includes the reimbursement of expenses incurred by Councillors, not all expenses as per your request. I am informed by relevant Council officers that only a portion of the Councillor expenses incurred are allocated on a per Councillor basis and in many cases there is insufficient information to accurately apportion Councillor expenses in accordance with your request.*

*Hence, as it is not possible to provide this information accurately, Council is unable to comply with your request. You may wish to resubmit your*

*application taking into consideration the knowledge that your request can only be partially complied with.*

74 Section 18(3) of the Act provides:

(3) If –

- (a) information requested under this Act is included with other information; and
- (b) the information requested can be extracted from that other information by the use of a computer or other equipment usually available to the public authority or Minister –

*the information is to be extracted accordingly.*

75 This office sent Council the above quote from Mr Willis and a copy of s18(3), asking pursuant to that provision:

1. Could Council, in due course (I do not require it at this time), extract from information it holds the information to answer the balance of Part 1 of Mr Archer's request (beyond whatever information is already contained in the Audit Panel papers)?
2. If not possible to answer the balance of Mr Archer's request in full, could Council at least answer it in part?

76 Mr Marik replied promptly but indicated that, due to budget estimates and key staff absences, he would struggle to reply in a timely manner. Hence, he said, Council would wait for the Ombudsman's preliminary decision and provide feedback at that time.

77 I will therefore direct that, pursuant to s18(3), Council extract the information required and then answer Part 1(c) of Mr Archer's application to the best of its ability. That may be subject to qualifications as to accuracy if needed. The recent decision in Robin Smith and Launceston City Council<sup>12</sup> provides guidance on s18(3) and attaches to it an example of Council best practice.

78 An alternative would be if Council is first able to negotiate with Mr Archer under s13(7) to refine his application. Doing so may require Council to make available to Mr Archer under s13(8) further general details of the relevant information in its possession beyond that provided by Mr Willis in his decision.

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<sup>12</sup> (April 2021) OI801-153 at [ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://ombudsman.tas.gov.au/right-to-information/reasons-for-decisions)

*Part 2 of the application – Credit card statements of the Mayor and General Manager for 11 months: Did Part 2 constitute a vexatious application for the purposes of s20(b) having regard to Guideline No. 2/2010 (the Guideline)?<sup>13</sup>*

- 79 For an application to be capable of being properly refused pursuant to s20(b), it must be vexatious or remain lacking in definition after negotiation entered into under section 13(7).<sup>14</sup> Here, Council refused Part 2 of the application as vexatious.
- 80 The Guideline commences its discussion of factors to be considered under s20(b) by noting an important point:
- the question for consideration under s20(b) is whether the application, not the applicant, is vexatious.*
- 81 The Act does not define the words *vexatious* or *vexatious application*. The Guideline therefore discusses the meaning of *vexatious* in the context of vexatious legal proceedings. The Guideline refers to the Macquarie Dictionary which defines *vexatious*, in the context of *vexatious proceedings* in litigation, to mean *instituted without sufficient grounds, and serving only to cause annoyance*.
- 82 The Guideline also cites s6 of the Vexatious Proceeding Act 2008 (NSW), which defines *vexatious proceedings* 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.*
- 83 Subsequent to the Guideline being published, the Vexatious Proceedings Act 2011 (Tas) was passed. It defines *vexatious proceedings* in identical terms to its NSW equivalent,<sup>15</sup> but does not further define *vexatious*. The Vexatious Proceedings Act 2011 (Tas) does not therefore, change the relevant considerations set out in the Guideline.
- 84 Under that Act the Supreme Court of Tasmania may make a *vexatious proceedings order* to prohibit a person from instituting proceedings.<sup>16</sup> To make such an order, the Court must be satisfied that a person has *frequently instituted or conducted vexatious proceedings in Australia*,<sup>17</sup> or, acting in concert with such a person, has

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<sup>13</sup> [Guideline 2/2010 - Guideline in relation to refusal of an application for assessed disclosure under the Right to Information Act 2009, s 20 - 1 July 2010 \(PDF, 1.4 MB\)](#) at [ombudsman.tas.gov.au/right-to-information/rti-publications](http://ombudsman.tas.gov.au/right-to-information/rti-publications). Copies of s20 and the Guideline are attached to this decision.

<sup>14</sup> Section 20(b). Section 13(7) provides that A public authority or a Minister may negotiate with an applicant to refine or redirect his or her application for assess disclosure of information.

<sup>15</sup> Vexatious Proceedings Act 2011 (Tas), s3.

<sup>16</sup> *Ibid*, s6(2).

<sup>17</sup> *Ibid*, s6(2)(a).

*instituted or conducted vexatious proceedings in Australia.<sup>18</sup> The Court must not make a vexatious proceeding order in relation to a person without giving them an opportunity to be heard.<sup>19</sup> These requirements are consistent with the Guideline’s conclusion that, *In view of the objects of the Act, the opinion that an application is vexatious should not be lightly reached.**

- 85 The Guideline sets out the factors to be considered when determining whether an application is vexatious for the purposes of s20(b). It provides that, in taking into account all the surrounding circumstances, the following two *specific factors should be considered*:
- (a) the Act’s object as set out in [s3](#); and
  - (b) whether the application might be refused under a more specific provision of the Act – if so, the more specific provision should be applied.
- 86 As to (a), the *object of the 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.<sup>20</sup>
- 87 The Guideline refers to additional factors which *may* potentially be considered, depending on the circumstances. The first of these factors, is (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.*
- 88 The other potentially relevant considerations, depending on the circumstances, are (continuing the Guideline’s numbering):
- (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.*

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<sup>18</sup> *Ibid*, s6(2)(b).

<sup>19</sup> *Ibid*, s6(4).

<sup>20</sup> Section 3(1).

*Council's application of s20 and the Guideline to Part 2 of Mr Archer's request for information (credit card statements of the Mayor and General Manager for 11 months)*

89 In his internal review decision, Mr Willis commenced his *Fresh Determination* in relation to Part 2 of Mr Archer's application by noting (by reference to more detail in the earlier decision) Council's *practice of having credit card statements reviewed by the audit panel on a regular basis*.

90 Mr Willis then referred to:

- (i) Guideline No. 2/2010;
- (ii) the definition of *vexatious proceedings* a including *proceedings instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose*;<sup>21</sup>
- (iii) when considering whether an application is "vexatious" within the terms of s.20(b) of the [Act], Guideline No. 2/2010 states that – depending upon the circumstances – factors for consideration may include "... whether the making of the application is part of a pattern or course of conduct by the applicant".

91 Mr Willis noted that,

*... Councillor Archer is subject to an investigation by the Local Government Office concerning leaking of confidential financial information provided to Councillors in closed sessions of Council.*

92 Mr Willis continued:

*I am aware that public disclosure of Council credit card details is a regular occurrence in the Mercury newspaper. It could therefore be argued that the motive for the request is public disclosure; and on that basis the request is not unusual. In the absence of context, it would be incorrect to conclude that public disclosure of credit card details would be a wrongful purpose.*

*However, taking into consideration the abovementioned investigation and my own observations of Councillor Archer's pattern of behaviour as a Councillor of Dorset Council, it would be unwise to accept that Councillor Archer's motives for requesting this information are, in any way, predicated upon advocating the public interest.*

93 Mr Willis then turned to the considerations contained in the Guideline as to:

- (i) *whether the making of the application is part of a pattern or course of conduct by the applicant and*
- (ii) *whether the proceedings have been instituted to harass or annoy.*

94 In regard to these considerations, he asserted:

*... there is overwhelming evidence that the application is indeed part of a sustained pattern of behaviour designed to annoy and harass both the Mayor and the General Manager of Dorset Council. This is a position shared by my fellow Directors. With regard to the Mayor, Councillor Archer*

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<sup>21</sup> Mr Willis citing s6 of the Vexatious Proceedings Act 2008 (NSW).

*has exhibited behaviour best described as a chronic propensity to agitate, provoke, insult and unsettle. The same predisposition has been also directed toward to the General Manager; and I understand that the Councillor is currently subject to a Code of Conduct complaint by the General Manager regarding bullying and harassment. I am of the understanding that the Local Government Code of Conduct Panel has conducted an initial assessment of the evidence provided and has determined the matter will proceed to a hearing. I have reviewed the evidence accompanying the code of conduct complaint and have spoken to other staff members and conclude that the application forms part of a pattern of inappropriate and intimidatory [sic] behaviour directed at the General Manager.*

95 Mr Willis then concluded:

*As per the original determination I am also of the opinion that the request is vexatious and is refused in accordance with Section 20 (b) of the Act.*

- 96 Mr Willis thereby focused his fresh determination through the lens of paragraph (b) of the statutory definition of *vexatious proceedings*<sup>22</sup> and the final factor in the Guideline:
- (e) *whether the making of the application is part of a pattern or course of conduct by the applicant.*
- 97 In doing so, however, Mr Willis gave insufficient regard to the terms of Part 2 of Mr Archer's *application* for information, it being the application rather than the *applicant*, which needs be vexatious to sustain refusal under s20(b).<sup>23</sup>
- 98 Council has not sent this office any information regarding the review, except that, as noted earlier, Mr Marik recently indicated that due to budget estimates and key staff absences, he would struggle to reply until early July 2021 to two questions this office posed to him regarding Part 1(c) of Mr Archer's application.
- 99 I do not know the outcome of, nor the reasons for, the Local Government Code of Conduct Panel's ultimate determination(s), such as whether it upheld against Mr Archer the *Code of Conduct complaint by the General Manager regarding bullying and harassment* on which Mr Willis relied in part. That might reinforce the reasoning of Mr Willis as to the sustained pattern of conduct he alleged by Mr Archer.
- 100 Even if Council's allegations against Mr Archer were correct, however, (which I cannot determine conclusively) they and the Guideline's final factor (e) are not sufficient reasons to refuse his request under s20(b), having regard to the following.

<sup>22</sup> See, eg. *Vexatious Proceedings Act 2008* (NSW), s6 and *Vexatious Proceedings Act 2011* (Tas), s3.

<sup>23</sup> As stated at the start of the Guideline's discussion of s20(b), *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.*

101 At a fundamental level, it is Part 2 of Mr Archer's *application*, particularly its substance and wording, on which my determination turns, as distinct from whether or not Mr Archer was a vexatious *applicant*.<sup>24</sup>

102 The Guideline's factors (a), (b), (c) and (d) do not support refusal under s20(b). I summarise my reasoning for that by reference to each of those factors.

(a) *the objects of the Act as stated in s3*

103 Mr Willis said, after referring to other relevant matters which he summarised from Mr Marik's second determination, that Council credit card statements [are] reviewed by the audit panel on a regular basis and there were no allegations of misuse of credit cards.

104 That notwithstanding, Mr Archer's application for the bank statements in relation to Council credit cards used by its Mayor and General Manager across 11 months is, on its face, far from vexatious. Rather, it seems quite consistent with the Act's object in s3 given that those are the leadership positions of, respectively, a council's elected governing body and its management staff.

105 Mr Archer had referred to the object of the Act in earlier correspondence to Council.

(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*

106 The Guideline required Council to turn its mind to whether the application might be refused under a more specific provision of the Act than s20. As in *Howlin*, Council did not do so in relation to Part 2 of Mr Archer's application before refusing it as vexatious on the basis of s20(b).

107 As noted in paragraph 87 above, the following considerations are relevant to a determination in this regard:

- (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.*

The wording of Part 2 of Mr Archer's application was none of these – rather, it was clear and concise, and confined to Council credit card statements of the Mayor and General Manager for a specified 11 month period.

(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*

108 Mr Archer's purpose in seeking the information was, insofar as is apparent from the nature of the information sought, related to accountability. His stated

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<sup>24</sup> *Ibid.*

purpose in correspondence to Council for seeking it under the Act, rather than through the audit panel papers given the restrictions on publishing information thereby obtained, was, in essence, to enable accountability. Accountability is consistent with the objects of the Act for the reasons set out under factor (a) above.

109 Mr Willis, in the extract of his reasons at paragraph 92 above, acknowledged the legitimacy of Mr Archer's stated purpose in seeking the information but went on to make the comments referring to an investigation.

110 The *investigation* Mr Willis had alleged was, *that Councillor Archer is subject to an investigation by the Local Government Office concerning leaking of confidential financial information provided to Councillors in closed sessions of Council*. Mr Willis thereby imputed to Mr Archer a motive different to his stated purpose in seeking the information.

111 In my view, Council has not discharged its onus under s47(4) to show that the information sought by Mr Archer should not be disclosed, including in regard to factor (d) of the Guideline. Mr Archer's stated purpose in seeking the information responsive to Part 2 of his application was consistent with the object of the Act. Council has not satisfied me that Mr Archer's actual purpose differed significantly from his stated purpose. Hence, factor (d) counts against the application being vexatious.

112 In summary, Council gave insufficient consideration to Part 2 of Mr Archer's application and the substance of the information sought, before concluding that it was vexatious under s20(b). In refusing Part 2 of application, Council overly relied on the Guideline's factors:

- (d) incorrectly, in my view; and
- (e) based on the sustained pattern of conduct it alleged of the applicant.

113 Council did not sufficiently consider the Guideline's other relevant factors or s3, which mitigated against use of s20(b) to refuse the application.

#### *Latest Ombudsman decision regarding s20(b)*

114 This office most recently considered an allegedly vexatious application for information in the decision of *Howlin and Clarence City Council*.<sup>25</sup> Mr Howlin had a long standing and ongoing dispute with the Clarence City Council regarding his property and responsibility for the road to it, which that Council said was a private road and not its responsibility.

115 So the dispute, and Mr Howlin's associated applications for information, concerned his private property-related interests. By contrast, Mr Archer's application does not seek information concerning his private interests. Rather, the information sought is consistent with his stated public purpose; and the Act's object, particularly in terms of accountability.

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<sup>25</sup> (February 2021) O1710-077 at [ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://ombudsman.tas.gov.au/right-to-information/reasons-for-decisions)

I116 The dispute in *Howlin* included appeals from the Resource Management and Planning Appeal Tribunal to the Supreme Court of Tasmania. Mr Howlin refused to accept the Court's decision, a refusal which could have been considered vexatious. Yet that did not suffice to make his application a vexatious one.

I117 Aspects of Mr Howlin's conduct such as noted above made the case for refusal of his application under s20(b) more compelling than it is for Mr Archer's application. Nevertheless, this office did not accept Clarence City Council's arguments that Mr Howlin's application was a vexatious one under s20(b).

I118 The following extract from the *Howlin* decision is apposite to the present case:

[37] *It would seem that Council considered the conduct of the applicant when concluding that the application is a vexatious one, rather than the application itself. I appreciate that Council might have experienced some frustration in its dealings with Mr Howlin, which have been substantial and protracted, but that is not a valid reason to refuse his request under s20(b), especially having regard to the objects of the Act referred to above.*

[38] *I note the third consideration in the guideline requires Council to turn its mind to whether the application might be refused under a more specific provision, which it has not done.*

[39] *I am not satisfied s20(b) applies in this matter, and Council cannot refuse to provide Mr Howlin with information responsive to his request relying on that provision.<sup>26</sup>*

I119 Similarly, I am not satisfied that s20(b) applies in this matter.

### Preliminary conclusion

I20 For the reasons given earlier, I have no jurisdiction to review Council's decision to refuse under s12(3)(c)(i) what I have referred to as Parts 1(a) and 1(b) of Mr Archer's application, in my consideration of the decision of Mr Willis.

I21 For the reasons given earlier, Council is to re-assess, specifically by reference to s18(3), the component of Mr Archer's application I refer to as Part 1(c).

I22 For the reasons given above, I determine that s20(b) does not apply to Mr Archer's application and Part 2 of it cannot be refused relying on that provision.

I23 Consequently, this matter is returned to Council. I direct it to re-assess the information sought in Part 1(c) and Part 2 of Mr Archer's application in accordance with the provisions of the Act.

I24 I apologise to the applicant for the length of time taken to finalise this decision.

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<sup>26</sup> *Ibid*, paragraphs [37]-[39].

## **Submissions to the preliminary conclusion**

- I25 The above preliminary decision was adverse to Council. Hence, a copy was forwarded to its General Manager seeking input before finalising the decision, as required by s48(1)(a).
- I26 On 15 June 2021 the General Manager replied, advising most co-operatively that Council did not intend making any comment on the preliminary decision.

## **Conclusion**

- I27 For the reasons given earlier, I determine the following.
- I28 I have no jurisdiction to review Council's decision to refuse under s12(3)(c)(i) what I have referred to as Parts 1(a) and 1(b) of Mr Archer's application, in my consideration of the decision of Mr Willis.
- I29 Council is to re-assess, specifically by reference to s18(3), the component of Mr Archer's application I refer to as Part 1(c).
- I30 I determine that s20(b) does not apply to Mr Archer's application and Part 2 of it cannot be refused relying on that provision.
- I31 Consequently, this matter is returned to Council. I direct it to re-assess the information sought in Part 1(c) and Part 2 of Mr Archer's application in accordance with the provisions of the Act.
- I32 I apologise to the applicant for the length of time taken to finalise this decision.

**Dated: 17 June 2021**

**Richard Connock  
Ombudsman**

## **Section 12 – Information to be provided apart from the Act**

- (1) This Act does not prevent and is not intended to discourage a public authority or a Minister from publishing or providing information (including exempt information), otherwise than as required by this Act.
- (2) Subject to guidelines issued by the Ombudsman under section 49, public authorities or Ministers may disclose information to the public as –
  - (a) a required disclosure; or
  - (b) a routine disclosure; or
  - (c) an active disclosure; or
  - (d) an assessed disclosure.
- (3) Assessed disclosure is the method of disclosure of last resort and –
  - (a) the principal officer of a public authority is to ensure that there are adequate processes in place in the public authority to ensure that there is appropriate active disclosure, routine disclosure or required disclosure of information by the public authority; and
  - (b) the principal officer of a public authority is to ensure that the processes in place under paragraph (a) comply with the guidelines issued by the Ombudsman under section 49; and
  - (c) the principal officer of a public authority or a Minister may refuse an application made in accordance with section 13 if the information that is the subject of the application –
    - (i) is otherwise available; or
    - (ii) will become available, in accordance with a decision that was made before receipt of the application, as a required disclosure or routine disclosure within a period of time specified by the public authority or Minister but not exceeding 12 months from the date of the application.

## **Section 20 – Repeat or vexatious applications**

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.

### **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) – see s 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.

**Simon Allston  
Ombudsman**

Date of first issue of Guideline: 1 July 2010

**OMBUDSMAN TASMANIA  
DECISION**

**Right to Information Act Review**

**Case Reference: O1610-065**

**Names of Parties:** Mr Patrick Billings and Department of Justice

**Reasons for decision:** s48(3)

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

**Background**

- 1 On 5 August 2016, Mr Patrick Billings a journalist with The Mercury, made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the Department of Justice.
- 2 The application sought information about prisoners who had been released before the expiration of their sentences. Specifically, Mr Billings requested:

*Details about all incorrectly released prisoners over the last 2 years, including gender, age, the offence they were being held in custody for, correct release date, date they were incorrectly released on, reason why they were incorrectly released, any correspondence relating to their incorrect release date, when they were returned to custody, any daily Risdon Prison summaries relating to incorrectly released prisoners, any Risdon Prison staff briefing relating to incorrectly released prisoners.*
- 3 On 2 September 2016, Ms Rhiannon Garth, a delegated officer, released a decision to the applicant. It claimed the information to be partially exempt under s36 on the basis that it contained the personal information of another person. The Department determined the information responsive to the request related to seven prisoners and released some information including:
  - 3.1 the gender and age of each prisoner;
  - 3.2 the date of early or late release;
  - 3.3 the correct earliest release date;
  - 3.4 the date each prisoner was returned to custody; and
  - 3.5 the Tasmania Prison Service's assessment of how the errors were made;but claimed as exempt information relating to the offences committed by those prisoners.
- 4 On 8 September 2016, the Applicant sought an internal review of the decision to exempt the information and on 30 September 2016, Mr Simon Overland, the then Secretary of the Department and therefore its principal officer, released an internal review decision to the applicant. Like the original decision, it determined that the

information was exempt under s36 on the basis that it was the personal information of another person.

- 5 On 10 October 2016, the applicant sought an external review by my office.

### **Issues for Determination**

- 6 The Department relied on s36 to partially exempt information on the grounds that if released it would make the individual prisoners' identity apparent or reasonably ascertainable. I must determine whether this is so.
- 7 As s36 is in Division 2 of Part 3 of the Act, should I determine the information is the personal information of another person, it is only exempt if it would be contrary to the public interest to release it having regard to, at least, those matters contained in Schedule 1.

### **Relevant legislation**

- 8 The Department has relied on s36. I have attached a copy of s36 to this decision. A copy of Schedule 1 has also been attached.

### **Submissions**

- 9 The applicant narrowed the scope of his request to the particular offences committed by the seven subject prisoners.
- 10 The applicant claims the release of this information is unlikely to identify an individual prisoner, and he asserts that even if it did, the information is publicly available through court reports. Specifically, he said:

*I would ask the offences committed by the inmates be disclosed as they are unlikely to identify the offenders unless they were particularly rare crimes. If this is the case, I would point out that their convictions are already on the public record, albeit unknown to me, given they would have been sentenced in an open court.*

- 11 Further, the applicant asserted:

*The operation of Tasmania's correction system is of strong public interest given it involves public safety, the deprivation of liberty of inmates, considerable public expenditure and in this case the information sought relates to the management of the prison system.*

- 12 The Department responded by saying that, despite a prisoner having committed a crime, they were still entitled to the right to privacy and the release of the offence committed in combination with the other information already released, may reasonably lead to the identification of an individual. Specifically, it submitted:

*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 give significant weight to ... whether the disclosure would promote or harm the interest of an individual or a group of individuals. I consider that if the identities of these individuals were to become public knowledge, those*

*persons could suffer unwanted attention or vigilantism from other members of the public. Additionally, the release of this information may cause undue stress to their victims.*

I3 The Department by its Secretary further submitted:

*I do note that it is the consistent practice of the Department not to release any information ... which may identify a prisoner or a former prisoner. We consider this a prudent practice, having regard to the sensitivities concerning victims of crime, and the Department's obligations as a personal information custodian more broadly.*

*While we acknowledge that there is often a prurient interest in factors which may potentially identify prisoners – including the offences for which they have been found guilty – it is our view that this does not equate to a genuine public interest in the release of the information.*

## **Analysis**

### **Section 36**

- I4 For information to be exempt under s36, it must contain the personal information of a person other than the person making an application under s13.
- I5 The Act, at s5, defines personal information as *any information or opinion in any recorded format about an individual whose identity is apparent or reasonably ascertainable from the information and opinion and the person is alive, or has been dead less than 25 years.*
- I6 I am satisfied that if information of the offence committed were to be made available, read in conjunction with the information already released, the identities of some of the individuals could be reasonably ascertainable.
- I7 A person with sufficient inclination could use court records and other investigative means to identify some of the prisoners mentioned in the application for assessed disclosure.
- I8 I am satisfied s36 can be applied to the information relating to the offences committed by each individual in question. Before the information can be confirmed as exempt, however, the public interest test must be addressed as required by s33(3).

### **Public Interest Test**

- I9 The Department submitted that the release of the information could reasonably lead to a significant threat to the individual prisoners, and potentially any victim's health, safety or welfare. I agree.
- I20 The applicant has claimed the information should be released as the mistakes by the Tasmanian Prison Service amount to a serious threat to public safety. While I acknowledge the applicant's claim in this regard, I have to consider, in the context of a potential serious threat, whether release of the redacted information would cause, contribute to, or exacerbate it.

- 21 The core information that would be of relevant concern to the public and the possibility of a serious threat to safety is the fact that mistakes were made, why they were made and when they were remedied. That information has already been released. I can see no inherent public interest in releasing information concerning the offence committed by each individual prisoner. The offence committed was not a consideration when the erroneous decisions to release those prisoners were made.
- 22 I am inclined to the view expressed by the Department that any desire on the part of members of the public to know the offences committed by the subject prisoners is less to do with the public interest and more to do with curiosity.
- 23 In this regard, 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 some members of the public might be interested in a certain activity or particular thing will not necessarily lead to the conclusion that disclosure of documents relating to it will be in the public interest.<sup>1</sup> In this instance I am not persuaded that it would be in the public interest to release the information, rather, when weighing relevant factors I conclude that its release would not be in the public interest.
- 24 When considering the matters contained in Schedule 1 of the Act, I find matters (a) and (b) in favour of release, and (h), (i), and (m) in favour of exemption.
- 25 In favour of release, there is a need for this sort of information to be made available to the public (a) as it may well contribute to a debate on a matter of broader public interest, namely the management of prisons and prisoners (b).
- 26 It might be thought that the information is tied to the government's decision-making (f) and administrative processes (g), and that its release would enhance scrutiny of those processes. As noted, however, the offences committed by the prisoners were not factors in the decisions to release them from custody; the information was not part of the decision-making or administrative process.
- 27 When considering those matters militating against release, publishing information that could lead to the identification of a prisoner, despite what wrongs they may have committed, would hinder equity and fair treatment (h).
- 28 In relation to the issue of public safety, the information that promotes public safety has already been released. To release the additional information has the potential to harm public safety (i) by introducing an element of fear into the community.
- 29 To release the information that may lead to identification of an individual or group and impinge on their privacy, could reasonably be anticipated to cause that individual or group harm (m). This is equally so in the case of both offenders and victims.
- 30 On balance, I find the information is exempt and that it is not in the public interest to release it.

<sup>1</sup>Re Public Interest Advocacy Centre and Department of Community Services and Health (No 2) (1991) 14 AAR 180 at 187; Re Angel and Department of Arts, Heritage and Environment (1985) 9 ALD 113

## Preliminary Conclusion

- 31 The information concerning crimes of the individual prisoners is exempt under s36 and is not in the public interest to release it.

## Submissions to Preliminary Conclusion

- 32 No submission was received from the Department.
- 33 Mr Billings did make a submission, however, and focussed on two primary points: the meaning of personal information for the purposes of s36; and the public interest test.
- 34 He submits that the test for determining whether information is personal information or not is whether the identity of the person to whom the information relates is apparent or *reasonably* ascertainable from that information, not ascertainable *per se*. Specifically, he submitted:

*The identity of the inmates in question could arguably be ascertainable from the information sought. However, I submit it is not “reasonably” ascertainable.*

*Anybody seeking to identify the inmates based on the information sought and the information already released would need to go to extraordinary lengths to do so. Even then it is less than likely they would succeed.*

*The person seeking their identity would have to trawl through every sentence related to that crime. A laborious and unreliable process of cross checking known-information would then have to be conducted. The inmate’s age – which has been disclosed – is an unreliable indictor because it does not match their age when sentenced.*

- 35 The applicant also submitted that guidance could be derived from other sources, including: s194K of the Evidence Act 2001; the decisions in *Scholes v AFP (1996) AATA 347* and *Salem Subramanian and Refugee Review Tribunal (1997) AATA 31*; and the Guidelines published by the Office of the Australian Information Commissioner in relation to the equivalent to s36 in the Freedom of Information Act 1982 (Cth).
- 36 Broadly speaking, s194K of the Evidence Act prohibits the publication, without court order, of any information that might lead to the identification of victims of certain, primarily sexual offences, or, in relation to those offences, the identification of witnesses other than the defendant. Mr Baines submits that it provides a clear indication of how the courts are required to deal with issues of identification, at least in certain cases. Specifically, he says:

*I believe it is relevant to consider the practice of the Supreme Court when considering what information, if released, could lead to the identifying of an inmate. Tasmania is governed by section 194k of the Evidence Act which prohibits the publishing information that could identify victims of sexual offences. This frequently means the identity of the defendants/inmates can not be published because this would in turn identify the victim.*

*As a consequence the court publishes de-identified sentencing remarks, relevantly however these documents still contain ages, nominal release dates and offences committed.*

*This clearly demonstrates that releasing the combined details of age, release dates and crimes committed do not identify an inmate and is therefore not personal information. If it were, the courts and news outlets that report on their sentencing remarks would be consistently breaching the Evidence Act.*

- 37 As to the public interest test, Mr Billings submits that, even if the information is considered personal information under s36, the matters favouring release outweigh those supporting its exemption.
- 38 He submits that, while the matters in Schedule 1(a) and (b) do support release, he also contends that matters (d), (f), (g), and (i) also favour release.

### **Further Analysis**

- 39 Mr Billings' submission concerning the Evidence Act has some force. While s194K of that Act has no direct application here, the court's practice of releasing redacted remarks on sentencing containing details of the offence but not the identity of the offender would clearly seem to indicate that, by doing so, it considers that it is compliant with the Act; the offender cannot be identified – even though his or her offence is known - and nor therefore, can the victim. It should be remembered, however, that s194K relates to a discrete cohort of cases.
- 40 When considering this in combination with Mr Billings' point regarding identity and the distinction between the identities of offenders being ascertainable or *reasonably* ascertainable, again the argument has some force in respect of some cases. While the Evidence Act does not use the phrase *personal information*, but rather prohibits the publication of *the name, address, or any other reference or allusion likely to lead to the identification* of a victim or witness, the approach taken by the court manages to avoid identifying victims by not identifying perpetrators, while at the same time publishing details of the offence committed and other information, such as ages.
- 41 In those circumstances, it would seem that the court does not consider that the offence committed constitutes *any other reference or allusion likely to lead to the identification* of a person. It is important to note that any consideration here of the Evidence Act is merely to – if appropriate - inform my decision on this review and it is not for this Office to determine whether it has been breached or not. How the same or similar information is dealt with in another place with the same basic objective of protecting personal information, however, may give some guidance as to how the review might be determined.
- 42 I reiterate that s194K applies only to a discrete category of case, where decisions and sentencing remarks need to be redacted. That is not the case here and indeed, sentencing remarks are frequently not published at all. The Magistrates Court, for example, does not typically publish all its decisions or comments on sentencing. The Supreme Court, mostly does publish.
- 43 I consider that a different approach should be taken where decisions and/or sentencing remarks have been published in an unredacted form to those where

publication has been redacted or has not occurred at all. In relation to the former, personal information being the identity of the offender would be reasonably ascertainable by searching information already available, and they are therefore exempt under s36, pending consideration of the public interest test. I determine in relation to the latter, where while it might be possible to identify the offender if the person seeking the information is industrious and persistent enough, the offender's identity is not *reasonably* ascertainable and details of the offence committed should be released to Mr Billings as requested.

#### *Public Interest Test*

- 44 I stand by my reasoning in the preliminary decision, as set out above, for the information I have determined to be exempt pursuant to s36. I will, however, consider further those matters in Schedule 1 that Mr Billings has raised.
- 45 In his submission to the preliminary decision, Mr Billings said that, in his view, matters (d), (f), (g), and (i) also favour release.
- 46 Matters (d) and (f) relate to government decisions and its decision-making processes and do not apply here.
- 47 Mr Billings suggests that the offence committed by a prisoner is an important factor in the timing of a prisoner's release. I agree, it would play a significant role in the Parole Board's considerations. That is not, however, what is under review here.
- 48 The application for assessed disclosure related to prisoners who were accidentally released. Based on the information already provided to Mr Billings, it is clear the releases were due to human error. Knowing the crime of the prisoner in this regard would not inform the reason for a decision or aid in the understanding of decision-making processes as it was not the crime that played relevant in this specific matter, rather it was the miscalculation of time and other human errors.
- 49 In relation to (g) and (f), I do not find these matters applicable in that this was not an issue relating to government decision-making, rather, it was a human error in the calculation of release dates, which upon realisation, were corrected.
- 50 For the reasons set out above for (d), in general terms, a mistake of this nature would find strong support for release from (g), however, this matter is specifically looking at the context of the crime of each prisoner released. Releasing the crime will not aid in government administrative processes because the crime did not bear any weight on the nature of the mistakes being made. If the request sought emails or briefing notes about *how these mistakes were made*, it would be a completely different argument.
- 51 The other matter raised by Mr Billings was (i). Matter (i) is whether the disclosure would promote or harm public health or safety or both public health and safety. This matter was relied on to exempt the information in the preliminary decision, however, I will consider it also for a factor in favour of release as submitted.
- 52 Mr Billings argues that release of the crimes would promote public safety as it would help the public keep pressure on the government not to let this happen again.

- 53 I respectfully disagree that this is a relevant consideration in relation to matter (i). Public safety, as discussed in the preliminary decision, is not determined on the crime committed. Consideration of public safety in this instance was that prisoners were released early, which has been rectified. The Government, in my view, would not determine how seriously it should take an incident like this based on how much public dissent it generated. I am confident that, even if this issue had not been made public in the first instance, the Department would have addressed it with the same rigour and rectified the mistake.
- 54 I find, on balance, that the public interest test supports exemption of the information identified above.

## **Conclusion**

- 55 Information in relation to those offences where a decision or comments on passing sentence have been published, the release of which would lead to the identity of the persons who committed them being reasonably ascertainable based on the information already released, is exempt.
- 56 Information concerning those offences where a decision or comments on passing sentence have not been published and which do not render the identity of the offenders reasonably ascertainable is not exempt and should be released to Mr Billings.

**Dated:** 7 February 2020

**Richard Connock**  
**OMBUDSMAN**

## **Addendum**

The Department wrote to me on 11 February 2020 to raise concerns that my final decision differed from the draft on which it provided input and was adverse to the Department. It sought to make submissions and for me to reconsider my decision, as it had not been given the opportunity to provide input on an adverse decision, as required under s48(1)(a) of the Act. I am only permitted to reconsider a finalised decision to correct an accidental mistake or omission, but I consider that this is the case here and I agreed to reconsider my decision. I apologise to the parties for my delay in finalising this reconsideration.

The Department made submissions opposing the release of any offence information, maintaining its position that this should be exempt pursuant to s36. I will not restate or analyse the submissions made regarding information in relation to offences where a decision or comments on passing sentence have been published, as I have already found this information to be exempt for the reasons detailed in my original decision.

The Department made the following submissions in relation to my conclusions and separation of the information into two categories:

*The Department is concerned that, while this methodology might be suitable for making individual decisions regarding whether to disclose offence information, it is nevertheless deficient when considering the list as a whole. Specifically, a decision to publish details of some charges, and not others, might of itself also give clues to ascertain the identity of an offender.*

*If details of a charge are not disclosed, one might conclude either:*

- there were no sentencing remarks; or*
- there were sentencing remarks but the offence was unusual or notorious.*

*This might lead to the identity of an offender to be ascertained from the information extracted from the sentencing remarks database...*

*Consequently, the Department believes that the only way to avoid such a situation is to publish none of the charge information as to publish even some could lead to the identity of the offenders being ascertained.*

*In this regard, it might be argued that paragraphs 55 and 56 of the Ombudsman's decision, by their form and content, indirectly reveal potentially exempt information.*

I do not agree with the Department's conclusions or that exempt information was revealed by my original decision. While it is true that the fact that no offence information would be released in relation to four prisoners provides a small amount of additional information, I do not consider this to be significant or that it renders their identity reasonably ascertainable. I stand by my reasoning that the appropriate balance has been struck between exempting information by which the prisoner's identity is reasonably ascertainable and releasing that from which it would be very difficult for their identity to be discerned.

I apologise for the oversight in not seeking the Department's input on the final version of my original decision, but do not consider that the decision requires amendment beyond the insertion of this addendum. The Department is to release offence information regarding the three prisoners released in error about whom no sentencing remarks or published decision could be located to Mr Billings as soon as is practicable.

**Dated:** 4 November 2021

**Richard Connock  
OMBUDSMAN**

## **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.

#### **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:** R2202-

**060 Names of Parties:** Professor Michael Rowan and Kingborough

**Council Reasons for decision:** s48(3)

**Provisions considered:** s35

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### **Background**

- 1 Municipal councils have responsibility for the initial approval of building work and for compliance and enforcement action relating to unapproved work under the *Building Act 2016*. Professor Michael Rowan is the co-owner of a property in Birches Bay, in the Kingborough municipal area. A fire safety bunker has been installed at the property and the Kingborough Council (Council) has been pursuing compliance action on the basis that proper approvals for the bunker were not obtained.
- 2 On 3 December 2021, Professor Rowan made an application for assessed disclosure to Council under the *Right to Information Act 2009* (the Act), seeking information regarding the approval of a wildfire safety bunker at his property. Specifically, he sought:
  1. *All correspondence including records of phone conversations or logs of phone calls and records of meetings between the Kingborough Council and any other organization relating to the approval of installations of personal bushfire shelters in Tasmania in general*
  2. *All correspondence including records of phone conversations or logs of phone calls and records of meetings between the Kingborough Council and any other organization relating to the approval of installations of the Wildfire Safety Bunker in Tasmania in particular*
  3. *All correspondence including records of phone conversations or logs of phone calls and records of meetings between the Kingborough Council and any other organization relating to the installation of the Wildfire Safety Bunker at my address...*
- 3 On 31 December 2021, a decision was released to Professor Rowan by Mr Fred Moult of Council, a delegated officer under the Act. Mr Moult indicated that Council had located two documents responsive only to Items 1 and 2 of Professor Rowan's request, and a further nine which were primarily relevant to Item 3 of the request. These documents were released to Professor Rowan, with some of the information redacted as exempt information under s35 on the basis that it was internal deliberative information.

- 4 As s35 is contained in Division 2 of Part 3 of the Act, it subject to the public interest test in s33. This means that if a public authority finds information *prima facie* exempt under this section, it must then consider all the matters in Schedule 1 of the Act in determining whether it is contrary to the public interest to disclose it. Mr Moult stated that the primary public interest matter which had been relied upon was (v) in Schedule 1 of the Act – whether the information is extraneous or additional information provided by an external party that was not required to be provided. A small amount of information was also redacted pursuant to s36 as personal information of a person other than the applicant.
- 5 On 7 January 2022, Professor Rowan sought internal review of Mr Moult's decision. On 21 January 2022, Mr Gary Arnold, Council's Principal Officer for the purposes of the Act, released an internal review decision which disclosed some additional information but otherwise affirmed the original decision. Mr Arnold provided some additional reasoning in relation to information exempted under s35(1)(b) on page 8 of the redacted documents<sup>1</sup>, indicating as follows:

*However, for the remainder of the redacted information, upon review, I find that matter (u) whether the information is wrong or inaccurate also applies when considering if disclosure is in the public interest, as the remainder of the first sentence contains unconfirmed anecdotal information, and the second sentence is the subjective opinion of the officer and not necessarily factual.*

- 6 On 28 January 2022, Professor Rowan sought external review of the Council's decisions. He confined his request as follows:

*My request for you to review the information provided to me relates to just one part of the information I sought...specifically, I ask you to consider Document 03 of Mr Moult's response to my RTI...*

- 7 Professor Rowan's request for external review was accepted under s44 of the Act on the basis that he was in receipt of an internal review decision and his application for external review was submitted within 20 working days after receiving that decision. The relevant fee had been paid.
- 8 Professor Rowan made an application under my office's Priority Policy for expedited processing of his external review, indicating that Council enforcement action was imminent and that the information may be significant in relation to his defence of such action. Due to this and the confined nature of the review application, his request was approved on 30 March 2022.

### **Issues for Determination**

- 9 I must determine whether the information in question is eligible for exemption under s35 or any other relevant section of the Act.

<sup>1</sup> Also referred to as Document 03 – TFS and Council regarding approval status of installed shelters Redacted, which comprises pages 6-13 of the bundle of redacted information.

- 10 As s35 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 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**

- 11 Council has relied on s35 only to exempt the relevant information. I attach a copy of this section to this decision at Attachment 1.
- 12 Copies of s33 and Schedule 1 of the Act are also attached.

### **Submissions**

- 13 On 28 January 2022, Professor Rowan provided the following submissions in support of his application for external review:

*I ask you to consider Document 03 of Mr Moult's response to my RTI..., which, as you will see...is redacted. Mr Moult stated that this redaction was justified by s35(!)(b) of the RTI Act 2009. If I understand his reasoning correctly, Mr Moult held that this section applied on the basis that the redacted sentences did not contain purely factual information in virtue of their expressing, as described in Schedule(!)(v) of the Act, 'extraneous or additional information provided by an external party that was not required to be provided'.*

...

*As is plain from the context, the sentences I am seeking contain opinion or anecdote that is specifically about me or my wife, Ms Wendy Edwards, or our installation of a Wildfire Safety Bunker, which will be directly relevant to understanding the Council's singular and dogged pursuit of our installation of the bunker as an offence against the Building Act 2016. If my inference here is correct, I do not see how the release of these sentences could be contrary to the public interest, and I believe they will be helpful to my private interest. Their release may, of course, be contrary to the private interests of the KCC's Mr Andy D'Crus, but only insofar as they may show that he has not upheld the KCC Customer Service Charter, and indeed to the private interests of Mr Arnold, who has already rejected a complaint from me concerning Mr D'Crus [sic] performance in relation to his pursuit of Ms Edwards and myself in relation to the installation of our bushfire shelter.*

*The release of this information, will, I expect, contribute to improving the standard of Tasmanian public administration, inasmuch as it will provide me with an opportunity to correct information which, in the judgement of Mr Arnold is 'wrong or inaccurate', but which is nonetheless held by the Permit Authority of the KCC to whom I expect we will shortly be apply for a Permit of Substantial Compliance for our bushfire shelter.*

- 14 The Council did not provide submissions beyond the reasoning for its original and internal review decisions, which relevantly included:

*Regarding information redacted under section 35(1)(b) of the act in item 03, TFS and Council regarding approval status of installed shelters\_Redacted (PDF attachment), the reasoning given in the initial RTI response relied on s35(1)(b) and matter “(v) whether the information is extraneous .....” in considering if the disclosure of the highlighted information would be contrary to the public interest.*

*Upon review I find that the first part of the sentence which was redacted: “We have issued a Building Order for this one...” should be released because it is purely factual – s35(2) Subsection (1) does not include purely factual information. Amended redacted document attached.*

*However, for the remainder of the redacted information, upon review, I find that matter (u) whether the information is wrong or inaccurate also applies when considering if the disclosure is in the public interest, as the remainder of the first sentence contains unconfirmed anecdotal information, and the second sentence is the subjective opinion of an officer and not necessarily factual.*

## **Analysis**

- 15 Council relied upon s35(1)(b) to exempt the information at issue in this external review.
- 16 For information to be exempt under this section, I must be satisfied that it consists of a record of consultations or deliberations between officers of public authorities.
- 17 If I find that this is the case, I must then determine whether the information was prepared or recorded in the course of, or for the purpose of, the deliberative processes related to the official business of Council.
- 18 The outlined exemption above does not apply to the following:
- purely factual information<sup>2</sup>;
  - a final decision, order or ruling given in the exercise of an adjudicative function<sup>3</sup>; or
  - information that is older than 10 years.<sup>4</sup>
- 19 As to the meaning of ‘purely factual information’ in s35(2), I refer to *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*<sup>5</sup> where the Commonwealth Administrative Appeals Tribunal (AAT) observed that the

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<sup>2</sup> Section 35(2).

<sup>3</sup> Section 35(3).

<sup>4</sup> Section 35(4).

<sup>5</sup> *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at 14.

word 'purely' in this context has the sense of 'simply' or 'merely' and that the material must be 'factual' in quite unambiguous terms.

- 20 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'.<sup>6</sup>
- 21 The information in question is part of an email dated 11 September 2020, between Mr Andy D'Crus of Council and an officer of the Tasmania Fire Service (TFS) regarding bushfire shelters at Professor Rowan's property and another Kingborough property.
- 22 I am unable to agree with Council that the email is a record of consultations between officers of public authorities in the course of a deliberative process. The TFS officer has an interest in the matter from a fire safety perspective, but the information claimed to be exempt does not appear to evidence any deliberations regarding potential building compliance action or enforcement required regarding bushfire shelters. No other information has been claimed by Council to be exempt under s35 during the interaction and the redacted material is more incidental commentary, consisting of an update on the current situation made from 'anecdotal evidence' and a statement of opinion from Mr D'Crus, rather than anything deliberative. Section 35 is not intended to cover all communications between public officers and is not applicable when extraneous or additional comments, which are not actually consultative or deliberative, are provided by a public officer.
- 23 Accordingly, I am not satisfied that Council has discharged its onus under s47(4) of the Act to show that s35 is applicable and that this information should not be disclosed.

### **Preliminary Conclusion**

- 24 For the reasons given above, I determine that the exemption claimed by Council under s35 is not made out. The email dated 11 September 2020 from Mr D'Crus of Council should be released in full to the applicant.

### **Conclusion**

- 25 As the above preliminary decision was adverse to Council, it was made available to Council on 24 May 2022 under s48(1)(a) to seek its input before finalising the decision.
- 26 Council advised on 25 May 2022 that it would not be making any submissions in response to the preliminary decision.

<sup>6</sup> *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.

27        Accordingly, for the reasons given above, I determine that the exemption claimed by Council under s35 is not made out. The information claimed to be exempt pursuant to s35 in the email dated 11 September 2020 from Mr D'Crus of Council should be released in full to the applicant.

**Dated:** 25 May 2022

**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.
- 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.

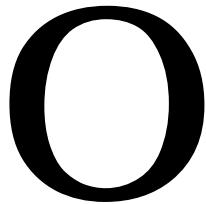
### **SCHEDULE I - Matters Relevant to Assessment of Public Interest**

Sections 30(3) and 33(2)

- (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: O 1706-057**

**Names of Parties:** Hon Rebecca White MP and the Minister for Resources, Minister for Building and Construction, Hon Guy Barnett MP

**Reasons for decision:** s48( I )(b)

**Exemption provisions considered:** s27, s30, s35, s36

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**Background**

- I The Hon Guy Barnett MP was sworn into Cabinet in 2016, partway through the term of the government following the resignation of a previous Minister. As a result, Minister Barnett received four incoming ministerial briefings dated July 2016 from the Department of State Growth and the Department of Justice. These briefings addressed (then) topical issues related to the Minister's newly acquired portfolio areas.
- 2 On 11 April 2017, the Hon Rebecca White MP, Tasmanian Labor Leader and Leader of the Opposition, applied under the *Right to Information Act 2009* for assessed disclosure of 'Any information contained in the incoming ministerial briefs for Minister Barnett.'
- 3 Minister Barnett released a decision to Ms White on 12 May 2017. He accepted a request by her to waive the fee, pursuant to s 16(2)(b) on the basis that she was a Member of Parliament acting in connection with her official duty, but decided not to release any of the information requested.
- 4 The Minister's Statement of Reasons for his decision noted that he had decided to withhold the requested information on the basis that it was exempt:
  - pursuant to s27 as internal briefing information of a Minister; and
  - pursuant to s35 as internal deliberative information.
- 5 The decision set out the terms of both these exemption provisions, listed the required elements and recorded that the Minister was of the view that those elements applied. The decision did not, however, specify which section applied to which parts of the information.
- 6 Ms White requested an external review of the Minister's decision under section 45(1)(a) of the Act. This office accepted Ms White's request to conduct a review. It was submitted to the office within the required 20 working days and,

as the decision was made directly by the Minister, I have the power to review it without internal review: s45(1)(a).

## Issues for Determination

- 7 There are three issues for determination:
- (a) *Is any of the information exempt on the basis that it is internal briefing information of a Minister under s27?*
  - ( ) *Is any information exempt on the basis that it is internal deliberative information under s35?*
  - (a) *Is any remaining information exempt under any other section of the*

## Act? Relevant legislation

- 8 As noted, the Minister relied on sections 27 and 35. I attach copies of these sections to this decision. If s35 is found to apply, because it is in Division 2 of Part 3 of the Act, it is subject to the public interest test contained in s33 and the matters in Schedule I will need to be considered.
- 9 A copy of Schedule I is also attached to this decision.

## Minister's Decision

- 10 In summary, the Minister decided that all the information responsive to the request was exempt and any factual information contained in the briefs could be located by other means such as departmental websites and annual reports. The Minister noted Ms White was not entitled to 'information that is otherwise available', consistent with the heading of s9.
- II For the information claimed to be exempt under s35, the Minister argued that the public interest in protecting the deliberative process was more important in this case than releasing the information. He suggested that the information 'by its very nature, is speculative, preliminary, and may be deliberately provocative.'
- 12 The Minister also argued that releasing the information would undermine the confidence of officers in the deliberative process, and be reasonably likely to prejudice the ability to obtain similar information in the future.

## Applicant's Submissions

- 13 Ms White rejected the Minister's claim that all the information responsive to her request was exempt.
- 14 She submitted that the Minister had made sweeping decisions to exempt information under s27 and s35 by incorrectly assuming some or all of the information could be publicly located. Ms White claimed the Minister's decision in this regard was not evidence based.
- 15 Ms White also submitted in relation to s35 that the Minister:

- failed to consider in favour of release arguments the matters referred to in items (e), (f), and (k) of Schedule I; and
  - relied heavily but incorrectly on matter (n).
- 16 Specifically, in relation to matter (n) of Schedule I, Ms White submitted:

*Public servants have an overarching obligation to give frank and fearless advice to Ministers, regardless of the operation of the Right to Information Act, incoming ministerial briefs could and should be prepared on the expectation that they will be released publicly. The disclosure of the incoming ministerial briefs would therefore not prejudice the ability of Ministers to obtain similar information in the future.*

*Furthermore, any argument regarding that the re/ease of incoming briefs would undermine the confidence of officers to prejudice the ability to obtain similar information in the future should be supported by clear specific and credible evidence or should state with precision the kinds of tangible harm to effective decision-making processes that can be expected to flow from disclosure.' This decision fails to do so and thus the weight of the general public need for government information to be accessible must prevail.*

## **Analysis**

- 17 In keeping with the authorities to which Ms White referred in her submission quoted above, a Statement of Reasons should be specific and reasoned in explaining why any information is claimed to be exempt.
- 18 As already observed, however, the Minister did not specify which of s27 and/or s35 applied to which parts of the briefings. Further, while the Minister set out both these exemption sections, listed their elements and expressed his view that those elements applied, he did not provide specific reasons for the exemption of information. Such an omission inhibits an applicant, particularly one denied all the information as here, the ability to form an understanding of the basis for a decision. It also supports Ms White's claim that the Minister had made a sweeping decision covering the briefings in their entirety, rather than examining the details of the specific information contained within them.
- 19 The information responsive to the application is comprised of four briefings dated mid-July 2016, totalling a combined 41 pages. The four briefings, titled either 'Issues Briefing Note' or 'Incoming Ministerial Brief', were headed with the following subjects:
- Mining Industry Overview
  - Current Forestry Policy Issues
  - Consumer, Building, and Occupational Services

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*Crowe and Department of Treasury [2013] AICnnr 69 (29 August 2013) at [53]; see also Re Cleary and Department of the Treasury (1993) 31 ALD 214 and Eccleston and Department of Family Services and Aboriginal and Islander Affairs (1993) 1 QAR 60*

- WorkSafe Tasmania.
- (a) ***Is any of the information exempt on the basis that it is internal briefing information of a Minister under s27?***
- 20 For information to be exempt as internal briefing information of a Minister, it must relevantly consist of 'an opinion, advice or a recommendation prepared by an officer of a public authority ... in the course of, or for the purpose of a public authority, providing a Minister with a briefing in connection with ... official business ... and in connection with the Minister's parliamentary duty': s27(I).
- 21 Section 27(3) provides that the exemption does not apply to information solely because it was submitted to a Minister for the purposes of a briefing; or 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.
- 22 Minister Barnett assumed responsibility for the relevant portfolios after the resignation from Parliament of the previous incumbent (Minister Brooks), approximately halfway through the term of the former government. Accordingly, most of the information in the four briefings was written for the purposes of briefing the Minister as to the areas for which he was newly responsible. In my view, the information they contain is prime facie caught by s27(3).
- 23 I say most as there are exceptions, such as a one page attendance list for an 'Information Seminar and Workshop' in Inveresk on 22 July 2016 regarding changes to the National Construction Code to allow the use of wood in the construction of mid-rise buildings. The attendance list is attached to the end of the Building and Construction briefing.
- 24 The information which the attendance list contains - being the date and time of the workshop, the venue where it was to be held, the identity of its chair and a list of attendees - 'was not brought into existence for submission to a Minister for the purposes of a briefing' as required for exemption by s27(3). Rather, it would have been sourced directly from pre-existing information recorded elsewhere, compiled for the purposes of the seminar and workshop and copied across to the briefing. Consequently, this page is not exempt under s27 (nor under s35(l), which contains equivalent wording).
- 25 Beyond that, however, I am satisfied all four briefings consist of opinion, advice or a recommendations created by an officer of a public authority in relation to the specific subject areas that the Minister assumed responsibility for at that time. The information in each briefing is directly connected to the Minister's portfolio responsibilities and, therefore, his parliamentary duties.
- 26 Information older than 10 years is not exempt by virtue of s27(2). On the evidence before me, I am satisfied that none of the information is older than 10 years.

*'purely factual information'*

- 27 Subsection 27(1) does not exempt 'purely factual information' unless 'its disclosure would reveal the nature or content of an opinion, advice, recommendation, consultation or deliberations of the briefing': s27(4).
- 28 Associate Professor Moira Paterson in her text, *Freedom of Information and Privacy in Australia: Information Access 2.0*<sup>2</sup>, refers to the decision in *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*<sup>3</sup>, where the Commonwealth Administrative Appeals Tribunal (AAT) observed that, in the phrase 'purely factual information', the word 'purely' has the sense of 'simply' or 'merely'. Therefore, to be excluded from exemption, the material must be 'factual' in quite unambiguous terms and not inextricably bound up with a decision-maker's deliberative processes.<sup>4</sup> This means that for 'factual' information to be exempt, it must be incapable of standing alone and must be so closely linked or intertwined with the deliberative process as to form part of it.<sup>5</sup>

- 29 Associate Professor Paterson states:

*Material may be purely factual even though it is not confined to primary facts. Conversely, it may fall outside the exclusion though it takes the form of a summary. In Harris v Australian Broadcasting Corporation (I 984) 1 FCR 150; 5 ALD 564 at FCR 155, the Full Court of the Federal Court referred to the distinction between primary facts and ultimate facts, and noted that a statement of ultimate fact might be a statement of purely factual material, notwithstanding that it involved a conclusion based on primary facts.'*

- 30 The distinction between primary and ultimate facts referred to in *Harris v Australian Broadcasting Corporation*<sup>6</sup> is relevant to aspects of the briefings which refer for example to the fact that a review of Forestry Tasmania in 2014-15 made four particular recommendations.

- 31 Associate Professor Paterson adds:

*A matter may also be purely factual even if its disclosure will give some indication of the subject matter of a document submitted to Cabinet.<sup>7</sup>*

- 32 This applies to those parts of the briefings which record that Cabinet approval will be sought to draft legislation. Such statements are purely factual, and all the more so given the time that has now elapsed, as evidenced by the public process of introducing legislation to Parliament.

<sup>2</sup> LexisNexis Butterworths Australia, 2<sup>d</sup> edition 2015

<sup>3</sup> (1984) 6 ALN N347 at N349

<sup>4</sup> Ibid, paragraph 7.30 at 419 citing *Re Evans and Ministry for the Arts* (1986) I VAR 315

Ibid, although the author appears to have made a typographical error at the end of that paragraph

<sup>6</sup> Supra, paragraph 8.54 at 479

<sup>7</sup> ( 1 984) 1 FCR 150; 5 ALD 564 at FCR 155

'Supra, paragraph 8.54 at 480, citing *Re Anderson and Australian Federal Police* (1986) 11 ALD 355

- 33 In *Parnell & Dreyfus and Attorney-General's Department*,<sup>9</sup> the Australian Information Commissioner varied two decisions of the Attorney-General's Department under the *Freedom of Information Act 1982* (Cth). The Department had refused access to an Incoming Government Brief (IGB) prepared for the Attorney.
- 34 The Commissioner substituted his decision, refusing access to some parts of the IGB and granting access to other parts. The Commissioner observed:
- ... the application of an exemption provision should be considered by looking first at the contents of the document under review, rather than at the entire document as though it had a single or dominating characteristic. It is relevant that the document under review is an IGB and was prepared as a single and composite document, but the FOI Act does not accord any special treatment to IGBs.<sup>10</sup>*
- 35 It appears from the Minister's global decision in the present matter that he looked less *at the contents of the document under review ... than at the entire document as though it had a single or dominating characteristic*.
- 36 The IGB in *Parnell & Dreyfus* was divided into two parts: the Strategic Brief and the Information Brief. While the Strategic Brief contained a large amount of factual material, the Commissioner was of the view that that material was integral to the deliberative content and purpose of the brief. He found, therefore, that the Strategic Brief did qualify for exemption.
- 37 As to the Information Brief, however, he found to the contrary. It too contained some deliberative material as well as factual information, but the Commissioner found that the latter did not relate to opinion or advice as required by the Commonwealth legislation, and he did not regard the deliberative and non-deliberative information as being interwoven and impracticable to separate."
- 38 I have considered the information in the briefings and applied ss3(4)(a), 27, and 47(5), and the case law described above.
- 39 In my view, the contents of the briefings at issue in the present case are more analogous to the Information Brief considered in *Parnell & Dreyfus* than to its Strategic Brief.
- 40 This is at least in part due to the timing of these briefings, prepared for a new Minister taking up portfolios partway through the Government's term. The top of the first page of each of the briefings contains blank spaces for the Minister to sign and date acknowledging that the briefings have been noted by him, but there is no request that the Minister 'approve' anything by way of a decision or otherwise. The two briefings from the Department of State Growth include a blank line enabling the "Minister's notation", but the two from the Department of Justice do not. None of the briefings provided to this office have been annotated by the Minister in the spaces provided.

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<sup>9</sup> [2014] AICmr 71

<sup>10</sup> Supra, at paragraph 34

<sup>11</sup> Supra at paragraph 45

- 41 Presumably, decisions had already been made by the previous Minister as to how the Government's policies should be implemented, which may explain the largely factual nature of the briefings presently in issue. It is likely that IGBs for Ministers in an incoming Government commencing its term would contain more by way of advice or recommendation, such as options for the implementation of policies taken to the recent election. As *Parnell & Dreyfus* illustrates, however, even such an IGB may contain considerable purely factual, non-exempt information.<sup>12</sup>
- 42 **I** do not consider the factual information in these briefings to be so embedded in, or interwoven with, their deliberative content that the former cannot be separated from the latter. Rather, the majority of the information in the briefings is purely factual information which is quite capable of standing alone as such, after redaction of that information which is deliberative in nature.
- 43 I returned to the Minister copies of the briefings after highlighting that information which I considered met the requirements for exemption under ss27(1) and (4). That is, information: which is not purely factual; and the disclosure of which would not reveal the nature or content of opinion, advice, recommendation, consultation or deliberations in the briefings. That information highlighted in the briefings can be redacted as exempt under s27.
- 44 The balance of the information is not exempt under s27 by virtue of s27(4). It should therefore be disclosed, unless I determine it is otherwise exempt on some other basis.
- 45 Section 27(5) expressly provides that nothing in s27 'prevents a Minister from voluntarily disclosing information that is otherwise exempt information'. Thus, when considering my preliminary decision under s48(1)(a), the Minister may, guided by s12(I) and the pro-disclosure duty in s3(4)(b), and considering the extensive time elapsed since the July 2016 briefings, choose to voluntarily disclose under s27(5) any of the highlighted information which would otherwise be exempt.

**(b) *Is any of information exempt on the basis that it is internal deliberative information under s35?***

- 46 Like s27, the exemption in s35(1) 'does not include purely factual information': s35(2). Hence, my earlier reasoning in relation to what constitutes purely factual information under s27 is also applicable in the context of s35, and need not be repeated here.
- 47 The information which is not exempt under s27 as 'purely factual information' is similarly not exempt under s35 by virtue of s35(2).

**(c) *Is any personal information exempt under s36?***

- 48 Some of the information which I have determined is not exempt under s27 or 35, includes the names of various individuals. Names are 'personal information' as defined in s5(1). They are, therefore, prime facie exempt under s36. Like

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<sup>12</sup> *Atkin and Forestry Tasmania O1409-140*

s35, however, s36 is subject to the public interest test contained in s33, and before can be fully exempt, I must be satisfied that their release would be contrary to the public interest.

*Name of a public relations consultant*

- 49 An individual is named in item 6 on page 3 in the Forestry briefing under the heading, 'Strategic Growth Plan for the Forest Industry', paragraph 1, third and fourth words. This paragraph identifies an individual, the principal of a public relations consultancy which bears their name, simply by virtue of them having been 'appointed in November 2015 as consultant to assist in co-ordinating development of the Growth Plan.' The Growth Plan was expected to be 'released by the end of September 2016'.
- 50 The fact of this person's appointment, in a professional capacity, to do some work so long ago could not 'be reasonably expected to be of concern to them' and it is not necessary that they be consulted pursuant to s36(2)(c).
- 51 In any event, disclosure of this information is not contrary to the public interest under s33(l) having regard to the matters contained in items (a), (b), (d), (e) and (f) of Schedule I.

*Mother of a deceased worker*

- 52 On page 12 of the Briefing to the Minister for Building and Construction headed 'Incoming Ministerial Brief — WorkSafe Tasmania' is a second heading with one paragraph under it. The heading is the name of an individual, being the mother of a deceased worker. The paragraph contains multiple repetitions of the mother's name.
- 53 The paragraph's last three sentences are not purely factual information. They are exempt under s27( I ).
- 54 The paragraph's first three sentences are purely factual information. They are not exempt under s27(1), by virtue of s27(4), nor under s35( I ), by virtue of s35(2). They do, however, contain the personal information of the mother of the deceased worker.
- 55 Contact details for the mother are not disclosed and It is not practicable for me to notify her of Ms White's application pursuant to s36(2). It is not therefore necessary for me to do so.
- 56 In any event, in my view, disclosing the mother's identity would risk harming her interests by causing her further distress as a result of what she might well perceive as a breach of her privacy: Schedule I, matter (m). Weighed against that, 'disclosure would inform the public about the rules and practices of government in dealing with the public': Schedule I, matter (e). The latter can be achieved and the balance best struck by disclosing the paragraph's first three sentences after redacting the individual's name, which I determine is exempt information.

*Attendees to an information session and workshop regarding regulatory changes*

- 57 On page 16 of the Briefing to the Minister for Building and Construction headed 'Incoming Ministerial Brief — Consumer, Building and Occupational Services' is a table headed 'Attendees'. The table's first column, under the word 'Attendees', consists of the names of individuals attending an Information Session and Workshop regarding regulatory changes on the afternoon of 22 July 2016. The second column, lists their employers or the organisations they represent. Page I of the briefing summarises the event, and notes that 'A list of attendees to the forum is attached for your reference.'
- 58 The names in column I are personal information as defined in s5( I ) for the purposes of s36. Disclosure of the names of individuals attending the innocuous afternoon Information Session and Workshop regarding regulatory changes could not, however, 'be reasonably expected to be of concern to them' and it is not necessary that they be consulted pursuant to s36(2)(c). Nor is it practicable to notify all the individuals of Ms White's application now, over four years after the forum. Accordingly, there is no need to do so.
- 59 I determine that p 16 of the Consumer, Building and Occupational Services briefing is to be disclosed in full, including the personal information it contains, as doing so is not contrary to the public interest having regard to Schedule 1, items (a) and (e).

*Appointments to statutory boards under the Workers Rehabilitation and Compensation Act 1988*

- 60 Persons are named on pages 3 and 4 of the WorkSafe briefing, who were:
- then members of the WorkCover Tasmania Board, all proposed for reappointment; or
  - proposed for appointment to fill vacancies as members of the Nominal Insurer.

Both these entities are established under the *Workers Rehabilitation and Compensation Act 1988*. Given that in July 2016 action on these appointments was required in the next six weeks, it is likely that these positions were then filled and are a matter of public record.

- 61 The object of the RTI Act is contained in s3, and is to improve democratic government in Tasmania by: increasing the accountability of the executive to the people of Tasmania; increasing the ability of the people of Tasmania to participate in their governance; and 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. This object is to be pursued by giving members of the public the right to obtain information held by public authorities and Ministers and s7 creates a legally enforceable right to information that is not exempt information.

- 62 Releasing the names of statutory board appointees in this context furthers government openness, transparency and, hence, the object of the Act Doing so also accords with the public interest, having regard in particular to items (a), (c), (d), and (f) in Schedule I .
- 63 For example, there is significant public interest in the release of board appointees' names as doing so 'would enhance scrutiny of government decision-making processes and thereby improve accountability and participation (Schedule I, item (f)). In this context, I note that all the proposed appointees were male, which appears inconsistent with the government's policy to promote female participation on public sector boards. The briefing summarises the reasons for recommended reappointments pending review of governance arrangements, thereby providing 'contextual information to aid in the understanding of government decisions': Schedule I item (d).
- 64 Disclosure of the names of the appointees in 2020 could not be reasonably expected to be of concern to them.
- 65 For the above reasons, all the names on pages 3 and 4 of the WorkSafe briefing are to be released in full.

*Names and work contact details of the State Service officers who prepared and cleared the briefings*

- 66 The briefings include the personal information of the Departmental officers who prepared, cleared, and signed the briefings. This consists of information such as their names, positions, work email addresses and work landline telephone numbers. This purely factual information is not exempt under s27 nor under s35 for the reasons given earlier. Nevertheless, s36 must be considered.
- 67 Public servants' names and contact details are typically not exempt under s36 following the application of the public interest test. This type of information was considered in a similar context by this office in *Bryan Green MP and Department of Treasury and Finance*.<sup>13</sup> As was noted in that decision at paragraphs 52-54:

- 52 *The names of those staff members is personal information in accordance with the terms of s36(1), however, the public interest test must be considered before the exemption can apply.*
- 53 *It is open to conclude that the re/ease of the names of officers who prepare official information could lead to better accountability, and there is little in the way of 'harm' if the names are re/eased. Especially as the staff members are performing their official duties and carrying out the functions they were employed to do.*
- 54 *When considering this against the names of staff already being information in the public domain via the Government Directory, there is little claim the information should remain exempt.*

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<sup>13</sup> O141 I - 123 at [www.ombudsman.tas.gov.au/data/assets/pdf\\_file/0006/392793/Bryan-Green-and-Department-of-Treasury-and-Finance-July-20\\_I\\_7.PDF](http://www.ombudsman.tas.gov.au/data/assets/pdf_file/0006/392793/Bryan-Green-and-Department-of-Treasury-and-Finance-July-20_I_7.PDF)

68 This approach is consistent with that adopted in other jurisdictions, and was referred to in a recent position paper on the issue produced by the Office of the Australian Information Commissioner.<sup>14</sup> As that paper's executive summary relevantly notes:

*The following principles will inform updates to Parts 3 and 6 of the FOI Guidelines:*

- *The FOI Act plays an important role in promoting transparency and accountability in government.*
- *Public servants are accountable for their decisions, their advice and their actions. Agencies and ministers must ensure staff understand this and that this is made clear in staff induction programs and ongoing training.*
- *Agencies and ministers should start from the position that including the full names of staff in documents released in response to FOI requests increases transparency and accountability of government and is consistent with the objects of the FOI Act.*
- *Agencies and ministers who have not identified work health and safety risks associated with disclosure of staff names and contact details should generally continue to provide full access to this information on request.*<sup>15</sup>

69 These principles are also relevant to the RTI Act, given its stated object referred to earlier in this decision.

70 Unless the Minister can show some demonstrable harm to the public interest, which his decision did not, then there is no reason to reduce the accountability of the Departments which prepared the briefings. Accountability is promoted by disclosing the officers who prepared the briefs, along with their contact details which, if current, are in any event, available in the Government Directory Service.<sup>16</sup> The personal information of the officers who prepared and cleared the briefings is not exempt pursuant to s36.

**(d) *Is any information exempt under s30 'Information relating to enforcement of the law'***

71 On pages 11 and 12 of the Briefing to the Minister for Building and Construction headed 'Incoming Ministerial Brief — WorkSafe Tasmania', is a heading, 'HIGH PROFILE PROSECUTIONS, INVESTIGATIONS & ISSUES'.

72 It is comprised of a table which 'provides an overview of [then] current prosecutions and significant investigations.'

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<sup>14</sup> Office of the Australian Information Commissioner, *Disclosure of public servants' name and contact details in response to FOI requests*, 20 August 2020 at [www.oaic.gov.au/freedom-of-information/guidance-and-advice/public-servants-names-and-contact-details](http://www.oaic.gov.au/freedom-of-information/guidance-and-advice/public-servants-names-and-contact-details)

<sup>15</sup> Ibid

<sup>16</sup> [directory.tas.gov.au](http://directory.tas.gov.au)

- 73 Given that over four years have elapsed since this table was prepared, I presume that the matters it lists are no longer current. Currency would, on the face of it, be seen to be a necessary (though not necessarily sufficient) condition to exempt the information in the table pursuant to s30. If my presumption as to currency is incorrect, then the Minister can advise and provide input regarding this aspect of my Preliminary decision under s48( I )(a).
- 74 WorkSafe Tasmania submitted that, as the regulator of the Work *Health and Safety Act 2012* (the WHS Act), it was constrained in its capacity to release information about investigations, even completed ones, by virtue of 227 of the WHS Act which makes it an offence, carrying significant penalties, to disclose, give access to or use any information gained by a person exercising a function or power under that Act.
- 75 That is not being asked of Worksafe here. The regulator has already released the information to the Minister when briefing him, which s27 I ( I )(3)(f) of the WHS Act expressly allows. The issue here is whether the information in the briefing is exempt under s30( I )(b), on which WorkSafe relied for non-current cases listed in the table. If not exempt, then the information in the table should be disclosed by the Minister, not by the regulator.
- 76 Paragraph 30( I )(b) exempts only information which 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'. I cannot see how the table in the briefing would do this. It does not disclose confidential sources of information, such as informants. Rather, it merely lists the status of what its over-arching heading describes as `High Profile', hence hardly confidential, prosecutions and investigations.
- 77 Therefore, s30( I )(b) does not exempt the table and it should be disclosed. This, in turn, means that any person concerned in providing the information is protected by the RTI Act, against:
- actions for defamation or breach of confidence (s5 I ( I )(b)); and
  - criminal offences.
- 78 Even if I am wrong in my conclusion that the RTI Act requires release of this information, the Minister can be reassured that the above protections apply not only to disclosures which are, in law, required or permitted by the RTI Act, but extend to those providing information `in the *bona fide* belief that the information was required to be provided in accordance with [the RTI] Act': s5 I ( I )(b) and s52(b).
- 79 Finally, I note that, even if s27 I of the WHS Act, s27 I applied here, its offence provision, s271(2), `does not apply to the disclosure of information, or the giving of access to a document —
- ..
- (e) that is required or authorised under a law': s27 I (3)(e).

80 The RTI Act is such a law, requiring disclosure of this information. **Preliminary Conclusion**

81 I determine the four incoming ministerial briefings are not exempt information, except for those parts that I have identified as exempt earlier in this decision.

82 Those exempt parts were either:

- not purely factual information, and thereby exempt under s27; or
- personal information disclosure of which would be contrary to the public interest, and thereby exempt under s36.

83 None of the remaining information in the briefings is exempt and is to be released in full to the applicant.

#### **Submissions to the Preliminary Conclusion**

84 The above preliminary decision was sent to Minister Barnett on 17 September 2020, seeking his input as required by s48(1)(a).

85 That correspondence also returned to the Minister the briefings with the information I considered should be redacted as exempt in accordance with the findings of the preliminary decision highlighted, before release to the applicant.

86 In a letter dated 6 October 2020, Mr Kim Evans (the Secretary of the Department of State Growth and a delegate of the Minister for Resources), provided the response set out below. Mr Evans' letter is reproduced below, and has been edited [in square brackets] where necessary to avoid including in this statement of reasons any information which I ultimately determined to be exempt information.

*I refer to your letter, dated 17 September 2020, addressed to the Hon Guy Barnett MP, advising that you had completed your review of a decision made by him in May 2017 in respect of an application for assessed disclosure under the Right to Information Act 2009 ('the Act') from Ms Rebecca White MP. With that letter, you provided your preliminary decision and information proposed to be released, and invited the Minister to comment.*

*The original decision was made by Minister Barnett in his capacity as Minister for Resources and Minister for Building and Construction. Since that time, the portfolio of Minister for Building and Construction has passed to the Hon Elise Archer MP. This raised some issues regarding a response to your preliminary decision, as two of the briefs relate to matters for which Minister Barnett is no longer responsible.*

*[The Department] wrote to you on 1 October 2020 on Minister Barnett's behalf to request an extension of time to resolve the issue and ensure the appropriate parties had an opportunity to respond. On 2 October, you kindly granted that request for extension of time.*

*Minister Barnett, in consultation with his colleague, the Minister for Building and Construction, has referred your preliminary decision and proposed release in relation to two briefs (Consumer, Building and Occupational Services and WorkSafe Tasmania) to Minister Archer for direct response to you.*

*In my capacity as a delegate of the Minister for Resources, I provide a response in respect of the remaining briefs.*

*There is no objection to the release of information as you propose, with the below exceptions. For clarity, I attach copies of the two briefs with the relevant additional sections highlighted.*

**I. Mining Industry Overview brief**

- a. *Final dot point in the section headed Relocation of MRT to Burnie - I submit that the last part of that point should be withheld, starting from 'Stages 3 and 4 are in the early stages...'. The information is factually inaccurate and I submit that it is therefore not 'factual information' within the meaning of the Act.*
- b. *Section headed Unity Mining - I submit that the remainder of this section, starting from [after 'Unity Mining was recently acquired by Diversified Minerals ...'] should be withheld. I submit that the information is not factual but speculative, and consists of opinion as to the likelihood of hypothetical future conduct. I further submit that whether or not the speculated conduct ever came to pass is irrelevant in deciding whether the information is factual.*

**2. Current Forestry Policy Issues brief**

*Point 10, titled [redacted by Ombudsman] - Contrary to your view expressed in paragraph 32 of your decision, I submit that point 10 should be withheld in full under s 26(1)(d) of the Act. There is ongoing debate within Cabinet about the extent of the issues and the appropriate method of addressing them, such that the requirement for legislative amendment is by no means settled. Given that the deliberation is not yet resolved, this information is a record which would reveal the deliberations of Cabinet if disclosed. I further submit that the information is not factual in the necessary sense. Further, the passage of time since the brief was first prepared has not affected the character of the information, nor neutralized the consequences of releasing it while the issues remain unresolved.*

*I further note a factual error in your decision at paragraph 22, where you state that Minister Barnett assumed responsibility for the relevant portfolios following the resignation of Minister Harriss. Minister Barnett actually assumed responsibility following the*

*resignation of Minister Brooks. [Noted and now corrected in paragraph 22]*

*Finally, I note the passage of time between the Minister's original decision and your review decision raises some difficult issues regarding the proper assessment of information. While I acknowledge that your decision is made de novo, and there may be little concern today in releasing much of the information now that it is no longer current, it is unclear the extent to which this may be relevant in determining whether the information was, in 2017, factual information that was inextricably linked with opinion, advice or recommendation and therefore 'briefing information'.*

*I further note that if Ms White was to apply today for those same briefs, she may well receive a different original decision.*

*Thank you again for the opportunity to comment on your preliminary decision. ...*

- 87 Given the contents of the opening four paragraphs of Mr Evans' letter, my office sought submissions from both the Office of the Hon Elise Archer MP, Minister for Building and Construction, and the Department of Justice. On 9 November 2020, the Director of that Department's Office of the Secretary advised my office by email:

*As mentioned by phone on Friday, I have discussed the outstanding response in relation to the Ombudsman's review of the application for assessed disclosure from Ms Rebecca White MP with both the Secretary, Department of Justice and the Office of the Hon Elise Archer MP, Minister for Building and Construction.*

*I have confirmed that there is no further comment they wish to make in relation to this matter, other than to note support for the comments made by the Secretary of the Department of State Growth in his letter dated 6 October 2020.*

*Thank you for the opportunity to comment. I apologise for the delay in providing a response.*

## **Further Analysis**

- 88 In view of the above response, the only matters requiring further analysis are those set out in Mr Evans' letter. I will address these briefly, mindful to avoid including in this statement of reasons any information which I determine is exempt information, the inclusion of such information in my determination being prohibited by s48(4)(a).
- 89 Mr Evans' submission at paragraph **I** a of his letter contended that part of the information in the final dot point in the section headed 'Relocation of MRT to Burnie - is factually inaccurate and therefore not 'factual information' within the meaning of the Act'.

- 90 I presume Mr Evans meant that the three sentences to which he referred are now inaccurate. It is unclear if he also meant they were inaccurate in 2017. More by way of explanation would have been needed to discharge his onus under s47(4) of showing that the information should not be disclosed. It is, however, not necessary for me to resolve that in this decision, since I respectfully disagree with the submission that because the "information is factually inaccurate ... it is therefore not 'factual information' within the meaning of the Act".
- 91 I consider that conclusion wrong in law, at least insofar as it relates to the following two sentences reproduced below. Mr Evans submitted they were exempt, but I have determined they are not, for the reasons which follow. I quote these two sentences in order to then explain why they are 'factual information' within the meaning of the Act and by virtue of s27(4), not exempt:

*Stages 3 and 4 are in the early stages of implementation and are fully funded. Stage 4 of the plan involves the consolidation of remaining Hobart functions to the Core Library thereby vacating the Mornington Office.*

- 92 As noted earlier, the RTI Act excludes 'purely factual information' from multiple exemptions. The phrase has equivalents in other FOI and RTI statutes, such as the *Freedom of Information Act 1982* (Vic). Its equivalent phrase 'purely factual material' has been considered by the Administrative Appeals Tribunal of Victoria, decisions of which are cited by Associate Professor Paterson in her book.
- 93 In *Re Thwaites and Department of Health and Community Services*, Deputy President Macnamara, in relation to the equivalent provision of the *Freedom of Information Act 1982* (Vic), observed:

*The operation of s 30(I) must also be seen in the light of subs (3) which excludes material from the exemption granted by s 30 in so far as it consists "only of purely factual material". Mr Pearce, for the applicant, submitted therefore that at least in so far as this exemption was concerned any factual material, unless inextricably bound up with the thought processes of the agency should be the subject of re/ease. This submission appears to be supported by the decision of Mrs Rosen in *Re Collins and Greyhound Racing Control Board* (1990) 4 VAR 65.<sup>17</sup>*

- 94 Associate Professor Paterson<sup>18</sup> most relevantly for present purposes writes, A document *does not cease to be factual 'by reason only of a debate as to the correctness of factual assertions contained in the document'*, quoting *Re Thwaites v Department of Health and Community Services*<sup>19</sup>
- 95 In applying s30 to Documents 8-16, the Deputy President also stated [my emphasis]:

*The information contained in the documents seems to me to be at least purportedly factual rather than consisting of opinion or advice.*

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<sup>17</sup> (1 995) 8 VAR 361 at 365

<sup>18</sup> Ibid at 419

<sup>19</sup> (1 995) 8 VAR 361 at 373 per Deputy President Macnamara. Associate Professor Paterson also cites at 419, n70, *Re Hulls and Victorian Casino and Gaming Authority* (1998) 12 VAR 483

*Accordingly, I would not uphold any claim for exemption with respect to those documents under s 30(1).<sup>20</sup>*

- 96 Section 27(4) of the RTI Act similarly distinguishes 'purely factual information' from 'the opinion, advice, recommendation, consultation or deliberations of the briefing'. This distinction turns on which of these categories best fits the information, on its face: that is, assertions - which may or may not be correct - as to factual matters on the one hand, compared to deliberative information in the form of opinion, advice, etc., on the other. In that context, purportedly factual information does not lose its factual character due to inaccuracy, since that does not transform its categorisation from factual to deliberative.
- 97 Similar concepts are also known to other areas of law. For example, legal elements of a contractual misrepresentation may include a false material statement of fact, whereas a false statement of law<sup>21</sup> or opinion<sup>22</sup> may not be considered a misrepresentation.
- 98 The expansive interpretation of 'purely factual information' under the RTI Act explained above reads down exemptions to which that phrase is an exception, consistently with Parliament's intention expressed in s3(4)(a).
- 99 Applying this interpretation to the briefing's two sentences regarding Stages 3 and 4 quoted above, they are, to adopt the wording of Deputy President Macnamara above,<sup>23</sup> at least *purportedly* factual, as distinct from consisting of opinion or advice, etc.
- 100 Under s47(4), the Minister's delegate 'has the onus to show that the information should not be disclosed' and I determine that the onus has not been discharged in this instance.
- 101 It follows that I do not uphold Mr Evans' submission contending for exemption of those two sentences under s27(4), even if, as he says, they are factually inaccurate.
- 102 The subsequent and final sentence of this section of the briefing does not contain purely factual information, but rather consists of an opinion. Hence, it is exempt under s27(I).
- 103 In general terms, I agree with Mr Evans' submission at paragraph I b of his letter regarding the Mining Industry Overview brief's section headed *Unity Mining*. The remainder of this section, starting from after 'Unity Mining was recently acquired by Diversified Minerals ...' is not purely factual information. Instead, it consists of speculative opinion as to the varying degrees of the likelihood of hypothetical future conduct, using as it does the words 'may', 'possibly' and 'likely'. Hence, it is exempt under s27(1).

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<sup>20</sup> (1 995) 8 VAR 361 at 371 per Deputy President Macnamara

<sup>21</sup> *Inn Leisure v D F McCloy* (1991) 100 ALR 447

<sup>22</sup> *Bisset v Wilkinson* [1927] AC 177

<sup>23</sup> *Ibid*

104 In general terms, I agree with Mr Evans' submission at 2a regarding Point 10 of the Forestry Policy Issues brief. I accept Mr Evans' advice that there is ongoing debate within Cabinet about this matter. That being the case, disclosure of point I 0 `would disclose a deliberation or decision of the Cabinet which has not been officially published': s26(4). Therefore, point 10 is exempt in full under s26(l)(d), even if it contains some purely factual information: s26(4).

*Final Notes in Mr Evans' Submission*

105 At the end of his letter, Mr Evans noted that the passage of time between the Minister's original decision and this external review decision raises some difficult issues regarding the proper assessment of information. Mr Evans acknowledged that my review `decision is made *de novo*, and there may be little concern today in releasing much of the information now that it is no longer current', but said it was 'unclear the extent to which this may be relevant in determining whether the information was, in 2017, factual information that was inextricably linked with opinion, advice or recommendation and therefore [exempt].'

106 As noted in the preliminary decision at paragraph 28 above, Associate Professor Paterson explains the meaning of 'purely' in the context of 'purely factual information'. It means that for briefing information to be excluded by s27(4) or its equivalent provisions elsewhere from exemption, 'the material must be "factual" in fairly unambiguous terms'.<sup>24</sup> This means that it 'must not be inextricably bound up with a decision-maker's deliberative processes'.<sup>25</sup>

107 I do not consider the balance of the information beyond that which I have found to be exempt in the briefs to be inextricably bound up with a decision-maker's deliberative processes for the reasons set out earlier, and meaning of 'purely factual information', as I have interpreted and applied it, including in my Further Analysis of Mr Evans' submission.

108 In any event, given the matters Mr Evans acknowledged, any uncertainty as to its disclosure is sufficiently alleviated by the fact that the delegates of both Ministers constructively do not object to the release of the information proposed in the preliminary decision, beyond the exceptions Mr Evans raised. And as noted in paragraph 45 above, s27(5) expressly provides that nothing in it 'prevents a Minister from voluntarily disclosing information that is otherwise exempt information'.

109 As noted, Mr Evans as the Minister's delegate, advised that 'There is no objection to release of the information as you propose [in the preliminary decision], with the below exceptions.' The exceptions Mr Evans raised have been addressed above. Accordingly, the balance of the information can be released without objection. I do not think it necessary for me to delve further into analysing these issues that are not necessary for me to determine before finalising this decision.

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<sup>24</sup> Supra, paragraph 7.30 at 419, quoting *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) 6 ALN N347 at N349

<sup>25</sup> *Ibid*, citing *Re Evans and Ministry for the Arts* (1986) 1 VAR 315

**I 10** Suffice it to say, I endorse Mr Evans' further note that if Ms White was to apply today for those same briefs, she may well receive a different original decision.'

### **Conclusion**

**III I** determine that the four incoming ministerial briefings are not exempt information, except for those parts I have determined exempt in this decision.

I 12 Those exempt parts were:

- personal information disclosure of which would be contrary to the public interest, and thereby exempt under ss33 and 36;
- not purely factual information, and thereby exempt under s27; or
- point 10 of the Forestry briefing, exempt in full under s26(I)(d), being a record, 'the disclosure of which would involve the disclosure of a deliberation or decision of the Cabinet', which has not been officially published.

113 All remaining information in the briefings is not exempt and is to be released in full to the applicant.

**Dated:** 22 January 2021

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DSMAN

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

## **Section 30 — Information relating to enforcement of the law**

- (I) Information is exempt information if its disclosure under this Act would, or would be reasonably likely to —
- (a) prejudice —
    - (i) the investigation of a breach or possible breach of the law; or
    - (ii) the enforcement or proper administration of the law in a particular instance; or
    - (iii) the fair trial of a person; or
    - (iv) the impartial adjudication of a particular case; or
  - (b) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law; or

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

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

## **Section 35 — Internal Deliberative Information**

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

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

- (2) Subsection (I) does not include purely factual information.
- (3) Subsection (I) does not include —
- (a) a final decision, order or ruling given in the exercise of an adjudicative function; or
  - (b) a reason which explains such a decision, order or ruling.
- (4) Subsection (I) ceases to apply after 10 years from the date of the creation of the information referred to in that subsection.

## **Section 36 — Personal information of a person**

- (I) 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.

Where, under s5(1):

**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.

## **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 economic development of the State;
  - (I)** whether the disclosure would promote or harm the environment and or ecology of the State;
  - (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
  - (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
  - (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;

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

# OMBUDSMAN TASMANIA

## DECISION

**Right to Information Act Review**

**Case Reference:** O1809-152

**Names of Parties:** Rhiana Whitson and Department of Primary Industries, Parks, Water and Environment

**Reasons for decision:** s48(3)

**Provisions considered:** s12, s30, s37, s39

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### Background

- 1 In January 2018, a polo event was held at Barnbougle in northern Tasmania. After the event, polo ponies were transported to Devonport in two trailers to return to the mainland on the Spirit of Tasmania overnight ferry (operated by TT-Line Pty Ltd). Upon return to the mainland, it was discovered that 16 ponies in one trailer had died at some point between being loaded in Devonport and arriving in Victoria. This was a matter of significant concern to the owners and members of the public, and quickly became a matter of media interest.
- 2 On 3 September 2018, Ms Rhiana Whitson, a journalist for the Australian Broadcasting Corporation, made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the Department of Primary Industries, Parks, Water and Environment (the Department). Ms Whitson defined her request as follows:

*All material including but not limited to correspondence relating to the death of polo ponies on the TT-line between January and August 2018.*

*I advise I am not interested in duplicate copies of documents or documents that have already been publicly released or media releases, media articles or media statements.*

- 3 On 10 September 2018, the Department's then principal officer, Dr John Whittington, released a decision to Ms Whitson. The Department found 546 pages of relevant information. It refused to release any of this information, determining that it was fully exempt under section 30(1)(a) of the Act as information relating to the enforcement of the law, on the basis of an ongoing investigation and potential prosecutions relating to the incident.
- 4 The Department also stated that some information exempt under s30 was also capable of exemption under s37 as information relating to the business affairs of a third party, and s39 as information obtained in confidence, and its release would be contrary to the public interest.

- 5 On 26 September 2018, Ms Whitson submitted the decision to this office for external review.
- 6 It was accepted under s45(1)(a) on the basis that Ms Whitson had an original decision made by a principal officer and it was submitted to this office for external review within 20 working days of her receipt of it.
- 7 The applicable fee had been waived under s16(2)(c) on the basis that Ms Whitson had demonstrated that she planned to use the information for a general public interest or benefit.<sup>1</sup>
- 8 The Department has since finalised its investigation and laid charges under the *Animal Welfare Act 1993* against the drivers of each of the horse trailers and TT-Line Pty Ltd. The prosecution of these charges remains ongoing before the Magistrates Court of Tasmania.

### **Issues for Determination**

- 9 I must determine whether the information the Department declined to release is eligible for exemption under ss30, 37, 39 or any other relevant section of the Act.
- 10 As ss37 and 39 are contained in Division 2 of Part 3, my assessment is subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under these sections, I am then required to determine whether it would be contrary to the public interest to release it having regard to, at least, the matters contained in Schedule 1.

### **Relevant legislation**

- 11 Copies of ss30, 37 and 39 of the Act are included at Attachment A.
- 12 As ss37 and 39 are contained in Division 2 of Part 3 of the Act, they are subject to the public interest test in s33. Section 33 requires the matters contained in Schedule 1 to be considered when determining where the public interest lies. Copies of s33 and Schedule 1 are also attached.
- 13 I note the Department has also referenced the following Acts:
  - *Animal Health Act 1995 (Tas)*;
  - *Animal Welfare Act 1993 (Tas)*; and
  - *Animal Welfare (Land Transport of Livestock Regulations) 2013 (Tas)*.
- 14 I have not reproduced these acts and regulations in my decision, but they are available online at [www.legislation.tas.gov.au](http://www.legislation.tas.gov.au).

<sup>1</sup> The current waiver for journalists under s16(2)(ba) did not exist at the time of Ms Whitson's application.

## **Submissions**

- 15 Ms Whitson made a comprehensive submission that outlined the objects of the Act, the inherent value of the information sought, and the nature of the decision made by the Department. Specifically, she submitted:

*Tasmania's Right to Information Act begins with an objective - to improve democratic government in Tasmania by increasing the accountability of the executive to the people of Tasmania, by increasing the ability of the people of Tasmania to participate in their governance, and significantly "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." This objective is core to the consideration of applications for assessed disclosure under the Act.*

*According to the decision letter the information requested was refused under section 30 of the Act relating to prejudicial information. I argue it is extremely unlikely that material held by the department relating to the deaths of the polo ponies could be considered prejudicial in its entirety, and that a blanket refusal under that section could not be warranted. Although I have not been provided with a list of what information is held by the department, it seems highly unlikely that absolutely everything held by the department in relation to the case would fall under that provision.*

*The case is also unlikely to be considered by a jury, which should weigh against the decision to refuse information under that provision. I disagree with the decision maker that "there is a direct causal link between the disclosure of information requested and the prejudice that may be caused if the information was disclosed through the RTI process" because it assumes there is a jury that would be prejudiced, which there is not.*

*Although court proceedings have been lodged in Victoria, none, as far as I am aware, have been lodged in Tasmania. Surely court proceedings in other jurisdictions should not impact on the provision of information in Tasmania under the RTI Act.*

- 16 Ms Whitson also made further submissions opposing the Department's assessment that it would be contrary to the public interest to release any information found to be prime facie exempt under ss 37 and 39.
- 17 The Department maintained that the information sought was subject to an investigation under the law and release of the information would likely prejudice its effectiveness. Specifically, it submitted in its decision:

*The information you seek form [sic] part of a current investigation of a breach or possible breach of the law that may result in court proceedings being instituted. I believe that the release of this information would be reasonably likely to prejudice the conduct of this investigation and/or any fair trial or adjudication of the case...*

*It is imperative that parties to proceedings are able to provide, request and submit evidence in accordance with practices and procedures of courts and the rule of evidence. Publishing evidence through the RTI process before parties are able to argue its status through the court process should not be allowed.*

*Finally, I need to be satisfied that the criteria ‘would or would reasonably likely to prejudice’ is fulfilled. The term requires more than the mere risk or mere possibility of prejudice. As there is the possibility that court proceedings may occur, any information disclosed relating to the reports on the ponies are far more likely than not to create prejudice. The disclosure of documents to an application before the parties involved are able to exercise their rights in court to argue against the disclosure of the documents as evidence would directly cause prejudice to any investigation or fair trial.*

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

*I find the requirements of section 30(1)(a) are satisfied. Section 30 exemptions are not subject to the public interest test.*

## **Analysis**

### **Section 30 – Enforcement of the law**

- 18 For information to be exempt under this section I must be satisfied that if the information was released it would be reasonably likely to prejudice:
  - (i) the investigation of a breach of 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.
- 19 The applicant acknowledged that legal proceedings had been commenced in Victoria by Mr Andrew Williams, one of the owners of the horses, but not yet in Tasmania. That is no longer the case.
- 20 As noted above, TT-Line Pty Ltd and the two horse trailer drivers have been charged with animal welfare offences following the incident and the prosecution of these charges is ongoing.
- 21 Of the 546 pages of information found to be responsive to the request, the first 382 pages consists of an undated report entitled *Polo Pony Transportation Incident 28-29<sup>th</sup> Jan 2018*, and appendices to that report. The appendices contain autopsy and pathology information, photographs, diagrams, inspection reports of the horse trailers and the Barnbougle site, and evidentiary material obtained in the

investigation of the incident. The report was created by a Veterinary Officer with Biosecurity Tasmania, a unit of the Department.

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

*I am an Inspector appointed under section 8 of the Animal Health Act 1995 and an Officer appointed under section 13 of the Animal Welfare Act 1993. My duties involve animal health investigations, animal welfare investigations, and compliance where veterinary expertise is required, for both DPIPWE and RSPCA.*

and contains the following comment:

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

- 23 This indicates that the report is not simply a report on a matter of interest but is one prepared by an expert for the purposes of providing expert evidence and opinion in an investigation, which may result in court proceedings. The investigation report has been prepared as a result of the investigation of a breach or possible breach of the provisions of the Animal Health and Welfare legislation referred to at paragraph 13 above.
- 24 I am satisfied the information contained in the report is directly relevant to that investigation and charges have been laid as a result of the investigation. Before determining whether the information is exempt, however, I must also give consideration as to whether its release would be prejudicial.
- 25 The word *prejudice* is not defined by the Act and is therefore to be given its ordinary meaning. The Macquarie Dictionary defines it as meaning *to affect disadvantageously or detrimentally*.<sup>2</sup>
- 26 The death of any animal that has likely experienced a period of suffering generates strong emotions in members of the public and others involved. The report under consideration is, as described above, expert evidence; it is a technical report on factors relating to the unfortunate death of the 16 ponies, which, if released, amongst other things could be anticipated to excite the emotions of the public and attract the attention of the media at large.
- 27 I consider that paragraphs (ii) and (iii) of s30(1)(a) are applicable, as the wide publication of the evidence and expert opinion which forms the basis of ongoing prosecution cases could clearly be prejudicial to the enforcement or proper administration of the law in these particular instances and the fair trial of the persons charged.
- 28 I accept Ms Whitson's submission that the low probability of a jury trial reduces the chance of any release of information having a deleterious impact on the

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<sup>2</sup> [www.macquariedictionary.com.au/features/word/search/?word=prejudice&search\\_word\\_type=Dictionary](http://www.macquariedictionary.com.au/features/word/search/?word=prejudice&search_word_type=Dictionary) at 6

impartial adjudication of the relevant cases and do not consider that paragraph (iv) applies.

- 29 I do not consider that paragraph (i) applies, as the investigation into the relevant breaches of the law has concluded and is unlikely to now be prejudiced by any disclosure.
- 30 For the reasons set out above, I determine the report and appendices at pages 1-382 are exempt from release under s30(1)(a)(ii) and (iii).
- 31 The information on pages 383-387 consists of correspondence between Mr Russell Hunter, Program Coordinator, Animal Welfare, Biosecurity and Product Integrity at the Department and, Mr Shane Ryan of Ryan Legal who represents Mr Williams. Specifically, this information is:
  - a letter from Mr Hunter to Mr Ryan dated 7 March 2018, with the subject *Request to Interview Mr Andrew Williams*;
  - a letter from Mr Ryan to Mr Hunter dated 9 March 2018 responding to the 7 March correspondence;
  - a letter from Mr Hunter to Mr Ryan dated 29 March 2018, with the subject *Queries regarding relationship with Mr Andrew Williams*; and
  - a letter from Mr Hunter to Mr Ryan dated 22 May 2018, with the subject *Final request for interview with Mr Andrew Williams*.
- 32 Following my earlier decision in relation to substantially the same information in the matter, Mandy Squires and the Department of Primary Industries, Parks, Water, and Environment dated 18 March 2019<sup>3</sup>, this information was released and is now publicly available and published on the Department's RTI disclosure log on its website.<sup>4</sup>
- 33 Accordingly, while the Department's claims that this information is exempt under s30 (or ss37 or 39) are no longer appropriate, the information is not required to be released to Ms Whitson, pursuant to s12(3)(c)(i), as it is otherwise available.
- 34 Pages 388 and 389 consist of a letter from the Chief Veterinary Officer of the Department to Mr Williams through Mr Ryan. This letter outlines some of the preliminary findings of the investigation and pre-empts the findings in the report considered above and, for the same reasons as those pertaining to the report, I determine this letter – unlike the others referred to above – to be exempt under s30(1)(a)(ii) and (iii).
- 35 Pages 390-392 consist of emails between Mr Hunter of the Department and Ryan Legal of an administrative nature and are also publicly available in the Department's RTI disclosure log on its website.

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<sup>3</sup> Available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions)

<sup>4</sup> [dpipwe.tas.gov.au/about-the-department/governance-policies-and-legislation/rti-disclosure-log](http://dpipwe.tas.gov.au/about-the-department/governance-policies-and-legislation/rti-disclosure-log), reference RTI 005 2018-19

- 36 For the same reasons as those given in relation to pages 383-387, these are not exempt under ss30, 37 or 39 but are not required to be provided to Ms Whitson by virtue of s12(3)(c)(i).
- 37 Pages 393-431 consist of additional evidentiary material gathered in relation to the investigation of the incident and, for the same reasons as pages 1-382, this information is also exempt from release under s30(1)(a) (ii) and (iii).
- 38 Pages 432 and 433 are two emails from Mr Hunter and Dr Lloyd Klumpp of the Department with Andrew Byrne of the Royal Society for the Prevention of Cruelty to Animals dated 2 February 2018 and 17 April 2018 respectively. As with pages 383-392 and 390-392, these have been published on the Department's RTI disclosure log following my previous decision. Accordingly, the emails are not exempt under ss30, 37 or 39 but are not required to be provided to Ms Whitson pursuant to s12(3)(c)(i).
- 39 Pages 434-474 consist of notes, plans and transcripts relating to interviews with persons under investigation regarding the incident. For the same reasons as for the investigation report and associated evidence, I consider the release of this information would be likely to prejudice current court proceedings and it is therefore exempt pursuant to s30(1)(a) (ii) and (iii).
- 40 Pages 475-489 and pages 521-525 consist of email correspondence between the Department and its counterpart agencies in Victoria and New South Wales relating to the investigations all three agencies were undertaking in the immediate aftermath of the incident. This information informs the Department's investigation report, indicating available evidence and making preliminary conclusions around what occurred.
- 41 Accordingly, for the same reasons as the Department's investigation report, I find that pages 475-489 are exempt from release pursuant to s30(1)(a) (ii) and (iii).
- 42 Pages 490-508 and pages 526-543 consist of emails between the Department and two veterinary specialists regarding the autopsy and pathology reports annexed to the Department's investigation report. As court proceedings in which this evidence will be presented remain ongoing, I consider that the information is exempt pursuant to s30(1)(a) (ii) and (iii).
- 43 Pages 508-510 consist of emails between the Department and the Department of State Growth regarding the registration details of the two horse trailers. As court proceedings in which this evidence will be presented remain ongoing, I consider that the information is exempt pursuant to s30(1)(a) (ii) and (iii).
- 44 Pages 510-520 consist of emails between the Department and TT-Line Pty Ltd regarding the investigation of transport arrangements for livestock on the Spirit of Tasmania. As court proceedings in which this evidence will be presented remain ongoing, I consider that the information is exempt pursuant to s30(1)(a) (ii) and (iii).
- 45 Pages 544-546 consist of emails between two Departmental officers regarding the investigation of sudden death in seemingly healthy horses. As court proceedings

in which this evidence may be presented remain ongoing, I consider that the information is exempt pursuant to s30(1)(a) (ii) and (iii).

- 46 Though it primarily relied on s30(1)(a), the Department sought to rely on s37 and s39 to exempt ‘some of the information obtained from various third parties’, though it did not provide a schedule of documents or any specificity around the exact information to which it considered these sections applied. Ms Whitson also made submissions around the application of s37 or s39, expressing her view that the release of information would not be contrary to the public interest.
- 47 As I have found that all information responsive to Ms Whitson’s request is not required to be provided to her, pursuant to s30(1)(a) (ii) , (iii) and s12(3)(c)(i), it was not necessary for me to review the Department’s application of s37 and s39.

### **Preliminary Conclusion**

- 48 For the reasons given above, I determine that:
  - the Department’s claim for exemption under s30 is predominately upheld but varied in part; and
  - the information I found not to be exempt under s30 is nonetheless not required to be released to the applicant, pursuant to s12, as it is otherwise available.

### **Conclusion**

- 49 As the above preliminary decision was not adverse to the Department, under s48(1)(b) it was made available to the applicant and a journalist colleague named as an alternative contact on the external review request, to seek their input before finalising the decision.
- 50 The applicant did not reply within the period this office provided but confirmation was received from her colleague on 20 May 2021 that they did not intend to provide any input.
- 51 Accordingly, for the reasons given above, I determine that:
  - the Department’s claim for exemption under s30 is predominately upheld but varied in part; and
  - the information I found not to be exempt under s30 is nonetheless not required to be released to the applicant, pursuant to s12, as it is otherwise available.
- 52 I apologise to the parties for the substantial delay in finalising this matter.

**Dated:** 21 May 2021

**Richard Connock**  
**OMBUDSMAN**

## **ATTACHMENT A**

### **Section 30 – Information relating to enforcement of the law**

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

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

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

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

### **Section 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 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.

## **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: O1901-032

R2202-011

**Names of Parties:** Robert Vellacott and Devonport City Council

**Reasons for decision:** s48(3)

**Provisions considered:** s32, s37

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### Background

- 1 In 2016, Devonport City Council (the Council), a public authority under the *Right to Information Act 2009* (the Act), decided to enter an operating lease agreement and associated 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 1,500m<sup>2</sup> comprising five permanent tenancies, an open market space and a mezzanine floor to accommodate a cooking school and food education opportunities.<sup>1</sup>*

- 3 PPD is a company in which Project & Infrastructure Holdings Pty Ltd (P+i), in October 2018, had a 50% direct ownership interest, to operate Providore Place<sup>2</sup>. 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 5 October 2018, Mr Robert Vellacott made an application for assessed disclosure under the Act to Council. Mr Vellacott is a ratepayer and holds concerns about the actions of Council and the manner in which public funds have been used in relation to the project. He sought:

- 1) Copies of the signed unredacted Head Lease Agreement between Devonport City Council and Providore Place

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<sup>1</sup> 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/](http://www.audit.tas.gov.au/publication/procurement-2/).

<sup>2</sup> See note 1 at page 15.

(Devonport) Proprietary Limited for the food pavilion Oldaker Street Devonport.

- 2) Copy of all amendments or replacement leases, if any, to the original agreement.
- 3) Details of security offered, if any, by Providore Place Devonport Pty Ltd and/or any other entity for the 10 Year \$4 million Head Lease.
- 4) Details of the individual amounts allocated, or to be allocated, to each of the tenancies from the \$850,000 allocation for fit outs.
- 5) Details of any other individual amounts allocated, or to be allocated, to each of the tenancies including design work or fit outs to bring tenancies to the state of “fit for purpose” as described by council.
- 6) Details and costs paid by or to be paid for by ratepayers/DCC for rectification and other necessary rework required to the individual tenancies since the actual completion of the “base build” construction of the Food Pavilion.
- 7) Copy of the key performance indicators (KPIs) for Providore Place (Devonport) Pty Ltd.
- 8) Details of statements of conflicts of interest as per the Conflicts of Interests Register, including initial Directors of the Providore Place (Devonport) Pty Ltd, senior council staff and aldermen.
- 9) Details of when Providore Place (Devonport) Pty Ltd commenced paying rent (noting “base build” was completed in November 2017).
- 10) Details of Council’s involvement and assistance financial or other, if any, given to Providore Place (Devonport) Pty Ltd in encouraging TasTAFE (Drysdale) to take up a tenancy in Providore Place.

5 On 24 October 2018, Ms Kym Peebles, a delegate under the Act, released a decision assessing the information found responsive to Mr Vellacott’s request. No documents were released. She decided in relation to:

- Items 1, 2, 3, 7 and 9 that all matters associated with the lease have been dealt with by Council in Closed Session, therefore, under s32(1)(a) of the Right to Information Act 2009, this information is exempt;
- Items 4 and 5 that fit-out and determination of the allocation to the tenancies is the responsibility of the head lessee, Providore Place (Devonport) Pty Ltd;

. Item 6 that:

*as previously advised the food pavilion project will need modifications to suit the nature and requirements of the tenancies to cater for previously unknown requirements. This work is being/has been completed in conjunction with the fit-out works and has not been separately itemised from a costing perspective.*

. Item 8 that:

*As previously advised... under s54 of the Local Government Act 1993 a person, by notice in writing to the General Manager, may apply to inspect the register of interests relating to Aldermen. The conflicts of interest register relating to staff is exempt from the provisions of the Right to Information Act 2009 under section 55(3) of the Local Government Act 1993. Council does not have a register of conflicts of interest relating to the directors of Providore Place (Devonport) Pty Ltd however there was formal notification of their roles with P+I Group.*

. Item 10 that:

*Council has actively engaged with the State Government and TasTAFE for the established [sic] of the cooking school at Providore Place. There has been no financial assistance provided by Council.*

6      Council did not advise Mr Vellacott of his rights of review regarding this decision and, following contact with my office, Ms Peebles reissued her decision on 14 December 2018. This decision detailed the internal review process and timeframes in which to seek a review, but the substance of her decision remained unchanged.

7      On 18 December 2018, Mr Vellacott emailed Mr Paul West, Council's Principal Officer under the Act, seeking a review of Ms Peebles' reissued decision.

8      In an emailed letter to Mr Vellacott on 24 December 2018, Mr West provided Council's internal review of Ms Peebles' decision. Mr West affirmed Ms Peebles' findings in relation to items 1, 2, 3, 7, 8 and 9, without adding any additional reasoning.

9      Mr West's decision elaborated on Ms Peebles' findings in relation to items 4, 5, 6 and 10. He stated:

.      In relation to Item 4, that:

*the total amount paid to date of the \$850,000 fit-out budget has been \$651,899. In processing lease incentive payments, Council has required details from Providore Place (Devonport) Pty Ltd. Providore Place (Devonport) Pty Ltd were asked in accordance with s37(2) of the Right to Information Act 2009 if this information could be released. In response Providore Place (Devonport) Pty Ltd advised they did not agree to the specific allocation to each tenancy being made public. Council has also*

*applied the public interest test and determined not to release the information requested in accordance with s33 of the Act.*

- In relation to Item 5, that the arrangements entered into for the amount paid as lease incentives to individual tenancies are confidential between Providore Place (Devonport) Pty Ltd and their sub-lessee.

- In relation to Item 6, that:

*there has been no additional expenditure on ‘rectification’ or ‘rework’. There has been continued expenditure on ‘base build works’ as tenancy fit-outs have progressed as part of the construction contract with Fairbrother Pty Ltd.*

- In relation to item 10, this further detail was provided:

*Council has not contributed financially, however has provided “in-kind” assistance in the form of staff time working with TasTafe, the State Government and Providore Place to establish the Drysdale facility in Devonport. The value of this time has not been separately costed.*

- 10 On 7 January 2019, Mr Vellacott sought external review of Council’s decisions. This office accepted his application under s44 of the Act on the basis he was in receipt of an internal review decision and his application for external review was submitted within 20 working days after receipt of that decision.
- 11 The applicable fee was waived under s16(2)(c), as Mr Vellacott indicated in his application that he intended to use the information for a general public interest or benefit and this was accepted by Council.
- 12 On 10 December 2021 this office requested that Council locate and assess a copy of the signed lease agreement between it and Providore Place (Devonport) Pty Ltd, as this did not appear to have occurred. An unsigned lease incorporated into the Agenda for a Council meeting on 24 October 2016 had previously been located and assessed.
- 13 On the same day Council located and assessed the signed lease agreement, and advised this office and Mr Vellacott that:

*...as no changes were made to the agreement between it being tabled at the Closed Council meeting in October 2016 and its execution in November 2016, we consider that the provisions of s32(1)(a) still apply, and the original decision not to release the information, owing to it being exempt, stands.*
- 14 On 14 and 18 January 2022, following contact from my office, Mr Vellacott provided further submissions regarding concerns he held that information responsive to his request had not been located by Council.

## **Issues for Determination**

- 15 I must determine whether the information is eligible for exemption under ss32, 37 or any other relevant section of the Act.
- 16 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 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.
- 17 I must also determine whether there has been a sufficient search by Council for information responsive to Mr Vellacott's request and whether section 55(3) of the *Local Government Act 1993* excludes the Act from applying to other information.

## **Relevant legislation**

- 18 Council has relied on ss32 and s37 in its decision to exempt information. I attach copies of these sections to this decision at Attachment 1.
- 19 Copies of s33 and Schedule 1 of the Act are also attached.
- 20 Council has also relied on s55(3) of the *Local Government Act 1993* in deciding that the Act is not applicable to some information sought, so a copy of this section is also attached.

## **Submissions**

- 21 Mr Vellacott provided submissions with his application for Assessed Disclosure on 5 October 2018 that addressed fee waiver but are also relevant in relation to his information request. He said (his emphasis):

*Public/Ratepayer's/Taxpayers interest. Council is NOT a private company and rate and taxpayers money are being used to provide **subsidized** premises to a company, i.e. Providore Place (Devonport) Proprietary Limited (who have direct connections to council's Living City Development Manager) and for costly fit outs for tenancies some of which will be in direct competition to other privately owned rate paying establishments. This will have a direct and indirect impact on them and brings into question obvious conflicts of interest, potential breaches of COAG agreements and the National Competition Policy. It is also questionable how council can agree to a commercial in confidence contract/s and expenditure of large amounts of funds to provide bespoke premises to a shell company with a very small paid up capital. Ratepayers have a basic right to know and be informed about this by their council.*

- 22 His submissions in seeking external review and in response to not receiving the majority of the information sought from Council included, to quote:

*I contend I am an aggrieved ratepayer and taxpayer, due to the facts, among other things, of the proven blatant misleading if not fraudulent statements, lack of due diligence conflicts of interest, nepotism and*

*abrogation of responsibility of looking after my best interests as a ratepayer by the previous mayor, aldermen and senior staff.*

*...I consider the content [of Council's decisions] to be entirely evasive and unsatisfactory.*

- 23        Mr Vellacott was also contacted on 14 and 18 January 2021 by this office regarding Council indicating to this office that there are no related documents for items 5, 6, 8 and 10. In reply to this he submitted:

*Since my original RTI request made on 5<sup>th</sup> of October 2018 I have, since that date, through much effort by not only myself and several others been able to obtain some of the details.*

*However at this point in time I suggest Council's management just doesn't want to look hard enough for the costs requested. Surely it is only reasonable that they respond with answers to each item requested with the actual amounts to each and as to why and where those costs should be accounted for and can be found....albeit they may be part of other works that council agreed to pay for. Also I contend, it is appropriate for DCC to provide information /answers to the complete set of my requests as I find it hard to believe they would not have this on record. "For DCC to suggest that they do not have the answers, in particular to request 6 is fanciful because I have good reason to believe that each tenancy rectification" was completed by a different contractor.*

*In regard to the information sought by me, I understand that management had, especially more so because of the contentious nature of the project, a duty to have kept a scrupulous itemised account of all variations and rectifications, due to mismanagement, as well as these extra costs incurred during construction. It is also my understanding that detailed record keeping was required as a condition of the Commonwealth Government's grant money as applied to the food pavilion construction.*

*Also this information should have been given to councillors, as they indeed had a right to know and should have known before payment of accounts was passed; albeit a baffling delegation to the General Manager existed for signoff on all expenditures relating to the food pavilion construction. Notwithstanding that, one would think it prudent that details of what the expenditure of taxpayer/ratepayer funds specifically included and would have been known at the time with records still in existence. Also if it had not been for my and other concerned persons badgering for an investigation or an inquiry then much of what the Auditor General revealed would more than likely never have been revealed.*

*Experience has shown that both council management and councillors ignore the approaches to resolve requests for information and complaints primarily on the basis of testing the resolve of the complainant in the hope that a complaint will "all go away over time"; it is the time honoured and very effective strategy of delay and frustrate.*

*Also Experience has shown that people cannot get a simple question answered in a forthright manner from council management or councillors when the answer is not favourable.*

*I would opine most if not all of requests for Right to Information and Code of Conduct complaints pertaining to the Devonport Living City project and Providore Place, now known as Market Square Pavilion arise from a lack of good governance and the eight (8) principles of good governance actually being applied by Devonport Council. (Incidentally - The proposed linking of the good governance principles to the COC under the reforms to the Local Government Act is welcomed and hopefully eliminates many of the RTI requests and COC complaints)*

*Unfortunately because there is no opposition as such on a council, as there is in parliament, which leaves it up to ratepayers and to a lesser degree the media to challenge questionable actions by councillors and management.*

*In defence of some individual councillors they are often gagged by a majority moving matters to Closed Session and then exacerbated by ruling no details be publicly disclosed. Legislation states that the use of Closed Session should be minimised but that becomes hard to assess when vague descriptions of business to be transacted are all that is listed in an agenda.*

*Refusal to make appropriate disclosures, often eventually becoming forced disclosures, can lead to Right to information requests and Code of Conduct complaints when the council tries to defend its position and attempts to indefinitely withhold information from the public by the abuse of privilege i.e. - cherry picking) the Local Government Act.*

- 24 Council did not make submissions beyond the reasoning in its decisions, which is discussed in the following analysis.

## **Analysis**

### **Section 32**

- 25 Council relied upon s32(1)(a) to exempt information which was considered at closed meetings of the Council. Exemptions under s32 are not subject to the public interest test.
- 26 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.
- 27 Subsections 32(2), (3) and (4) restrict the application of this section to information which is less than 10 years old, was brought into existence for submission to the closed meeting for consideration and is not purely factual. However, 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 I – Copy of signed Head Lease Agreement between Council and PPD*
- 28 Council originally located and assessed an agenda for the meeting of the Council on 24 October 2016 (which is publicly available on its website) and a report prepared by an officer of the Council for the closed session of that meeting containing information, discussion and recommendations regarding the lease. These documents do not appear to be within the scope of Mr Vellacott's request, so have not been further analysed in this external review. They are not required to be released to Mr Vellacott.
- 29 After a request from my office, Council located and assessed the 25 page signed Operating Lease Agreement between it and PPD and determined the entire document was exempt under s32(1)(a).
- 30 While I accept that this document was considered at a closed session of the Council on 24 October 2016, I am not satisfied that it was brought into existence for submission to a closed meeting. It is the 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.
- 31 There is nothing in the signed lease which discloses deliberations of the Council and the decision by Council to enter into the lease agreement has been officially published and confirmed by the Council.
- 32 I do not consider that Council has discharged its onus under s47(4) to show that this information is validly exempt under s32. Accordingly, I determine that the operating lease is not exempt under s32.
- 33 I further note that the key terms of the lease have been published in the Auditor-General's report into the commercial and governance processes involved in the matter.<sup>3</sup> Accordingly, I consider that there does not appear to be any remaining part of the lease which is likely to expose the Council or PPD to any competitive disadvantage or which would justify exemption under other provisions of the Act.

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<sup>3</sup> See Note I at p15.

- 34 My recent decision in *Elaine Anderson and the Director of Inland Fisheries*<sup>4</sup> 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.
- 35 For all of these reasons, I consider that the operating lease signed on 10 November 2016 should be released in full to Mr Vellacott.

*Item 2 – Amendments or replacement leases*

- 36 Council located three documents which it considered responsive to Mr Vellacott's request for copies of *all amendments or replacement leases, if any, to the original agreement* and claimed all were exempt under s32(1)(a).
- 37 The first document is an excerpt from the agenda for the Council meeting of 24 September 2018 with the closed session item at 8.3, Food Pavilion Update, highlighted. The full agenda is available to the public and published on the Council's website. The excerpt is clearly not exempt, but is not required to be released to Mr Vellacott as it is otherwise available under s12(3)(c)(i).
- 38 The second document is the Food Pavilion Update, which is headed 'Report to Council meeting on 24 September 2018'. It contains information, discussion and recommendations regarding a proposed variation to the lease agreement terms in relation to the rent payable by PPD. I am satisfied that this document is exempt under s32(1)(a), as it was brought into existence for submission to the closed meeting and is contained in a record of that meeting.
- 39 The third document is an attachment to the Food Pavilion Update, authored by a director of PPD and seeking the variation to the lease agreement. I am again satisfied that this document is contained in the official record of a closed meeting of the Council and is exempt under s32(1)(a).

*Item 3 – Details of security offered*

- 40 Council has not located any additional documents relevant to this part of Mr Vellacott's request, but referred back to information relevant to items 1 and 2. None of these documents appear to reference any security offered by PPD or any other entity. Council has said that there is no such security.
- 41 I am unsure what the Council was attempting to refuse to release by claiming in its original and internal review decisions that the information was exempt under s32(1)(a), as no relevant information appears to exist. I encourage the Council to express itself more clearly in future. The exemption is not made out but no information is required to be released to Mr Vellacott as it does not exist.

*Item 7 – Key Performance Indicators*

- 42 As with Item 3, Council has not located any additional documents relevant to this part of Mr Vellacott's request, but referred back to documents located as

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<sup>4</sup> April 2021, available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions).

responsive to Items 1 and 2. None of these documents reference Key Performance Indicators and Council has stated that there are no Key Performance Indicators for PPD.

- 43 Again, there is no relevant information to assess or release and I do not understand why Council has sought to apply a s32(1)(a) exemption. The exemption is not made out but no information is required to be released to Mr Vellacott as it does not exist.

*Item 9 – Details of when PPD commenced paying rent*

- 44 Council asserts that the documents responsive to Item 2 regarding amendments to the lease are also those relevant to this part of Mr Vellacott's request. It indicates that its position on the documents is unchanged. I maintain my findings in relation to Item 2, that these documents are exempt under s32(1)(a) or otherwise available under s12(3)(c)(i).

- 45 I note that some information has been provided in the Auditor-General's report No 1 of 2019-20 *Procurement in Local Government*, particularly<sup>5</sup>:

*We have further noted that on 24 September 2018, Council approved a variation to the lease to defer the payment of rent by PPD from 1 July 2018 to 1 February 2019, due to delays in finalising fit outs for tenancies. As at 30 August 2019, PPD was in dispute with DCC over the Providore Place head lease agreement and its rental liability.*

*DCC sought legal advice and was assessing its position. As at 30 August 2019, DCC had only received minimal rent for Providore Place, with the matter currently subject to arbitration.*

## **Section 37**

- 46 Council, in its decision dated 28 June 2019, claimed information responsive to Items 4 and 5 of Mr Vellacott's request regarding the amounts spent on fit-out and design work for individual tenancies was exempt from release pursuant to s37 of the Act, following consultation with PPD. Section 37 is subject to the public interest test in s33.
- 47 Section 37 provides for the exemption of information that is related to the business affairs of a third party, when that information is acquired by a public authority from a person or organisation other than the person making the application for disclosure, if either:
- the information relates to trade secrets; or
  - its disclosure would be likely to expose the third party to competitive disadvantage.
- 48 Council has exempted information responsive to Items 4 and 5 pursuant to s37 but provided almost no reasoning to Mr Vellacott to support this decision. It merely stated that PPD did not agree, following consultation under s37(2), that

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<sup>5</sup> See Note 1 at page 16.

the information should be made public and Council had subsequently determined not to release the information requested in accordance with s33 of the Act.

- 49 Council provided further detail in submissions to my office on 28 June 2019, saying

*Under Council's lease with Providore Place Devonport P/L (PPD), an allowance of \$850k was to be provided as a lease incentive for fit-outs. The lease does not provide Council with the right to determine how the tenant (PPD) spends the money, this is for the tenant to determine. It is the tenant's discretion on how much of the lease incentive is provided to each of the sub-tenants.*

...

*PPD have been insistent that the information remains confidential as they do not want the sub-tenants knowing how much lease incentive, others have received. They also do not want to negotiate the remaining sub-leases with potential new tenants who are in a position of knowing how much lease incentives have been provided to others within the complex.*

- 50 Council has not specified which part of s37 it is relying upon, however there is no indication in any document or submission of trade secrets being in issue, so I will proceed on the basis that the exposure of PPD to competitive disadvantage is the relevant concern.

- 51 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...*

- 52 The Court further held that:

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

- 53 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.
- 54 I note here, that in the New South Wales Supreme Court decision of *Kaldas v Balbour*<sup>6</sup> it was held that the Ombudsman is not subject to the supervisory

<sup>6</sup> [2017] NSWCA 275 (24 October 2017)

jurisdiction of the courts in New South Wales. I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to s33 of the *Ombudsman Act 1978* and that I am also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.

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

*Items 4 and 5 – Individual amounts allocated for design work or fit-out to each tenancy*

- 56 In this instance, I accept that PPD is in competition with other commercial landlords to attract and retain retail tenants. I am satisfied that there is a real chance of competitive disadvantage if the amounts paid to support design and fit-out of tenancies were provided to Mr Vellacott. The information is *prima facie* exempt, subject to consideration of the public interest test.

*Public interest test*

- 57 Council provided the following table summarising its assessment of the matters in Schedule 1 of the Act, though it did not include these in its original decision or internal review decision provided to Mr Vellacott. 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.
- 58 A copy of Council's table is below:

SCHEDULE 1 – Matters Relevant to Assessment of Public Interest (Section 37)

RTI Request: Robert Vellacott				
The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:				
	Yes	No	N/A	Favourable
			<input type="checkbox"/>	It's not gov information
(b) whether the disclosure would contribute to or hinder debate on a matter of public interest	<input type="checkbox"/>			Against
(c) whether the disclosure would inform a person about the reasons for a decision		<input type="checkbox"/>		Against
(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions			<input type="checkbox"/>	
(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public			<input type="checkbox"/>	

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation			<input type="checkbox"/>	
(g) whether the disclosure would enhance scrutiny of government administrative processes			<input type="checkbox"/>	
(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government			<input type="checkbox"/>	
(i) whether the disclosure would promote or harm public health or safety or both public health and safety			<input type="checkbox"/>	
(j) whether the disclosure would promote or harm the administration of justice, including affording procedure fairness and the enforcement of the law			<input type="checkbox"/>	
(k) whether the disclosure would promote or harm the economic development of the State			<input type="checkbox"/>	
(l) whether the disclosure would promote or harm the environment and or ecology of the State			<input type="checkbox"/>	
(m) whether the disclosure would promote or harm the interests of an individual or group of individuals	<input type="checkbox"/>			Against
(n) whether the disclosure would prejudice the ability to obtain similar information in the future			<input type="checkbox"/>	
(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			<input type="checkbox"/>	
(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			<input type="checkbox"/>	
(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority			<input type="checkbox"/>	
(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility			<input type="checkbox"/>	
(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation	<input type="checkbox"/>			Against
(t) whether the applicant is resident in Australia	<input type="checkbox"/>			For
		<input type="checkbox"/>		For
(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided	<input type="checkbox"/>			Against
(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	<input type="checkbox"/>			Against

(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person	<input type="checkbox"/>	<input checked="" type="checkbox"/>		Against
(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	<input checked="" type="checkbox"/>			Against

- 59 I do not agree with Council's assessment that matter (a) is not applicable as this is not government information. The information is held by Council and relates to the expenditure of public funds which have been provided to PPD under the lease agreement to spend as lease incentives to attract tenants. I do accept that the information was not created by public officers and relates to a private business, however, so do not consider that this matter has a relatively low weight but is in favour of release. I consider that factor (d) – whether the disclosure would provide contextual information to aid in the understanding of government decisions – is of similar relevance and weight.
- 60 Council has assessed that matter (b) is relevant and the disclosure would hinder debate on a matter of public interest. Given the one word reasoning provided for this assessment, it is difficult to ascertain Council's rationale for this position. I consider that the release of additional information about the expenditure of public funds in relation to a major project undertaken by Council would contribute to the debate as to whether this was an effective use of ratepayer funds.
- 61 I accept that the contribution to the debate would be modest, however, as the amount of public funds allocated and actually expended (as at the date of the application) has already been provided to Mr Vellacott. The Council's decision to permit PPD complete discretion to allocate the funds between tenants is also known. The additional detail of the split of this amount between tenancies would not significantly add to the debate, so I consider this a factor in favour of release but not of major weight.
- 62 Factor (m) I do not agree is particularly relevant, as the interests of an individual or a group of individuals do not appear to be specifically impacted. I consider that impacts on PPD or retail tenants are better considered in relation to factors (s) and (x) regarding business interests. There is some impact on ratepayers as a group of individuals due to their concerns about financial mismanagement by Council, but I would consider this to weigh in favour of disclosure rather than against.
- 63 Factors (s) and (x) are the primary factors warranting consideration in this matter and weigh against release.
- 64 In relation to (s), the information relates to business decisions made by a private business as to how to allocate funds to tenants as an incentive to take up leases. While these business decisions were made within the legislative context of Tasmania and PPD should have been aware that such details relating

to a project involving a public building and public funds could be disclosed under the Act, its assumption that such allocations would be kept confidential is not unreasonable. I accept that negotiations on other sub-leases and the relationship between PPD and its tenants could be negatively impacted by the disclosure of this information.

- 65 Despite this, given the passage of time and the disclosure of information about the existence and overall spend on lease incentives, I do not consider that the negative impact is likely to be significant.
- 66 In relation to (x), while I accept that this information is not generally available to PPD's competitors, it is also not information which would give significant advantage to any competing landlord in this instance. The lease incentive funds provided by the Council are specific to these premises and the overall value of these incentives has already been disclosed. The passage of time has also reduced the likelihood of negative impact occurring due to the lack of currency of the information. This factor still weighs against disclosure, however, as a competing landlord could potentially obtain useful information regarding individual fit-out allocations and use this to commercial advantage.
- 67 I broadly agree with the remainder of the Council's basic assessment of the factors which are relevant or not applicable to this matter.
- 68 Overall, I consider that the balance of public interest factors does not favour release of the individual allocations of the lease incentive funds to particular tenancies. While it is marginal, I determine that it would be contrary to the public interest to disclose this information. This information is exempt under s37(1)(b) and not required to be disclosed to Mr Vellacott.

*Has there been an insufficient search for information by Council?*

- 69 Section 45(1)(e) of the Act provides that:

*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 –*

*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;*

- 70 Council identified Items 6 and 10 of Mr Vellacott's request as having 'No related documents' in its Schedule of Documents dated 18 January 2019 (which was not provided to Mr Vellacott) but did not explicitly state this in its original and internal review decisions. There was also reference in the internal review dated 24 December 2018 that information *has not been separately itemised* (Item 6) and *the value of this time has not been separately costed* (Item 10). It might be understood from these comments that no documents exist relating to Items 6 and 10.

71 However, as was the case in relation to Items 3 and 7 discussed above, it was not clearly explained to Mr Vellacott that there were *no related documents* found to be responsive to his request for Items 6 and 10. Due to this, contact was made by my office with Mr Vellacott in January 2022, and he was provided an opportunity to make further submissions in relation to these items.

72 Mr Vellacott, in his submissions, states:

*However at this point in time I suggest Council's management just doesn't want to look hard enough for the costs requested. Surely it is only reasonable that they respond with answers to each item requested with the actual amounts to each and as to why and where those costs should be accounted for and can be found....albeit they may be part of other works that council agreed to pay for. Also I contend, it is appropriate for DCC to provide information/answers to the complete set of my requests as I find it hard to believe they would not have this on record. "For DCC to suggest that they do not have the answers, in particular to request 6 is fanciful because I have good reason to believe that each tenancy rectification" was completed by a different contractor.*

*In regard to the information sought by me, I understand that management had, especially more so because of the contentious nature of the project, a duty to have kept a scrupulous itemised account of all variations and rectifications, due to mismanagement, as well as these extra costs incurred during construction. It is also my understanding that detailed record keeping was required as a condition of the Commonwealth Government's grant money as applied to the food pavilion construction.*

73 Council's position is that the modifications or rework to suit individual tenancies has been included in the fit-out costs for these tenancies and not separately costed as it all comprises work to make the retail space fit for that particular tenant. It has provided figures of the amount paid by Council of ratepayer funds towards fit-out.

74 I consider Council's position reasonable. Its definition of fit-out includes what Mr Vellacott considers 'rectification and other necessary rework required to the individual tenancies' and it has already dealt with his requests for information regarding fit-out. I am not satisfied that there has been insufficiency of searching regarding this part of Mr Vellacott's request.

75 In relation to Item 10, there was also reference in Council's Internal Review that:

*Council has not contributed financially, however has provided in-kind assistance in the form of staff time working with TasTafe, the State Government and Providore Place to establish the Drysdale facility in Devonport. The value of this time has not been separately costed.*

- 76 Mr Vellacott has concerns about the record keeping of Council and that various documents ‘should’ exist had it undertaken its duties scrupulously. This is not a matter appropriate for me to determine in making an external review decision under the Act, I must focus on the documents responsive to the request or whether they are actually in existence. I cannot bring a document into existence or chastise Council regarding its record keeping, as I have not investigated or reviewed its administrative action outside of the Act.
- 77 Council states that it has not separately costed staff time spent in assisting TasTAFE, the State Government and PPD to establish a cooking school in Devonport and that records regarding this consequently do not exist. I accept this and I am not satisfied that there has been an insufficiency of searching by the Council for relevant information.
- 78 If there are no related documents, I have no further power to review these items.

*Section 55(3) Local Government Act 1993*

- 79 In relation to Item 8 of Mr Vellacott’s request regarding conflict of interest declarations, Council stated that the Act did not apply due to its exclusion by s55(3) of *Local Government Act 1993*.
- 80 Section 54 of the *Local Government Act 1993* provides:
- (1) *The general manager is to keep a register of interests, of councillors, of which the general manager has been advised under section 48(4).*
  - (2) *A person, by notice in writing to the general manager, may apply to inspect the register of interests.*
  - (3) *On receipt of an application, the general manager is to allow the applicant to inspect the register of interests.*

- 81 Section 55(1) of the *Local Government Act 1993* provides that:
- An employee of a council must notify the general manager, or in the case of the general manager the mayor, in writing of having an interest as referred to in [section 49](#) in any matter in respect of which he or she—*
- (a) *provides advice to the council or council committee; or*
  - (b) *makes a decision or determination; or*
  - (c) *makes a recommendation to the council or council committee.*

*Penalty: Fine not exceeding 50 penalty units.*

- 82 Section 55(2) provides that:

*The general manager is to –*

- (a) Advise the council of the existence of any interest notified under subsection (1); and
- (b) Keep a register of any such interest.
- 83 Section 55(3) provides that: Any register kept under subsection (2)(b) is exempt from the provisions of the Right to Information Act 2009.
- 84 I agree with the Council that Mr Vellacott may inspect the conflict of interest information regarding councillors and that the Act does not apply to the register of conflict of interest information regarding Council staff. I also have no reason to doubt that Council does not hold conflict of interest information regarding PPD's directors. Accordingly, I have no power to review this part of Mr Vellacott's request.

### **Preliminary conclusion**

- 85 In accordance with the reasons set out above, I determine the following:
- Exemptions claimed pursuant to s32 are varied;
  - Exemptions claimed pursuant to s37 are upheld; and
  - There has been a sufficient search for relevant information by Council.

### **Submissions to the preliminary conclusion**

- 86 The above preliminary decision was made available to Council on 16 February 2022 under s48(1)(a) of the Act, to seek its input before finalising the decision.
- 87 On 1 April 2022, Council provided submissions in response setting out that it stridently disagrees with the Ombudsman's preliminary decision concerning the Head Lease. It maintained its position that the signed lease agreement was exempt under s32, as an unsigned version was attached to a Council officer's report which was specifically prepared for, and submitted to, to a closed meeting of Council.
- 88 Council's submissions continue as follows:
- (vii) Once satisfied as to these matters, there is no further residual discretion available to the Ombudsman to determine whether or not the document should or should not be exempt by operation of other provisions in the RTI Act or for other discretionary reasons.
- (viii) It consequently follows that the Ombudsman would err in law and err administratively by taking into account irrelevant matters such as:
- (a) At paragraph 30 of the preliminary decision where the Ombudsman identifies as relevant the fact that the Head Lease is a record of a commercial agreement concerning the leasing of a building owned by the Council to PPD, not a record from a closed session of the Council. As a matter of fact that is clearly wrong.

*(b) Furthermore it would be an irrelevant consideration, and in any event an error of law, for the Ombudsman to determine at paragraph 3! that there is nothing in the signed lease that discloses deliberations of the Council and the decision by Council to enter into the lease agreement has been officially published and confirmed by the Council. With the greatest respect, that is a completely irrelevant consideration and is simply not the test for determining exemption under the provision of s.32.*

*(c) Similarly it would be an irrelevant consideration to further determine that the key terms of the lease have been published in the Auditor-General's report into commercial and governance processes involved in the matter. To say nothing of the fact that the Auditor-General's report has been published since and during the inordinate delay of the Ombudsman to make any decision in relation to this matter, it is again simply irrelevant to the test of determining whether or not the document was exempt pursuant to s.32.*

*(ix) The Ombudsman makes reference to the decision in Elaine Anderson and the Director of Inland Fisheries. This decision is distinguishable on its facts and much of the reasoning of the Ombudsman could not be regarded as germane to the matters that arise for consideration in relation to the disclosure of a replica document very clearly considered by the Council in a closed meeting of Council and therefore ought not be disclosed in any event.*

- 89 Council then raises concerns that the highest levels of confidentiality should be preserved in relation to the subject matter of the Council's deliberations in a closed meeting of the Council. It continued (verbatim):

*The Council's position is that the fundamental underpin for the operation of s.32(!) of the RTI Act is the preservation of confidentiality embedded in the meeting procedures regulations dealing with closed meetings. This fundamental underpin is perhaps best expressed by Justice Tennant in Kingborough Council v Resource Management Planning Appeal Tribunal [2013] TASSC 60 at [35] where she stated the following:*

*"The regulations made specific provision for meetings to be closed in certain circumstances, and for certain consequences to flow from that in relation to the minutes of those meetings. Such meetings, and the way in which their minutes are dealt with, are considered differently from the usual meetings of the Council. The clear intention behind the provision must be to permit the Council, in certain circumstances, to have confidential meetings without concern about their content being generally available."*

### **Further analysis**

- 90 I do not disagree with Council that closed meetings of a council should be able to be held confidentially or that an unsigned version the lease agreement

regarding Providore Place was attached to a report prepared for submission to such a meeting by a Council officer. I also accept that the signed version and the unsigned version are identical, except for the signatures and dates affixed to the final document. I expressed as much in my preliminary decision.

- 91 I also maintain my views expressed at paragraphs 28-35 above and do not accept that I have entertained irrelevant considerations or not properly considered the application of the law or statutory construction, as suggested by Council.
- 92 Section 32(3) states:
  - (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.*
- 93 Accordingly, I am somewhat mystified by Council's arguments that these are irrelevant considerations or that it is somehow a misapplication of the Act to consider s32(3) in assessing s32. Rather than being irrelevant or inappropriate to consider, the parts of s32(3) are in fact mandatory considerations in the proper assessment of whether information is capable of exemption under s32.
- 94 The purpose of s32 is to enable the exemption of information which reveals the confidential discussions and decisions undertaken at closed meetings of councils. As with all exemptions in the Act, s3 clearly indicates that it should be interpreted so as to facilitate the provision of the maximum amount of information and comply with pro-disclosure intentions of the Act. This is especially the case for exemptions, such as s32, which are not subject to the public interest test. It would frustrate the purpose of the Act, if such exemptions were interpreted expansively.
- 95 The signed lease agreement does not reveal any confidential discussions or deliberations of a closed session of Council and it was not brought into existence for submission to a closed meeting for consideration, it exists to document an agreement to lease a public building to a private company. That such an agreement exists, and was being considered in closed session at the 24 October 2016 Council meeting, has been officially published by Council. Accordingly, I consider that the lease is information excluded by s32(3) from being exempt under s32 and Council's submissions have not altered this view. I determine that the signed lease agreement is not exempt under s32 and should be released in full to Mr Vellacott.
- 96 Council misunderstood my comments regarding the Auditor-General's publication of key lease terms and associated lack of competitive disadvantage

likely to result from any disclosure of the lease, I agree that these are not relevant to the assessment of whether the information is exempt under s32. I mentioned these considerations as they are relevant in relation to potential alternative exemptions, which could have been claimed by Council, such as s37. I maintain my view, however, that there is no other exemption which appears to be applicable. The signed lease is not exempt under the Act and is to be disclosed to Mr Vellacott.

### **Conclusion**

97 For the reasons given above, I determine that:

- Exemptions claimed pursuant to s32 are varied;
- Exemptions claimed pursuant to s37 are upheld; and
- There has been a sufficient search for relevant information by Council.

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

**Dated: 6 April 2022**

**Richard Connock  
OMBUDSMAN**

## **ATTACHMENT I – Relevant legislative provisions**

### **32. Information related to closed meetings of council**

- (1) Information is exempt information if it is contained in –
- (a) the official record of a closed meeting of a council; or
  - (b) information proposed by an officer of a council or a councillor for the purpose of being submitted to a closed meeting of a council for consideration if the officer or councillor has contributed to the origin, subject or contents of that record; or
  - (c) information that is a copy of, or a copy of part of, information referred to in paragraph (a) or (b); or
  - (d) information, the disclosure of which would involve the disclosure of a deliberation or decision of a council made at a closed meeting of the council, other than information by which a decision of the council was officially published.
- (2) Subsection (1) ceases to apply after the end of the period of 10 years commencing on the date of the creation of the information referred to in that subsection.
- (3) Subsection (1) does not include information solely because it –
- (c) was submitted to the closed meeting of a council for consideration; or
  - (d) 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

### **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.

#### **45(1) 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) 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.

***Local Government Act 1993 (Tas)***

**55. Pecuniary interest of employees**

(1) An employee of a council is to notify the general manager, or in the case of the general manager to notify the mayor, in writing of any direct or indirect pecuniary interest as referred to in this Part that the employee or the general manager has in any matter in respect of which he or she –

- (a) provides advice to the council or council committee; or
- (b) makes a decision or determination; or
- (c) makes a recommendation to the council or council committee.

Penalty: Fine not exceeding 50 penalty units.

(2) The general manager is to –

- (a) advise the council of the existence of any interest notified under [subsection \(1\)](#); and
- (b) keep a register of any such interest.

(3) Any register kept under subsection (2) (b) is exempt from the provisions of the Right to Information Act 2009.

# OMBUDSMAN TASMANIA

## DECISION

**Right to Information Act Review**

**Case Reference:** O1905-168  
R2202-013

**Names of Parties:** Robin Smith and the City of Launceston

**Reasons for decision:** s48(3)

**Provisions considered:** s20(a)

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### Background

- 1 The City of Launceston (Council) is conducting its City Heart project, a multi-million dollar development being implemented across several stages to revitalise and reinvigorate Launceston's city spaces. Mr Smith is the owner of Coffee Republic, a small business in Launceston's Brisbane Street Mall, and has a keen interest in how the project affects local businesses.
- 2 On 11 April 2019, Mr Smith lodged an application for assessed disclosure under the *Right to Information Act 2009* (the Act) with Council. Mr Smith asked for 33 types of information as follows<sup>1</sup>:
  1. Any record showing how old the leaf blowers are (invoices for purchase perhaps)...
  2. Any information Council holds on the artwork (*It's About Us*) during what is called 'design development on delivery of the Brisbane St Mall project'...
  3. Any efforts Council has made regarding the *It's About Us* statue/artwork in the Mall (Brisbane Street) in relation to the benefactor and person marked as designer in view that the person is a convicted criminal. Please include any records Council has in relation to this artwork since the conviction
  4. Any records of cities with food vans or tents similar to the Brisbane St Mall...
  5. Record of any food businesses engaged at the date of the above email – 09-01-19...
  6. Records of consultation with business [sic] since 3 August 2015 about St John St bus stop relocation/proposed works...
  7. Total spent or committed for Brisbane St Mall in the name of City Heart as at today's date together with any sums in dispute with contractors/suppliers...

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<sup>1</sup> Mr Smith's references to his prior efforts to obtain information and attached emails have been omitted for clarity.

8. Copy of on-street dining applicants required to locate screen fencing...
9. Copy of those not required – plans or letters...
10. Any record that the Lion's clock (donated) was checked, required replacement or refurbishment...
11. Any records of public comments about Coffee Republic or Robin Smith in relation to on-street dining since City Heart works began being Thursday 12<sup>th</sup> April 2018...
12. Records of attendees Council Meeting [sic] 27 June 2018 about Mall works with traders and others...
13. Any records which relate to request by email 25-1-19...
14. Records of Council looking at parking comparison with Hobart...
15. Copy of footage as detailed in email in C.B.D [Central Business District] 9<sup>th</sup> April 19
16. Records of plastic ban proposal...
17. Records of cleaning C.B.D in last F/Y [financial year]...
18. Charge (copy of records) for electricity in Brisbane St Mall...
19. Records of any requests council directed to Ms Lisa Brady from Coffee Republic or Robin Smith and to whom they are currently tasked please...
20. Records of discussions with Lions Club re clock future...
21. Any record of the above clock (Q10; Q20) being relocated to Royal Park...
22. Any records of Food Van motion amendment...
23. Records on Lions donated clock as listed in Attachment #18...
24. Records of decision or basis for the same relating to O.S.D [on-street dining] at Coffee Republic...
25. Diminished dining potential letter copy...
26. Council correspondence in EXAMINER NEWSPAPER 26 Sept 2018...
27. Plan or permit for Aromas van & seating...
28. Any records of complaints about Coffee Republic or Robin Smith since last request in an R.T.I (18 Dec 2017) please...
29. Clarification of Mr Skirving's response – O.S.D...
30. Any information council holds to past requests as consolidated in email 12-03-19...
31. Any information Council holds on any question or request detailed in email dated 25-2-19...
32. Copy of Mr Skirving's letter in answer to questions raised with Ms. Brady re: O.S.D at Coffee Republic...
33. Any records of CPTED [Crime Prevention Through Environmental Design] being applied to Brisbane St. Mall design.

- 3 On 16 May 2019, Mr Michael Stretton, General Manager of Council, released a decision to Mr Smith. Mr Stretton refused all aspects of the application pursuant to s20(a) of the Act. He determined that the information sought was the same or similar to information sought in previous applications of Mr Smith's and that his current application did not disclose any reasonable basis for again seeking access to the information.
- 4 Given Mr Smith was in receipt of a decision made by the Principal Officer of Council, he applied for external review under s45(1)(a) on 24 May 2019, which was accepted by this office on 28 May 2019.
- 5 On 28 February 2022, an Investigation and Review Officer from this office sought clarification from Mr Smith regarding whether there was any information he no longer sought through his external review application. Mr Smith advised by email on 16 March 2022 that he no longer required answers to questions 4, 16 and 20 of his application. Accordingly, this external review is restricted to the remaining parts of Mr Smith's request.

### **Issues for Determination**

- 6 I must determine whether the application can be refused under s20(a) of the Act, on the basis that it relates to the same or similar to information sought under a previous application to Council by Mr Smith.
- 7 I must also determine whether the application, on its face, discloses any reasonable basis for again seeking access to the same or similar information.

### **Relevant legislation**

- 8 Council has relied on s20 of the Act, a copy of which is Attachment 1 to this decision. I also attach 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**

#### *Mr Smith*

- 9 This office invited Mr Smith to make submissions on 28 May 2019, as to why he considers his application is not the same or similar to the previous requests cited by Council. Mr Smith responded over several emails. In an email dated 28 May 2019 he said:

*The mall refurbishment issue looms large on Launceston CBD retailers. Cityheart is blamed for contributing to an acceleration in the downturn in trade. More questions are likely to follow so it is important that I continue my inquiries in this regard. In time, more questions arise and information comes to light about council's actions.*

*At the very least, in order to provide an appropriate response to your invitation, I would need to know which of the 33 questions seeking information, council interprets as 'similar' or the 'same'.*

*It is a bit broad to cite a similarity and have their case rest on little more than, say, that I am again asking questions about Launceston or the Brisbane St. Mall?*

*Every question is worded differently or covers a unique time period. How do I differentiate that? List a comparison matrix of the last 20 years of FOI and RTI requests?*

*In anticipation of this, I will require council to provide me copies of back issues as I don't have an encyclopaedic collection of them.*

10 In his email dated 31 May 2019 Mr Smith asserted:

*... that it would be entirely reasonable of me to say that it is beholden on council to identify where a similar question may have been posed.*

*Having reviewed my past requests to check for inadvertent coping [sic] or overlap of questions, I can find none that would give rise to that accusation.*

*Therefore, I can identify nothing more I need to elaborate [sic] upon to justify my request which stands before the Ombudsman in its current form.*

11 In a further email also on 31 May 2019 Mr Smith said:

*While I Am [sic] not aware how council perceives similarities, I write to confirm that the two questions following have points of difference if there was any such doubt.*

**RTI accepted by council 22<sup>nd</sup> August 2018**

Question #4. Total expended on BSM (Brisbane St. Mall) to date.

**RTI accepted by council 11<sup>th</sup> April 2019**

Question#7. Total spent or committed for Brisbane Street Mall in the name of Cityheart [sic] as at today's date together with any sums in dispute with contractors/suppliers.

The first questions (Q#4) was made during the build, at a time when the builder and council fell into dispute and work appeared to be adversely affected. The answer was [sic] given to Q#4 was up to 30<sup>th</sup> July 2018 (v's 22<sup>nd</sup> August) as an active disclosure (which was a satisfactory and useful answer).

The second question (Q#7) was when the dispute had moved to being a legal matter – questions for a period of some 8 months difference. Furthermore, one asks for the total and the other asks for total or committed.

*Council*

12 Council did not provide any submissions beyond the following reasoning in Mr Stretton's decision:

*Your application seeks information which, in my opinion, is the same or similar to information sought by previous applications and your current application does not, on its face, disclose any reasonable basis for again seeking access to the information.*

*In its totality the current request is a request for information on the Mall and closely related matters. You have submitted eleven formal applications for assessed disclosure on this subject previously. The information you seek in the current application is the same or similar to information sought by those eleven applications.*

*In addition to the previous formal applications for assessed disclosure, this request is very similar to a number of previous requests that have been answered through active disclosures made at face to face meetings, by email, and through public council meetings.*

*In accordance with s20(a) of the Act, your application is refused on the basis that it is a repeat application.*

**13 Mr Stretton also provided the following Other comments at the end of his decision:**

*Whilst I have refused your application on the basis of the reasons provided above, I refer you to the following information which I trust will put your enquiries at an end:*

- Minutes of Council meeting 7 February 2019 regarding artwork in the Mall.*
- Minutes of Council meeting 7 March 2019 regarding the Lions Club clock.*
- Minutes of Council meeting 21 March 2019 regarding plastic ban.*
- Minutes of Council meeting 5 June 2017 regarding bus stop move.*
- Minutes of Council meeting on 7 February 2019 regarding plastic ban.*
- The motion you mention at Q22 has not progressed.*
- The cost of parking in Hobart and Launceston is publicly available information.*
- I have instructed Council officers to provide you with costings on cleansing in 2017/2018 as soon as that information has been determined.*
- Council does not have an itemised record for lighting of the Mall.*

- You should obtain your own independent professional advice about how various principles may have been applied to the designs of the Mall.

Please refer to the 13 May 2019 email from Mr Seymour regarding the path forward on the appropriate steps to obtain an on street dining permit. In all other respects, Council officers will not engage with you on this issue or respond to any unanswered enquiry covered by this decision at the time of writing.

- 14 Mr Stretton listed the eleven previous formal applications for assessed disclosure as part of the Evidence/material upon which findings are based<sup>2</sup> as well as Mr Smith's questions on notice at Council meetings, previous informal requests for information including the emails alluded to in [Mr Smith's] application.
- 15 On 4 July 2019 a Senior Investigation and Review Officer from this office emailed Council requesting clarification regarding which parts of Mr Smith's eleven previous applications under the Act were considered to have been repeated in the 33 questions in the current request, given Council's reliance on s20(a).
- 16 In an email dated 10 July 2019, Mr Duncan Campbell, Governance and Paralegal Officer from Council, responded by setting out the following:

*My understanding of Council's position is not that each and every aspect of the request is the same or similar to previous requests, although in a lot of respects they are. Rather, it is that, taken as a whole, the application under consideration is the same or similar to some if not all of his previous requests. I am happy to arrange for submissions to be made on this issue if it would be beneficial.*

*If it is the Ombudsman's view that Council was not justified in rejecting the application under s 20(a) of the Act, we would like to make further submissions as to the applicability of other sections to the request. Most notably, given the vagueness of the application, it is likely that we would need to make submissions as to the suitability of s 20(b) of the Act. It would simply not be possible for Council to ensure it had obtained all relevant information when the scope of the application is not clear. I also suspect that if Council were required to provide all relevant information to the thirty three matters raised, we would need to consider whether this this [sic] would amount to an unreasonable diversion of resources. In such a case we would like to make submissions as to the suitability of applying s 19 to the application.*

- 17 Mr Campbell then addressed each question in Mr Smith's application individually. His responses will be discussed further below.

<sup>2</sup>Listed as Council reference SF6210, SF6200, SF6478, SF6527, SF6567, SF6598, SF6604, SF6740, SF6765, SF6841 and SF6894.

## **Analysis**

- 18 Council indicated that it relied on s20(a) in its refusal of Mr Smith's application.
- 19 For s20(a) to be validly applied, I must be satisfied that the information requested is the same or similar to information sought under a previous application. Application refers only to a previous application under the Act.
- 20 I must also be satisfied that the current application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information.
- 21 The Act gives members of the public the right to obtain information and it is expressly indicated that discretions in the Act are to be exercised so as to facilitate the provision of the maximum amount of official information. Accordingly, restrictions on the access to information and assessment of applications under the Act should only occur when truly necessary.
- 22 I address each category of information individually (except, as outlined above, those no longer required by Mr Smith – items 4, 16 and 20) given they each give me different relevant considerations. I note that when I refer to Council under each item it relates to the response from Mr Campbell in his email dated 10 July 2019.

*Item 1: Any record showing how old the leaf blowers are (invoices for purchase perhaps)*

- 23 In relation to this question Council said:

*A Council officer advised Mr Smith on the age of the leaf blowers, both verbally and in writing. No reason was given as to why this information was insufficient. However, no formal applications have been received on this issue previously.*

- 24 Given this information has already been provided to Mr Smith in writing, Council is entitled to refuse to provide this information pursuant to s12(3)(c)(i). It should not have refused this part of the application under s20(a), as no previous applications under the Act have been made on this point.

*Item 2: Any information Council holds on the artwork (It's About Us) during what is called 'design development on delivery of the Brisbane St Mall project'*

- 25 Council provided the following information:

*Mr Smith has previously requested information on the placement of or costs involved with various objects in the Mall:*

- *In SF6894 he sought "costings, invoices and records of thylacine sculptures in the Brisbane Street Mall". The thylacine sculptures were artwork sculpture [sic] placed in the Mall as part of the City Heart redevelopment,*

- In SF6567 he sought "copies of all correspondence Council holds, has sent or received to the existing roof over the Brisbane St Mall from 30 June 2014." The roof was removed from the Mall as part of the City Heart redevelopment.

*Information sought in SF6894 and SF6567 is similar to information point [sic] 2 of this application in that each relates to the redevelopment of the Mall for the same period.*

- 26 Although it appears Mr Smith has previously requested similar information, I do not consider that questions about different artwork or structures in the Brisbane Street Mall constitute a repeat request for information. I agree with Mr Smith that Council appears to have applied an overly broad definition of what is similar or repeat information, considering any question relating to the City Heart project or the Brisbane Street Mall as within this category. As I set out in my previous decision of *Darryl Howlin and Clarence City Council*<sup>3</sup>:

*tthe intent of s20(a) is to include similar information and is not restricted to identical information requests. It specifically includes the word similar in the section and clearly intends that a request which is inappropriately repetitious may have differences to a previous request. I do not consider, however, that this wording should be interpreted as permitting all similar requests to be refused or that different requests for the same or similar purpose would be captured.*

*Many information requests cover similar topics and the word similar in s20(a) must be construed very narrowly in order to give effect to the objects of the Act. I consider similar in this context to mean so similar as to be almost the same, as the provision concerns repeat applications.*

- 27 I am not satisfied that this question is a repeat of a previous request and can be differentiated from questions asked in Mr Smith's previous applications. This part of Mr Smith's request should accordingly be assessed by Council.

*Item 3: Any efforts Council has made regarding the It's About Us statue/artwork in the Mall (Brisbane Street) in relation to the benefactor and person marked as designer in view that the person is a convicted criminal. Please include any records Council has in relation to this artwork since the conviction.*

- 28 Although Council said this information is sought in the broader context of the placement of objects in the Mall, and in that sense shares some similarity with point 2 above and the matters raised therein, it also said Mr Smith has not previously lodged a formal request for assessed disclosure for this information.
- 29 Accordingly, this part of Mr Smith's request is not a repeat under s20(a) and is to be assessed by Council.

<sup>3</sup> February 2021, available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision)

*Item 5: Record of any food businesses engaged at the date of the above email – 09-01-19*

- 30 Regarding this Council said:

*Similar to information requested in SF6894 relating to food vans, where Mr Smith requested details on "engagement with any business or business body in Launceston CBD on the matter of Brisbane Street Mall food service trial and the consideration of it." The date range in SF6894 is not defined, but the request is dated 16 Jan 2019. Effectively the same date range.*

- 31 I agree with Council that the date range is effectively the same and the requirements of s20(a) would have been satisfied, had Council not refused Mr Smith's previous request under s19(1) as it considered responding to it would involve a substantial and unreasonable diversion of its resources from its other work. I consider that the previous refusal to accept a request for information constitutes a reasonable basis for again seeking access to part of the same or similar information. This part of Mr Smith's request should be assessed by Council.

*Item 6: Records of consultation with business [sic] since 3 August 2015 about St John St bus stop relocation/proposed works*

- 32 Given Council has said that *this is the first time that [Mr Smith] has made a formal request for such information*, this cannot be a repeat request under s20(a) and this part of Mr Smith's request should be assessed by Council.

*Item 7: Total spent or committed for Brisbane St Mall in the name of City Heart as at today's date together with any sums in dispute with contractors/suppliers*

- 33 In relation to this item, Council said:

*In SF6894, Mr Smith sought "any records for expenditure on Brisbane Street Mall related to the City Heart refurbishment works in total or individual including any items before Council but not yet paid; thus total committed." There is no date range stipulated in SF6894.*

*In SF6740, Mr Smith sought very similar information relating to "total expenditure on community engagement" and "total expenditure for City Heart planning" for the Mall development. No date range.*

*In substance, across SF6894, SF6740 and SF6910 he is seeking information relating to the redevelopment of the Mall over an 18 month period. The information sought is similar across each application.*

- 34 The date of this item is the date of Mr Smith's application, which is 11 April 2019. Council has identified a similar request in SF6894 but, in accordance with my reasoning set out in relation to item 5, the refusal of that application means that it cannot be considered a repeat. I have also set out in previous decisions<sup>4</sup>

<sup>4</sup>See *Andrew McCullagh and Northern Midlands Council* (June 2022) and *Darryl Howlin and Clarence City Council* (February 2021) available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions)

that requests for the same information which relate to a different time period should not be considered repeat requests under s20(a), provided an appropriate interval has passed since the last application. Given Mr Smith's previous similar request was made on 16 January 2019 and was wider (including any sums in dispute with contractors/suppliers), it could not be a repeat for the period which does not overlap. For these reasons, this part of Mr Smith's request is to be assessed by Council.

*Item 8: Copy of on-street dining applicants required to locate screen fencing*

- 35 Regarding this item Council notes:

*In SF6765, Mr Smith sought all information relating to on-street dining permits relating to two businesses (Gloria Jeans and UpYork) for 2018, and for all businesses in the Quadrant Mall from 29 February 2016 - 22 July 2016.*

*In SF6894 he sought a copy of every hand drawn on-street dining plan from 2015 until 16 January 2019.*

*In SF6604, Mr Smith sought on street dining plans with specific attributes, namely for properties "against property line". Whilst this application has different criteria, he is in substance seeking the same or very similar information - on street dining documentation.*

- 36 This request appears to be somewhat different as it relates to screen fencing and temporary fencing in on-street dining applications. Council is entitled to decline to provide again any information it has previously given Mr Smith pursuant to s12(3)(c)(i), but it has not indicated the outcome or date of these previous applications it considers repeats. Accordingly, I am not satisfied on the information before me that the requirements of s20(a) have been met. This part of Mr Smith's request should be assessed by Council.

*Item 9: Copy of those not required – plans or letters*

- 37 Council notes: See point 8 above. Mr Smith is seeking information relating to on street dining documentation, which has been sought at point 8 above, SF6894, SF6765 and SF6604. No date range provided.
- 38 The requirements of s20(a) have not been satisfied for the same reasons as applied to item 8 and this part of Mr Smith's request is to be assessed by Council.

*Item 10: Any record that the Lion's clock (donated) was checked, required replacement or refurbishment*

- 39 In relation to this item Council said:

*This is a new request except as it relates to the Mall as part of the City Heart development - please see point 2 above. No date range provided.*

- 40 Given this is a new information request, it is to be assessed by Council.

*Item 11: Any records of public comments about Coffee Republic or Robin Smith in relation to on-street dining since City Heart works began being Thursday 12<sup>th</sup> April 2018*

- 41 The information requested in Item 11 is the same or similar to information previously requested. Council states:

*This is the narrowing of previous information sought.*

*At point 3 in SF6894 Mr Smith sought social media comments that were not defined in terms of subject matter, although it was read as applying to anything about the Mall. No date range provided, but application dated 16 January 2019.*

*At point 6 in SF6894 Mr Smith sought any public or closed platform comments on Coffee Republic's on street dining. No date range provided, but application dated 16 January 2019.*

*In SF6478 Mr Smith sought copies of posts on Council's Facebook site "which refer to Coffee Republic...during 2016".*

- 42 Given that public comments are, by definition, already publically available, Council is entitled to refuse to provide this information pursuant to s12(3)(c)(i). It should provide reasonable assistance, on request, to Mr Smith in advising where such comments are located.

*Item 12: Records of attendees Council Meeting [sic] 27 June 2018 about Mall works with traders and others*

- 43 In relation to this item Council said *Mr Smith has not previously requested information relating to the meeting of 27 June 2018 and although it further noted he has previously requested agendas and minutes of other meetings which include attendee lists for City Heart Quadrant Mall in SF6598, this is different information and for this reason this part of Mr Smith's request is to be assessed by Council.*

*Item 13: Any records which relate to request by email 25-1-19 [amended by Mr Smith in Attachment 10 of his application to be email dated 1 April 2019 and not 25 January 2019]*

- 44 In relation to this Council said:

*This point incorporates point 10. It is asked in the context of redevelopment of the Mall as part of City Heart on which he has sought information on numerous occasions (see SF6567, SF6740, SF6894). There is no date range provided. Comments at point [question] 2 are relevant.*

- 45 This relates to repairs to the clock and, although it overlaps with Item 10, it is different to information sought on previous applications and this part of Mr Smith's request is to be assessed by Council. It is open to Council to deal with this part of Mr Smith's request jointly with Item 10.

*Item 14: Records of Council looking at parking comparison with Hobart*

46 Council said:

*Mr Smith has not previously lodged a formal application for assessed disclosure regarding comparisons between Hobart and Launceston parking costs. This aspect of the request is raised in the context of Council currently looking at options regarding free parking trials in multi-story carparks. In SF6200, Mr Smith sought information on "parking promotions, initiatives or trials conducted by council" in the ten years to 14 July 2014. More generally, Mr Smith sought information on the use of Council carparks during certain times and the fees paid in SF6452. Less relevantly, Mr Smith sought information on parking revenue - albeit on-street parking revenue - in SF6765.*

47 Given this is new information, this part of Mr Smith's request is to be assessed by Council.

*Item 15: Copy of footage as detailed in email in C.B.D 9<sup>th</sup> April 19*

48 Council said that, although numerous requests for CCTV footage have previously been made in Mr Smith's past RTI applications, *this is a new date range*. Accordingly, this part of Mr Smith's request is to be assessed by Council.

*Item 17: Records of cleaning C.B.D in last F/Y [financial year]*

49 Council said:

*Mr Smith has previously requested information relating to various costings in the Mall.*

*In SF6567, Mr Smith sought budget information for "maintenance expenditure for Brisbane St Mall for 2017"*

*In SF6841 where he requested information on totals expended on and costings for redevelopments Civic Square and the Mall.*

*In SF6604, Mr Smith sought information on the cost of providing Wi-Fi in the CBD during 2015-2016.*

*In SF6598, Mr Smith sought expenditure information regarding CCTV in the Mall in financial year 2014/2015.*

*In SF6740 Mr Smith sought the budget for the Mall redevelopment and the "total expenditure for City Heart planning" for the Mall for the relevant period to 7 April 2018.*

*In SF6894 Mr Smith sought "any records for expenditure on Brisbane St Mall related to the City Heart refurbishments" of the Mall to 16 January 2019.*

*Please note Mr Smith was provided with the figure relating to this aspect of the request on 16 May 2019.*

- 50 This request appears to be slightly different to previous requests and specifically focused on cleaning costs, which is not the case with the other requests. It also appears to relate to a more recent time period, which can be differentiated from the previous requests. I would have considered that this part of Mr Smith's request is to be assessed by Council but, given Council has said this information has already been provided to Mr Smith, Council is entitled to refuse to provide it pursuant to s12(3)(c)(i).

*Item 18: Charge (copy of records) for electricity in Brisbane St Mall*

- 51 Council has provided the same response to this as it did to Item 17. There is no indication that this specific information has previously been asked for and it is too broad an interpretation of s20(a) to consider that all requests for costings regarding the Launceston central business district would be repeat requests. This part of Mr Smith's application is to be assessed by Council.

*Item 19: Records of any requests council directed to Ms Lisa Brady from Coffee Republic or Robin Smith and to whom they are currently tasked please*

- 52 Council said:

*This aspect of the request seeks customer service requests assigned to Council officer Lisa Brady concerning Coffee Republic. Whilst the request is for specific records (as opposed to a global request), it is likely the subject of the information sought is the same or very similar to every RTI request Mr Smith has ever lodged - the Mall and/or the CBD.*

- 53 Although Council has said it is likely this information is similar to information previously sought in prior RTI requests, they have not provided any specific information to show this is in fact the case. Accordingly, on the information before me, I am not satisfied that this is a repeat request. This part of Mr Smith's request is to be assessed by Council.

*Item 21: Any record of the above clock (Q10; Q20) being relocated to Royal Park*

- 54 Council's response to this item is that it is a subset of point 13. Point 13 refers to point 10, which says it is a new request except as it relates to the Mall as part of the City Heart development. I note this question specifically relates to the clock being relocated to Royal Park, which is not mentioned in the previous request relating to the clock. Although this request overlaps with questions 10 and 13, it is seeking different information and accordingly, this part of Mr Smith's request is to be assessed by Council. It is open to Council to assess these parts of Mr Smith's request jointly, due to the similar subject matter.

*Item 22: Any records of Food Van motion amendment*

- 55 In relation to this item Council said:

*This aspect of the request is a subset of a long series of requests for information on food vans in Launceston. In SF6894, Mr Smith sought information on "consultation with any business or businesses" for the*

*"Brisbane Street Mall food service trial" and all consultation of discussion about "locality of food vans/tents in the Brisbane Street Mall in 2018-2019". The extent to which this is "the same or similar" to other applications is less than other aspects of this application.*

- 56 Given the information sought is specifically related to a by-law amendment regarding food vans, rather than other information previously sought regarding food vans in the Brisbane Street Mall, this is different to previous applications. This part of Mr Smith's request is to be assessed by Council.

*Item 23: Records on Lions donated clock as listed in Attachment #18*

- 57 The attachment Mr Smith refers to in this request is an email from him to Council dated 3 April 2019 seeking specific information relating to the removal of the clock from the Brisbane Street Mall. This includes:
- Any records of correspondence between Lyons [sic] Clubs and council;
  - Any proposals for the clock to be relocated to other city parks;
  - Any quotes for repair/modification to the clock;
  - Any quote for a replacement clock.
- 58 Mr Smith seeks this information *from the inception of Cityheart which is as far back as [he seeks] historically*.
- 59 Council's response to this request is the same response it provided for Item 21. In this regard I am of the view that this is specific information that appears to have not previously been sought by Mr Smith and, as such, this part of Mr Smith's request it is to be assessed by Council. As with the other clock queries, it is open to Council to assess these jointly due to the overlapping subject matter.

*Item 24: Records of decision or basis for the same relating to O.S.D [on-street dining] at Coffee Republic*

- 60 Council said:

*The point isn't clear but appears to relate to on street dining plans.  
Accordingly information is similar to that sought by SF6765, SF6894 and SF6604 relating to on street dining. See point 27 below.*

- 61 Point 27 then refers to a request for information relating to food businesses operation on Council owned or controlled land, which Council note is very similar to information sought in several previous applications which sought on-street dining permits for a range of locations and time periods, none of which specifically relate to the information sought in this question.
- 62 Although Council has adopted the view that the point of this request isn't clear, I consider that Mr Smith's request is sufficiently clear, if read in conjunction with Attachment 19, which Mr Smith has specifically referred to. Attachment 19 is an email from Mr Smith to Council dated 1 February 2019 in which he seeks information relating to Council's reasons for refusing to permit his

business, Coffee Republic, to conduct on-street dining during the construction period of the City Heart development.

- 63 Consequently, I am of the view that this is new information not previously sought, and this part of Mr Smith's request is to be assessed by Council.

*Item 25: Diminished dining potential letter copy*

- 64 Council refers to the point made in relation to Item 24.
- 65 Mr Smith indicates that this part of his request is to be read in conjunction with Attachment 20. Attachment 20 is an email from Mr Smith to Council dated 1 March 2019 seeking a copy of the plan Council created which sets out some additional council seats in an area outside Coffee Republic in the Brisbane St. Mall.
- 66 I consider that this is a different request to that which is asked by Mr Smith in Item 24. I also consider that it is seeking different information to that which has been sought in previous requests. For these reasons this part of Mr Smith's request is to be assessed by Council.

*Item 26: Council correspondence in EXAMINER NEWSPAPER 26 Sept 2018*

- 67 Council said *this point makes no sense and isn't a request at all*.
- 68 This part of the request refers to Attachment 21, which is an email from Mr Smith to Council dated 1 October 2018 seeking *any correspondence from the council within the last couple of weeks to the EXAMINER NEWSPAPER which may be the source for the article from the 26 September (please see attached news cutting)*.
- 69 I am unsure why Council has said this does not make any sense and does not constitute a request. In my view it is quite clear when read in conjunction with the attachment. In the absence of any information from Council to indicate this is the same or similar to previous information sought by Mr Smith, this part of Mr Smith's request is to be assessed by Council.

*Item 27: Plan or permit for Aromas van & seating*

- 70 Council said:

*In substance this is a request for information relating to food businesses operating on Council owned or controlled land. In that sense it is very similar to information sought:*

- *In SF6765, Mr Smith sought "on-street dining permits... for the period 2018 for both Gloria Jeans in the Avenue and UpYork..."; "on-street dining permits for businesses in the Quadrant Mall" during 27 Feb 2016 - 22 July 2016*
- *In SF6894, Mr Smith sought "copy of every on-street dining plan for the City of Launceston... drawn by hand from 2015 to 16 January 2019"*

- In SF6604, Mr Smith sought "copy of plans of all on-street dining in the CAA which is for a location against property line..." No date range.
- 71 Given none of the previous requests specifically relate to Aromas Van located [sic] Civic Square and associated seating, as stipulated in Mr Smith's email to Council dated 14 September 2018 (Attachment 22), I am of the view this part of Mr Smith's request is to be assessed by Council.

*Item 28: Any records of complaints about Coffee Republic or Robin Smith since last request in an R.T.I (18 Dec 2017) please*

- 72 In relation to this Council said:

*This is the same or similar to the requests in:*

- SF6604 ("detail of any complaints about Coffee Republic..." no date range but application dated 7 April 2017)
- SF6567 ("details of all complaints about Coffee Republic received by Council in 2017", application dated 5 January 2017)
- SF6740 ("any complaints Council received about Coffee Republic or Robin Smith in 2017 which have not otherwise been released to me under another RTI request")
- SF6527 ("details of any complaint about Coffee Republic in 2016 relating to food or health matters or goods-on-footpath")

- 73 As this part of the request relates to a different time period, it is to be assessed by Council.

*Item 29: Clarification of Mr Skirving's response – O.S.D [on-street dining]*

- 74 Council said:

*The Act does not give a right to clarification. To the extent he is seeking any information that relates to Mr Skirving's involvement with on street dining, it is similar information sought by SF6604, SF6765, SF6894 and this application.*

- 75 I agree with Council that Mr Smith is not entitled to request clarification through the process under the Act and, rather, he only has the right to seek information already in existence. For this reason Council is not required to respond.

*Item 30: Any information council holds to past requests as consolidated in email 12-03-19*

- 76 Council said: *This point isn't clear but it relates to on street dining and in that respect is similar to SF6604, SF6567, 6894 and other aspects of this application. See point 27.*

- 77 Mr Smith refers to Attachment 23 as a prior attempt to obtain this information, which is an email from him to Council dated 12 March 2019. The email outlines Mr Smith's attempt to obtain responses from Council relating to some unanswered questions he had previously asked in relation to on-street dining permits and other related matters.
- 78 Although questions 8 and 24 also relate to on-street dining, I consider that the information sought in this question is different to the information sought by those items, as well as in previous applications. Accordingly, this part of Mr Smith's request is to be assessed by Council.

*Item 31: Any information Council holds on any question or request detailed in email dated 25-2-19*

- 79 Council's response to this was: *By his own admission he states in his email of 25 February 2019 that the requests are “indeed most relating to [the Mall or City Heart]”. In that respect, similar to many previous requests including SF6210, SF6200, SF6478, SF6527, SF6567, SF6598, SF6604, SF6740, SF6765, SF6841, SF6894.*
- 80 Although, as Council has identified, this question relates in a broad sense to the City Heart project and the Brisbane Street Mall, this is not sufficient to say it is a repeat request, as I set out in relation to Item 2. Furthermore, although there is some crossover with previous applications, there are some outstanding matters unaddressed by Council and those parts of this request are to be assessed by Council.

*Item 32: Copy of Mr Skirving’s letter in answer to questions raised with Ms. Brady re: O.S.D at Coffee Republic*

- 81 Council's response to this was:

*It isn’t clear what this request is for, but presumably he is requesting a second copy of a letter he was already provided with but has misplaced. Mr Smith has requested documentation he has already been sent by another Council officer in SF6740. In any event, the information sought is similar to information sought in SF6604, 6765, SF6894 and this application as it relates to on street dining.*

- 82 Given Council has said this information has already been provided to Mr Smith, Council is entitled to refuse to provide this information pursuant to s12(3)(c)(i).

*Item 33: Any records of CPTED being applied to Brisbane St. Mall design.*

- 83 Council's response to this was: *No formal request has been received on this matter previously. A response was provided to Mr Smith at the Council meeting on 4 April 2019.*

- 84 Although Council has said it responded to this part of the request at the Council meeting referred to, I consider that the response at the meeting did not address the information Mr Smith is seeking in this aspect of his RTI application. The response at the meeting included general information in response to Mr Smith's question: *Is there anything that Council could do regarding the anti-social behaviour occurring near the statues at the western end of the Brisbane Street Mall?* This included general information regarding Crime Prevention Through Environmental Design (CPTED). In contrast, what Mr Smith is asking for here is any records of CPTED being applied to the design of the Brisbane Street Mall. Although the distinction is subtle, I consider it is different information sought and this part of Mr Smith's request is to be assessed by Council.

*Overall comments*

- 85 I accept that Mr Smith has made a significant number of applications for, often overlapping, information regarding the Launceston central business district and City Heart project and Council's broad view that these are repetitious is understandable. However, a closer examination and analysis of the individual elements of his request shows that in most cases Mr Smith is actually seeking different information, with variances in subject matter or the time period involved. Mr Campbell of Council recognised this in his email dated 10 July 2019, indicating that it is not so much that *each and every aspect of the request is the same or similar to previous requests but taken as a whole, the application under consideration is the same or similar to some if not all of his previous requests*. Council has recognised this important distinction but misunderstood the implications in relation to the application of s20(a). An application must be so similar as to be almost the same in actual content, rather than general topic, for s20(a) to be applicable. This misunderstanding by Council forms the basis for the determinations I have made, outlined above, which set aside almost all applications of s20(a).
- 86 Despite these determinations, I do recognise and acknowledge that generally Mr Smith's applications are often broad and undefined and the overall subject matter is very similar to his previous requests. Dealing with such requests has the definite potential to be a substantial and unreasonable diversion of a public authority's resources from its other work. When this is the case, however, a more appropriate course of action would be for Council to consider whether s19 or s20(b) of the Act apply, in which case it would be required to negotiate with Mr Smith in accordance with s19(2) or s13(7) of the Act in an attempt to refine his request to a more manageable level and remove any ground for refusal.
- 87 In this instance Council appears to have struggled to assess Mr Smith's application in accordance with the Act and applied and interpreted s20(a) much too broadly rather than using more apposite parts of the Act. Although I appreciate broad and repetitious applications can be challenging and time consuming for public authorities, it is important that they are each considered

on their individual merits with the correct application of the Act and in recognition that the intention of Parliament is that discretions conferred are to be used to facilitate the provision of the maximum amount of official information.

### **Preliminary Conclusion**

88 For the reasons outlined above I determine the following:

- Council is not entitled to refuse, pursuant to s20(a), to assess Items 2, 3, 5-10, 12-15, 18, 19, 21-28, 30, 31 and 33. I direct Council to assess these parts of Mr Smith's request in accordance with the provisions of the Act;
- Council is entitled to refuse, pursuant to s12(3)(c)(i), to provide information in relation to Items 1, 11, 17 and 32; and
- Council is not required to answer Item 29.

### **Conclusion**

89 As the above preliminary decision was adverse to Council, it was made available to Council on 20 September 2022 under s48(1)(a) to seek its input before finalising the decision.

90 Council advised on 29 September 2022 that it would not be making any submissions in response to the preliminary decision.

91 Accordingly, for the reasons given above, I determine that:

- Council is not entitled to refuse, pursuant to s20(a), to assess Items 2, 3, 5-10, 12-15, 18, 19, 21-28, 30, 31 and 33. I direct Council to assess these parts of Mr Smith's request in accordance with the provisions of the Act;
- Council is entitled to refuse, pursuant to s12(3)(c)(i), to provide information in relation to Items 1, 11, 17 and 32; and
- Council is not required to answer Item 29.

92 I apologise to the parties for the inordinate delay in providing this decision.

**Dated:** 29 September 2022

**Richard Connock**  
**OMBUDSMAN**

## **ATTACHMENT I**

### ***Right to Information Act 2009 Section 20 – Repeat or vexatious applications***

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.

### **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 s20(b);
3. remains lacking in definition after negotiation entered into under s13(7) – see s20(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.

**Simon Allston  
Ombudsman**

Date of first issue of Guideline : 1 July 2010

# OMBUDSMAN TASMANIA

## DECISION

### Right to Information

#### Act Review

Case Reference: OI904-087

R2202-014

**Names of Parties:** Robin Smith and City of Launceston

**Reasons for decision:** s48(3)

**Provisions considered:** s19

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### Background

- 1 The City of Launceston (Council) is conducting its City Heart project, a multi-million dollar development being implemented across several stages to revitalise and reinvigorate Launceston's city spaces. Mr Smith is the owner of Coffee Republic, a small business in Launceston's Brisbane Street Mall, and has a keen interest in how the project affects local businesses.
- 2 On 16 January 2019, Mr Smith made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to Council. Mr Smith sought *all records and information Council holds in any form on the following questions/requests:*
  1. *Details of “engagement” with any business or business body in the Launceston C.B.D. on the matter of Brisbane St Mall food service trial and the consideration of it.*
  2. *Details of where Council claims it has been “working for many months to accommodate numerous requests from Mr Smith...” and details of “a number of changes to the locations of various elements... in the Brisbane St Mall.*
  3. *Copies of Council’s public comments, both current and past, on all platforms. Also, those posts where Council has hidden or altered posts over time and marked with messages such as like or thumbs up. N.B. I do not have membership to Facebook and I am not about to join. The sites relating to our business are not connected with us.*
  4. *Council rules or control via by-law on Acts relating to use of pallet trolleys or trucks in the Brisbane Street Mall.*
  5. *Costings, invoices and records of thylacine sculptures in the Brisbane St Mall.*
  6. *Copies or records of in [sic] 2019 about Coffee Republic where Council made comment about the status of on-street dining and/or application process on public or closed platform. Thumbs up or ‘likes’ including historical or changed signals or markers.*

7. Any records for expenditure on Brisbane St Mall related to the City Heart refurbishments works in total or individual including any items before Council but not yet paid; thus total committed.
8. Copy of every on-street dining plan for the City of Launceston application process where it has been drawn by hand from 2015 thru [sic] to today.
9. CCTV footage of Brisbane St Mall as follows:
  - 12 Jan 2019 covering public telephone box outside Telstra in the Mall 11:25 - 11:28pm
  - 12 Jan 2019 Vinnies Van outside Myer 8:15pm - 8:18 inclusive.
10. Copies of all discussion or consultation about locating food vans/tents in Brisbane St Mall in 2018-19 inclusive.
11. CCTV footage of outside Telstra 7<sup>th</sup> Jan 2019. 1:07 to 1:09pm covering thylacines in the Mall.

- 3 On 23 January 2019, Mr Duncan Campbell, Governance and Paralegal Officer at Council, sent an email to Mr Smith and, pursuant to s19(2) and s13(7) of the Act, offered him the opportunity to refine [his] application so that it is one that can be reasonably handled. Mr Campbell estimated the volume of information responsive to the request to be something in the order of 1760-2760 pages, plus 11 minutes of CCTV footage. Mr Campbell then provided his consideration of the factors in Schedule 3 of the Act, further outlined in the Analysis section below.
- 4 On 25 January 2019 Mr Smith responded to Mr Campbell's email by raising several issues and seeking clarification on several points; but, he did not narrow the scope in any significant way. Mr Campbell responded to this email on 29 January 2019, noting his view that Mr Smith had in fact widened the scope of one of the questions and again asked Mr Smith to narrow the scope of the application in a meaningful and substantial way by COB 31 January 2019, so that it can be reasonably managed. Mr Smith did not respond to this email.
- 5 On 6 February 2019 Ms Louise Foster, Director Corporate Services at Council and a delegated officer under the Act, released a decision to Mr Smith. Ms Foster noted the negotiations regarding refinement of scope and the fact that Mr Smith had not responded to Mr Campbell's second email of 29 January 2019 which sought to further negotiations with a view to making the application a reasonably manageable one. Ms Foster set out that the CCTV footage responsive to questions 9 and 11 in Mr Smith's application no longer existed due to a hard drive failure. She refused to assess or provide any of the remaining information pursuant to s19, indicating:

*Having considered the matters set out in Schedule 3 of the Act, I am satisfied that the work involved in providing the information requested would substantially and unreasonably divert the resources of Council from its other work.*

- 6 Mr Smith sought internal review of this decision on 24 February 2019. In his request for internal review, he addressed aspects of Ms Foster's decision and also responded to the points raised by Mr Campbell in his email dated 29 January 2019. In summary, he reiterated his concerns regarding viewing information on social media platforms, confirmed he would be happy with the *lead figure* relating to question 7 and questioned Mr Campbell's search results and resultant estimation of pages regarding one of the questions he had queried. He did not raise concerns or seek review regarding the hard drive failure and lost information responsive to questions 9 and 11 of his application.
- 7 On 25 February 2019, Mr Smith provided information to support his internal review request, which included a list of emails he said *Ms. Foster mentioned in paragraph #7 of her Reason for Decision* and which he confirmed were *mostly relating to the Brisbane St. Mall (our location – Launceston CBD) or Cityheart [sic] Project*. He provided further submissions which are outlined below.
- 8 On 12 April 2019, Mr Smith had not received his internal review decision from Council and consequently sought external review by this office on the basis that a decision had not been made within the statutory timeframe. His application was accepted under s45(1)(f) of the Act on 29 April 2019; however, it is noted that by that time Mr Michael Stretton, General Manager of Council, had in fact released his internal review decision to Mr Smith.
- 9 In his internal review decision dated 26 April 2019, Mr Stretton affirmed the original decision and set out that he considered *the work involved in providing the information requested would substantially and unreasonably divert the resources of Council from its other work*. He again refused the request pursuant to s19(1)(a) of the Act and had regard to the matters set out in Schedule 3 in making his decision.
- 10 Following the release of the internal review decision, my Senior Investigation and Review Officer confirmed with Mr Smith that he wished to continue with his external review. On 30 April 2019, Mr Smith's application to extend his application to a full external review under s46(2) was accepted.
- 11 On 28 February 2022, an Investigation and Review Officer from this office sought clarification from Mr Smith regarding whether there was any information he no longer sought through his external review application. Mr Smith responded on 16 March 2022, indicating he no longer required questions 4, 7 and 11 in his request to be answered by Council.
- 12 Given the information Mr Smith has indicated he no longer requires and the information lost by Council in the hard drive failure, my review is restricted to the following remaining questions:
  - I. *Details of “engagement” with any business or business body in the Launceston C.B.D. on the matter of Brisbane St Mall food service trial and the consideration of it.*

2. Details of where Council claims it has been “working for many months to accommodate numerous requests from Mr Smith...” and details of “a number of changes to the locations of various elements... in the Brisbane St Mall.
3. Copies of Council’s public comments, both current and past, on all platforms. Also, those posts where Council has hidden or altered posts over time and marked with messages such as like or thumbs up. N.B. I do not have membership to Facebook and I am not about to join. The sites relating to our business are not connected with us.
5. Costings, invoices and records of thylacine sculptures in the Brisbane St Mall.
6. Copies or records of in [sic] 2019 about Coffee Republic where Council made comment about the status of on-street dining and/or application process on public or closed platform. Thumbs up or ‘likes’ including historical or changed signals or markers.
8. Copy of every on-street dining plan for the City of Launceston application process where it has been drawn by hand from 2015 thru [sic] to today.
10. Copies of all discussion or consultation about locating food vans/tents in Brisbane St Mall in 2018-19 inclusive.

### **Issues for Determination**

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

- When Council was considering refusal under s19(1), did it give Mr Smith a reasonable opportunity to remove Council’s grounds for this refusal as required by s19(2)?
- Having regard to Schedule 3, would processing Mr Smith’s request amount to a substantial and unreasonable diversion of Council’s resources from its other work?

### **Relevant legislation**

14 Section 19 is the section of the Act relevant to this review, which incorporates Schedule 3. I attach copies of s19 and Schedule 3 to this decision at Attachment I.

### **Submissions**

#### *Mr Smith*

15 Mr Smith rejects the assertion that the information responsive to his questions is of such a significant volume that processing it would be a substantial and unreasonable diversion of Council’s resources. Mr Smith submitted in his internal review request to Council dated 24 February 2019:

*I write to seek a review of Ms. Foster's decision to refuse to provide any information in response to my RTI request 16<sup>th</sup> February [SF6894] on the following grounds:*

*In response to Ms Foster's 'Reasons for Decision' on page 3 in the 5<sup>th</sup> paragraph of her letter dated 6<sup>th</sup> February, that the such [sic] release may be of 'concern' to third parties, it does not waive my right to seek the same.*

*I will address [under separate cover] any relevance of details listed in her paragraph #7 of previous assessed disclosures and the eight open requests for information held by the ECM system together with reviewing also if para #9 [multiple ordinary customer service requests] likewise is relevant. Does Ms. Foster suggest that this constitutes a form or [sic] release [if responded to] or perhaps an attempted request for the same outside the ACT [sic]?*

*Ms Foster draws into her summation that Mr. Campbell wrote 29 January requiring a response was requested by 31 January but this is of little consequence. However here are some comments in reply to his email:*

1. *Where I doubted there are 1000 pages, may I then have a copy of the 999 as I can find only one [in January 2019]. At the risk of being repetitive, this seeks is about [sic] the "Brisbane St. Mal food service trial...".*
2. *If your reply to my inquiring about 'accommodation of my [Robin Smith's] 'numerous requests' generates 500 pages over the recent past, then I would like a copy of those pages please.*
- ...
3. *Council has the capacity to make the sites open to all [me] without the imposition of having to go through Facebook's viewing requirement [logged in by membership] with all that such a membership involves.*
6. *Please refer my Q3.*
7. *Lead figure please. Thank you.*
10. *With respect here, where you write "Can you refine this in any way", is your iFerret search results [Zero; 5439; 772 & 300] suggesting more about your search approach than the deserved results?*

*It must be said that your claim in a 'Basis of Estimates' of work required is most notable undermined by:*

- i). *the results of you [sic] parameters giving 500 pages as being generated from question #2 about as you write, my 'numerous requests' for the Brisbane St. Mall. And*

*ii). the results of you [sic] parameters giving between Zero; 5349, 772 & 300 being generated to my question #10 about discussions about locating tents or food vans in the Brisbane St. Mall.*

- 16 Mr Smith again submitted in his further email to Council on 25 February 2019:

*While Ms Foster's intimation here (and with previous rejections by council) is possibly that there is an unreasonable diversion of resources under schedule #3 part (g), I do not think that this is substantial grounds for rejection. Ms Foster alludes to item (g) where Mr Campbell is part time and busy but again council has been subject to the Act for some 30 years now and should be aware of the requirements.*

*On the whole my requests are either ignored or summarily directed to the RTI route. Ms Foster reiterates Mr Campbell's calculations of processing time. I think that this '7 minutes' relates to considering documents for release not differentiating which documents (potentially 885) are to be considered relevant to the remit. I reject that calculation.*

*I can only reiterate (see past correspondence following a previous RTI) that while council alludes to it having made assumption [sic] as to the motivation for such requests to council, I am aware that council has not shown much sign that it would likely become cognisant that it's [sic] management and Cityheart [sic] Project have contributed to a fall in trade in the Brisbane St. Mall (and Quadrant Mall). This information has value to us and cannot be seen to have a bearing on council's obligation to comply with the law (Act).*

- 17 Mr Smith did not provide any additional submissions with his application for external review.

#### *Council*

- 18 Council did not provide specific submissions in response to this external review, beyond the reasoning of its decisions. The determinations of its decisions are set out below.
- 19 In Council's original decision, Ms Foster first referred to the emails between Mr Campbell and Mr Smith as background information she had considered. She noted in Mr Smith's response to Mr Campbell dated 25 January 2019 that Mr Smith withdrew [his] question 4 and restricted question 5 to relevant bills and invoices. She further noted he appeared to widen the scope of point 10. Subsequent investigations indicate an increased [sic] in the information subject to your application by approximately 300 emails plus attachments. She finally noted the CCTV footage was no longer part of the application given the hard drive failure and that Mr Smith did not respond to Mr Campbell's second email dated 29 January 2019 which sought to further negotiations with a view to making the application a reasonably manageable one.
- 20 Ms Foster ultimately determined that the work involved in providing the information requested would substantially and unreasonably diver the resources of Council from its

other work. Before reaching this decision, she addressed each of the matters in Schedule 3 of the Act, which will be set out in the Analysis.

- 21 In Council's internal review, Mr Stretton first considered relevant content from Ms Smith's emails dated 24 and 25 February 2019.
- 22 In relation to Mr Smith's assertion in his email dated 24 February 2019 that Ms Foster's statement that the release of the information may be of 'concern' to third parties does not waive [his] right to seek the same, Mr Stretton noted:

*Your right to seek the information is not at issue. The purpose of this statement is to demonstrate consideration of the timelines binding Council. This is a requirement of Schedule 3(!)(e) of the Act.*
- 23 In response to Mr Smith's assertion in his email dated 24 February 2019 that he will address any relevance of details regarding Ms Foster's statement that his application seeks information that is similar to previous formal requests for assessed disclosure that Mr Smith has lodged with Council, particularly as it relates to the Mall, City Heart and on-street dining plans, Mr Stretton said:

*There is no suggestion to be read into this text. The purpose of this statement is to demonstrate consideration of the extent to which you have made other applications to Council for the same or similar information. This is a requirement of Schedule 3(!)(g) of the Act.*
- 24 In response to Mr Smith's statement in his email dated 24 February 2019 that Ms Foster draws into her summation that Mr Campbell wrote 29 January requiring a response was requested by 31 January..., Mr Stretton stated:

*With the exception of your comment at point 7, your response does not refine your application in any meaningful and substantial way. I note that your request for a lead figure only at point 7 reduces the volume of information that you seek by approximately 200 documents.*
- 25 Mr Stretton then made the following specific comment regarding Mr Smith's email dated 25 February 2019:

*I am of the view that 'processing time' considers both the content and relevance of documents that contain information believed to be responsive to your request. I am satisfied that seven minutes per page is a reasonable estimate.*
- 26 In his reasons for decision Mr Stretton noted he agreed with the reasons provided by Ms Foster in Council's original decision. He made some further comments addressing the factors in Schedule 3, which will be considered in the Analysis section below.

## **Analysis**

When Council was considering refusal under s!9(!), did it give Mr Smith a reasonable opportunity to remove Council's grounds for this refusal as required by s!9(2)?

- 27 Council has made a determination under s19(1) that the work involved in providing the information requested by Mr Smith would substantially and unreasonably divert its resources from its other work. Section 19(2) requires that, before making such a determination, the applicant is to be given a reasonable opportunity to consult the relevant public authority with a view to the applicant being helped to make an application in a form that would remove the ground for refusal.
- 28 Council provided copies of emails between Mr Duncan Campbell of Council and Mr Smith, which constituted its consultation with Mr Smith under s19(2) regarding reduction of the scope of the request. In his first email to Mr Smith, dated 23 January 2019, Mr Campbell set out that:

*It is my view that in its present form, your application will be rejected...I am offering you the opportunity to refine your application so that it is one that can be reasonably handled.*

*...In summary, relevant information is likely to be something in the order of 1760 – 2760 pages... Before an application is refused under s19(1), the decision maker must consider the factors listed in schedule 3 of the Act. I provide my own opinion of the factors...to give you an opportunity to address those which may help convince the decision maker that your application is a reasonable one. Specifically,*

- a) *Your application is imprecise and seeks a number of discreet [sic] information sets.*
- b) *The purpose of your application isn't clear.*
- c) *It is not a reasonably manageable task to process this application given I have a number of other important and competing governance tasks...*
- d) *There are likely at least 5 sources for the information requested including servers, desktop computers, ECM, emails, hand written notes and hard files. The Ombudsman's position is that 7 minutes per page is reasonable estimate [sic] of the time it would take to assess the relevant information against the Act. On that basis, it will take between 205-322 hours to process 1760 – 2760 pages of information...it will cost between \$11902.30 and \$18695.32 to comply with your request...*
- e) *The nature of the information is such that it is very likely third party interests will be involved and they would need to be contacted before assessment could occur.*
- f) *The estimation of information totalling 1760 – 2760 is based on initial research. ... The final number of pages could easily exceed these figures.*
- g) *Your application relates primarily to the Brisbane Street Mall. You have lodged several previous RTIs on this subject, aspects of which share similarity with this application, particularly in relation to on*

*street dining plans and City Heart figures. The food van issue is somewhat a new issue.*

- h) I am unable to comment on this as negotiations are only beginning on this matter.*
    - i) I work three days per week and I am the only officer who processes RTI requests, except if I am on leave or a conflict exists...*
- 29 Mr Campbell then provided a breakdown of the number of pages relevant to questions 1, 2, 5 and 10 in Mr Smith's application, providing commentary as to how these figures were calculated. He then noted that, given social media comments are publicly available, he foresaw questions 3 and 6 of the request being rejected pursuant to s12(3)(c)(i) of the Act.
- 30 Mr Campbell further identified approximately 10 on-street dining plans that were potentially able to be released in relation to question 8 and, subject to more concrete advice, he noted this aspect of Mr Smith's request was *of itself not an unreasonable request*.
- 31 On 25 January 2019, Mr Smith responded to Mr Campbell's email. He raised a number of matters, including the implications of joining and leaving Facebook as well as clarification regarding the online platforms used by Council. He also sought clarification of the meaning of *purpose* in relation to Mr Campbell's statement relating to matter (b) in Schedule 3 and clarification regarding the previous RTIs Mr Campbell referred to relation to matter (g), as well as offering to differentiate previously asked questions from each other if needed. In addition, he questioned the volume estimations provided by Mr Campbell in relation to questions 1 and 2. In relation to costings, he confirmed he sought information relevant to the cost only of the thylacine sculptures in relation to question 5. Finally, Mr Smith provided clarification as to the difference between questions 1 and 10 and thanked Mr Campbell in anticipation of receiving the information relating to question 8.
- 32 In Mr Campbell's email response dated 29 January 2019 he provided some clarification regarding the meaning of *purpose*, justified his page estimations but also offered to provide lead figures rather than documents where possible, and reiterated his position regarding information on social media platforms. He also identified that although *there has been some narrowing of the application scope (but also widening)*, in his view the application is still very broad. Mr Campbell again requested that Mr Smith refine the application in a meaningful and substantial way. Mr Smith did not respond to Mr Campbell's email.
- 33 Overall, I am satisfied that Council did provide Mr Smith with a reasonable opportunity to refine the scope of his application and thereby remove the grounds for refusal under s19, as required under s19(2) of the Act.
- 34 Council made commendable efforts, in the detailed emails outlined above, to clearly set out the reasons it considered that s19(1) was applicable and to help Mr Smith amend his application to remove the ground for refusal. The in-depth

breakdown of the number of pages responsive to each part of Mr Smith's request, indication of the number of hours it would take and associated cost, gave Mr Smith a genuine understanding of the parts of his request considered to be unreasonably broad. Council appropriately considered and explained the factors in Schedule 3, as well as offering options to provide information in a shorter form to try to answer Mr Smith's questions without it creating an unreasonable diversion of its resources.

- 35 Mr Smith is not obligated to accept Council's position and refine his application, and he ultimately declined to do so. He did withdraw question 4 and agreed to receive a lead figure rather than numerous pages of documents in relation to the expenditure on the City Heart project in his emails dated 25 January 2019 and 24 February 2019. Overall, however, I agree with Mr Stretton's comment that his *application [remained] unrefined in any meaningful and substantial way* and indeed he appeared to widen the scope in relation to question 10.
- 36 I must then determine whether Mr Smith's request was in fact overly broad and unable to be reasonably processed by Council.

*Having regard to Schedule 3, would processing Mr Smith's request amount to a substantial and unreasonable diversion of Council's resources from its other work?*

- 37 For a request for information to be refused under s19, the public authority in possession of the information must be satisfied that the work involved in providing the information would be a substantial and unreasonable diversion of its resources from its other work. It must also have regard to the nine matters in Schedule 3 in coming to this decision.
- 38 Council was satisfied that the work required to process the information it had found to be responsive to Mr Smith's request would be a substantial and unreasonable diversion of its resources. In both its decisions, Council specifically addressed and considered the matters in Schedule 3, reaching similar conclusions to those of Mr Campbell.
- 39 In the original decision, Ms Foster noted:

*Your application is not expressed in a precise manner, but rather seeks information relevant to numerous discreet topics. Your email of 25 January 2019 does little to accurately define what you are seeking, and as a practical matter it would be difficult to locate all relevant information when the parameters of the request are not known (a). The purpose and importance to you in obtaining the information is not known (b).*

*Mr Campbell is responsible for obtaining information relevant to RTI requests. He is employed part time and has competing priorities, including the processing of other RTIs and governance tasks. The extent of Council's resources to deal with your request is Mr Campbell's time plus limited ancillary support from other officers within Council (i). The request is not reasonably manageable given the amount of relevant information,*

*particularly as significant officer time is taken up regularly dealing with your formal and informal applications for information and explanation (c).*

*Estimates from relevant staff, combined with some iFerret searching by Mr Campbell, identified something in the realm of 885 potentially relevant pages of information. On the basis of the Ombudsman office's advice of 7 minutes per page processing time, it would take approximately 103 hours to process your request, at a cost of \$58.06 an hour or \$5,995 in total (d)*

*It is very likely that the release of relevant information would be of concern to third parties, triggering the time extension provisions under the Act ... (e)*

*Relevant emails identified in iFerret searching have not been checked for the number or extent of attachments. More certainty cannot be gained without expending significant resources (f).*

*This application seeks information that is similar to previous formal requests for assessed disclosure that you have lodged with Council, particularly as it relates to the Mall, City Heart and on-street dining plans. In addition, a review of our ECM system reveals you may have as many as eight open requests for information or explanation received in writing between 24 January 2019 and today, some covering the same or similar issues you have raised in the current application. ... (g)*

*I appreciate that you have narrowed the scope of your application in some respects, but note the application has been broadened in other respects. The information sought is still very extensive. ... (h)*

*In addition to the formal applications for assessed disclosure you make throughout the year, you often have multiple ordinary customer service requests open with Council as detailed above. If Council is required to process your request in full, it have [sic] an impact on Council's capacity to respond to your ordinary customer service requests (i).*

**40 In his internal review decision, Mr Stretton similarly noted:**

*I agree with the reasons provided in the decision letter dated 6 February 2019 and also offer the following:*

*With the exception of your comment at point 7 in your email dated 24 February 2019, your application remains unrefined in any meaningful and substantial way. Even after considering your emails of 24 February 2019 and 25 February 2019, your application remains imprecise in that it seeks "all records and information Council holds in any form" on multiple discreet [sic] topics. I have formed the view that your request cannot be accommodated within a reasonable time, and with the exercise of reasonable effort (a).*

*Your email dated 25 February 2019 expresses your view that City of Launceston's "management and Cityheart Project have contributed to a fall in trade in the Brisbane St. Mall (and Quadrant Mall)" and states that "this information has value to us". I take this to be a clarification of the importance of the documents to you, however, the imprecise nature of your application means that the link between your view and the documents you request is not clearly apparent (b).*

*I am of the view that City of Launceston's current resourcing arrangements for dealing with applications for assessed disclosure are such that we can accommodate all reasonable requests within appropriate timeframes and with appropriate effort (c).*

*Your comment at point 7 in your email dated 7 February 2019 reduces the estimate of potentially relevant pages of information from 885 to 685. Processing time is approximately 80 hours (685 pages x 7 minutes per page). At a cost of \$58.06 per hour, the total estimated cost of processing your request is approximately \$4644 (d).*

*I am of the view that contact with third parties will be required if your application were to proceed. In light of your most recent application for assessed disclosure which lists 33 questions, it is very likely that City of Launceston would seek to negotiate an extension of time beyond the 40 business days provided for by the Act (e)...*

*In reaching my decision to refuse your application, I have had regard to the matters specified in Schedule 3 of the Act, as detailed in the decision letter dated 6 February 2019 and as I have described above. I am satisfied that the work involved in providing you with the information sought by your application would substantially and unreasonably divert the resources of City of Launceston from its other work.*

- 41 Most notably, in relation to the substantial and unreasonable impact on its resources, Council ultimately claimed it would take approximately 80 hours to process the 685 pages of information responsive to the request. As outlined above, Council reached its estimate of approximately 80 hours to process 685 pages by applying a time period of seven minutes per page to assess each document against the Act, adopting the method used by the Australian Information Commissioner and used in previous decisions I have made.<sup>1</sup> These estimates were provided by both Ms Foster and Mr Stretton in relation to factor (d) of Schedule 3.
- 42 I note this estimate is significantly less than the initial estimate made by Mr Campbell and indicates that the request would be able to be processed within the statutory timeframe. However, I accept that it is still a sizeable number of

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<sup>1</sup> See Carlo di Falco and Tasmania Police (August 2020) and Damien Matcham and Brighton Council (January 2018), available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions)

documents and that this current application must be seen in the context of Mr Smith's other requests for information from Council.

- 43 While other applications to Council can be specifically taken into account pursuant to matter (g) in Schedule 3, this only relates to previous applications for information occurring prior to the assessed disclosure request under the Act. I do not consider that it is permissible to consider later applications for information, as Mr Stretton has done in his internal review decision in referencing Mr Smith's requests for information received after the date of this application. If subsequent applications are able to be refused as repeats, vexatious or an unreasonable diversion of resources, this should be addressed in response to that application and not a previous one.
- 44 This is not the case in relation to Ms Foster's comments that Mr Smith's current application seeks *information that is similar to previous formal requests for assessed disclosure that [he has] lodged with Council, particularly as it relates to the Mall, City Heart and on-street dining plans*. Such previous applications can be relevant and I accept that Mr Smith has made a significant number of requests for information previously. Although Ms Foster further noted that Mr Smith also often has *multiple ordinary customer service requests open with Council*, it is important to equally note Mr Smith's comments in his submissions that *on the whole [his] requests are either ignored or summarily directed to the RTI route so I am not able to be satisfied that he obtained the information he sought through these requests*.
- 45 Further matters considered by Council include factor (a), whereby both Ms Foster and Mr Stretton found that Mr Smith's application was *not expressed in a precise manner* and it covers *multiple discreet [sic] topics*. I agree with Council's comments in this regard to a certain extent; however, I do believe some questions in Mr Smith's request were in fact very precise and further that the number of pages and time involved in processing those parts of his request did not prevent release under s19.
- 46 Specifically, I am of the view that the assessment under the Act of the approximately ten on-street dining plans in question eight of Mr Smith's application and the 50 pages of information relating to the costing of the thylacine sculptures would not constitute an unreasonable diversion of Council's resources. The on-street dining plans were identified by Mr Campbell in his email dated 23 January 2019 as *of itself not an unreasonable request*, and which Mr Smith confirmed he would like to receive in his email dated 25 January 2019. Mr Campbell also said the 50 pages relating to the thylacine sculptures were *of itself not unreasonable to deal with* although he did note it would be if combined with the remainder of Mr Smith's application.
- 47 The object of the Act is set out explicitly in s3, and the intention of Parliament is that discretions conferred are to be exercised so as to *facilitate and promote, promptly and at the lowest reasonable cost, the provision of the maximum amount of official information*. Therefore, when a public authority is considering refusal of an application for assessed disclosure under s19, it is vital that it carefully assesses

each of the individual elements of the application in order to identify whether any part could be reasonably assessed and information released. Refusal can occur in relation to just part of an application and consideration should also be given to whether options such as the release of information in tranches or extensions of time under s15(4) of the Act could enable an application to be assessed. These options may not be reasonable or practical in all scenarios, but should always be considered and refusal only used as a last resort.

- 48 For example, if an application is split by the applicant into ten equal parts, each able to be reasonably handled individually but cumulatively constituting a substantial and unreasonable diversion of a public authority's resources, an application could be refused in full under s19. However, if the same application was split by the applicant into two small parts and eight large parts, it would be open to a public authority to respond to the small sections and refuse the remainder under s19.
- 49 In relation to this application, Council has not taken the latter course and I do not consider that it has established why the parts of Mr Smith's application which could be processed relatively easily, such as the on-street dining plans and thylacine sculpture costings, have not been assessed. During the s19(2) consultation, Mr Campbell identified these as being able to be responded to without this being an unreasonable diversion of resources but Council's decisions only assessed the application as a whole, rather than considering whether any part of the request could be reasonably assessed. It is not clear why this did not occur, in order to be consistent with the intentions of Parliament for public authorities to facilitate the provision of the maximum amount of information.
- 50 Council's comments regarding factor (b) in Schedule 3 include an initial comment by Ms Foster that Mr Smith did not identify the purpose and importance of obtaining the information. It then included a subsequent assessment by Mr Stretton that Mr Smith did clarify the importance of the information in his email dated 25 January 2019 when he said the management of the City Heart Project had contributed to a fall in trade in the Brisbane St. Mall and that "*this information has value to [them]*". Mr Stretton further took the view that *the imprecise nature of [Mr Smith's] application means that the link between [his] view and the documents [he] request is not clearly apparent*.
- 51 On this point, I note that the Act does not specify that an applicant must provide reasons as to why they are seeking the information requested. The Act gives members of the public the right to obtain information and this is not restricted to applicants who can show a purpose which is considered to be worthy by public authorities and Ministers. However, matter (b) in Schedule 3 sets out that 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. While this gives a public authority the ability to consider the purpose of a request for information, I do not consider that an imprecise or unknown purpose should be weighed significantly against an applicant. In this

instance, I do not disagree with the view that the demonstrable importance of these specific documents to Mr Smith has not been clearly shown and that the purpose for which he seeks them does not appear to justify an increase to the threshold of what would be a reasonable quantity of information to process. Accordingly, I consider matter (b) to be a neutral consideration.

- 52 In relation to factor (c), I note that although Ms Foster identified Mr Campbell's part-time status and competing priorities as factors to take into account, Mr Stretton took the view that the *City of Launceston's current resourcing arrangements for dealing with applications for assessed disclosure are such that [Council] can accommodate all reasonable requests within appropriate timeframes and with appropriate effort*. This factor is very much related to factor (i), which was not addressed by Mr Stretton. Ms Foster addressed factor (i) by saying: *If Council is required to process [Mr Smith's] request in full, it have [sic] an impact on Council's capacity to respond to [his] ordinary customer service requests (i).*
- 53 In this regard I note that it is vital that public authorities allocate adequate resourcing to enable them to respond to requests under the Act. Factors (g) and (i) do not enable reasonable requests to be denied due to limited resourcing being allocated but can be relevant with particularly small or large public authorities, especially when requests are on the cusp of what is manageable. I do not consider that (g) or (i) are of significant importance in this matter, Council appears to be stating that it can handle reasonable requests but does not have the resources to accommodate and assess requests which would result in a major diversion of resources from its regular work. This is an appropriate position to take and is consistent with the provisions of the Act.
- 54 Council raised the time involved in third party consultation regarding factor (e) and the consequent extension of time that may be required. I do not consider this a strong argument, as extensions of time for the purpose of third party consultation are provided for in the Act and should not impact timelines binding the public authority.
- 55 In relation to factor (f), Ms Foster referred to the uncertainty of the iFerret<sup>2</sup> searches and Mr Stretton did not consider this factor. This is of some relevance and there is a *possibility that processing time might exceed to some degree the estimate first made*. I note that the estimates by Council have varied considerably between Mr Campbell, Ms Foster and Mr Stretton, however the estimate of the volume of information has actually reduced with each assessment. Accordingly, there is an equal possibility that processing time might in fact be lower than the current estimate.
- 56 Finally, factor (h) was only considered by Ms Foster and her comments include that she appreciates Mr Smith narrowed the scope of [his] application in some respects, but note the application has been broadened in other respects. The information sought is still very extensive. I agree with Council that the information

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<sup>2</sup> Council's search tool within its document management systems.

sought is extensive and that Mr Smith did not refine his application to a significant degree following negotiations under s19(2).

- 57 Overall, it is a difficult decision to make in relation to whether s19 is applicable, as Mr Smith's request is on the cusp of what might be regarded as reasonable in terms of the volume of information involved and the time it would take Council to undertake the assessment. However, I find that Council's reliance on of s19 and consideration of the factors in Schedule 3 was reasonable in relation to the broad and imprecise parts of Mr Smith's request, particularly in the context of his frequent requests for information. The impact on Council's ability to undertake its other work appears legitimate and Mr Smith largely did not engage with Council's detailed attempts to assist him to reduce his request to a manageable scope.
- 58 Despite this, Council should not have refused more confined parts of Mr Smith's request and I do not consider that s19 is applicable in relation to the on-street dining plans and the thylacine sculpture costings, information responsive to which is able to be reasonably assessed by Council.

### **Preliminary Conclusion**

- 59 In accordance with the reasons set out above, I determine the following:
  - Council is entitled to refuse, pursuant to s19, to provide information in relation to questions 1, 2, 3, 6 and 10 in Mr Smith's application; and
  - Council is not entitled to refuse, pursuant to s19, to provide information in relation to questions 5 and 8. I direct Council to assess the information responsive to this part of Mr Smith's request in accordance with the provisions of the Act.

### **Conclusion**

- 60 As the above preliminary decision was adverse to Council, it was made available to Council on 2 September 2022 under s48(1)(a) to seek its input before finalising the decision.
- 61 Council advised on 28 September 2022 that it would not be making any submissions in response to the preliminary decision. It committed to collating and assessing the information responsive to questions 5 and 8 as soon as possible.
- 62 Accordingly, for the reasons given above, I determine that:
  - Council is entitled to refuse, pursuant to s19, to provide information in relation to questions 1, 2, 3, 6 and 10 in Mr Smith's application; and
  - Council is not entitled to refuse, pursuant to s19, to provide information in relation to questions 5 and 8. I direct Council to assess the information responsive to this part of Mr Smith's request in accordance with the provisions of the Act.
- 63 I apologise to the parties for the inordinate delay in finalising this decision.

**Dated: 29 September 2022**

**Richard Connock  
OMBUDSMAN**

**Attachment I****Relevant Legislation****Section 19**

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

having regard to –

- (c) the matters specified in Schedule 3 –

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

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

**SCHEDULE 3 - Matters Relevant to Assessment of Refusing Application**

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

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

- (g) the extent to which the applicant has made other applications to the public authority or Minister in respect of the same or similar information or has made other applications across government in respect of the same or similar information, and the extent to which the present application might have been adequately met by those previous applications;
- (h) the outcome of negotiations with the applicant in attempting to refine the application or extend the timeframe for processing the application;
- (i) the extent of the resources available to deal with the specified application

**OMBUDSMAN TASMANIA**  
**DECISION**

**Right to Information Act Review**

**Case Reference:** O1801-153

**Names of Parties:** Mr Robin Smith and Launceston City Council

**Reasons for decision:** s48(1)(a)

**Provisions considered:** s18

**Background**

- 1 The Launceston City Council started a major project called City Heart in 2014. It was a multi-million dollar project run over two stages to revitalise and redevelop the heart of the central business district in Launceston.
- 2 The project included upgrades to the public areas in the Quadrant Mall (completed), Civic Square (currently underway), and the Brisbane St Mall (pending). The nature of this work has raised some issues with local residents and business owners.
- 3 On 18 December 2017, Mr Robin Smith submitted an application for assessed disclosure to the City of Launceston seeking a range of information related to the City Heart project. Specifically, he sought information on the following matters:
  - (1) *Budget for City Heart Brisbane Street Mall redevelopment, source and total if from external body.*
  - (2) *Copy of vehicle permits issued for Brisbane St Mall for 4 April 2017.*
  - (3) *Total expenditure on community engagement for City Heart planning.*
  - (4) *Total expenditure for City Heart planning for Brisbane Street Mall where identifiable.*
  - (5) *Number of FOSMs [Front of Shop Modules] issued with permits for 2017 where insurance policy is current and a copy held by Council.*
  - (6) *How many 'A' frame permits were issued for 2017.*
  - (7) *Any complaints Council received about Coffee Republic or Robin Smith in 2017 which have not otherwise been revealed to [the applicant] under another RTI request.*
  - (8) *Copy of all correspondence from Simon Tennant to the applicant in 2017.*
  - (4) *How many vehicle permits issued for the Quadrant Mall where keys were issued for traffic bollards.*

- 4 On 25 January 2018, Mr Michael Stretton, Council's General Manager and therefore its principal officer, released a decision to Mr Smith. The decision released information on some of the matters in the application, determined there was no information held responsive to others, and exempted some information under s30 and s36.
- 5 Mr Smith requested an external review of Council's decision on 31 January 2018, specifically relating to Item 3 of his application.
- 6 The request was accepted for external review under s45(1)(a) on the basis the original decision was made by the principal officer and Mr Smith requested the review within 20 working days of being in receipt of the decision. The application fee was paid.

### **Issues for Determination**

- 7 Mr Smith has only requested an external review of Item 3. Council's response to Item 3 was that there was no information available. Therefore, the issue for determination is:
  - (I) Was there any information available at the time Mr Smith's application was made?

### **Relevant Legislation**

- 8 Section 18 is most relevant to this decision and is at the end of this decision. **Submissions**

- 9 Council's decision stated that Mr Smith's Question 3 went beyond information in its possession, seeking 'analysis' to which he was not entitled. However, Council went on to add that it would release the analysis to him at a later date. Specifically, its decision stated:

*The Act provides you with a legally enforceable right to be provided with information in the possession of Council that exists at the time the application is received. The Act does not provide you with a right to analysis.*

*I have determined that this aspect of your application is a request for analysis of information, not a request for information. The disclosure of relevant analysis to you during an open tender process would likely expose Council to competitive disadvantage.*

*It is for this reason that I refuse to provide the analysis to you as an active disclosure at this time. I have instructed Council officers to release the analysis to you on or before 3 April 2018.*

- 10 Mr Smith submitted Council had not appropriately applied the Act and the information should have been provided. Mr Smith relied on the first part of Council's response, a narrative, to claim its refusal to release the information was spurious. Specifically, he submitted:

*In [Item] 3 I seek expenditure on community engagement consultation on City Heart Project (sic). Council appears to reject my RTI on spurious grounds being 1) a claim that release requests analysis, not release [sic] and 2) council has an open tender of some description. I doubt neither of the grounds are reason for withholding at this time together with the an [sic] outside firm prepared a document for council which is an item it calls a 'program'.*

## **Analysis**

*Was relevant information in the possession of Council at the time of Mr Smith's application?*

- 11 In the Act, 'information' means (as defined in s5(1)):
  - (a) anything by which words, figures, letters or symbols are recorded and includes a map, plan, graph, drawing, painting, recording and photograph; and
  - (b) anything in which information is embodied so as to be capable of being reproduced.
- 12 In the Act, 'information in the possession of a public authority' (as defined in s5(1)) relevantly means 'information in the possession of a public authority that relates to the official business of the authority, ...' Subsection 5(3) is also relevant.
- 13 'Total expenditure on community engagement for City Heart planning' [Mr Smith's Item 3] relates to Council's official business.
- 14 A public authority has no obligation under the Act to create new information in response to an application for assessed disclosure. Rather, it must assess relevant information that was in its possession when it received the application.
- 15 The question remains, at that time it received Mr Smith's December 2017 request, did Council have in its possession information responsive to Item 3?
- 16 Council advised this office on 7 February 2018, that money had been spent on community engagement relating to the City Heart project. However, Council said it did not have that amount listed in a single document, other than in analysis created in January 2018 (after Mr Smith's application).
- 17 Council's view was that, since 'The analysis did not exist at the time the application was received', it was therefore not subject to Mr Smith's application.
- 18 The Act, s18(3) provides:

If –

  - (c) information requested under this Act is included with other information; and
  - (d) the information requested can be extracted from that other information by the use of a computer or other equipment usually available to the public authority or Minister –  
the information is to be extracted accordingly.
- 19 Mr Smith's application for assessed disclosure did not request analysis. He requested total expenditure on community engagement for City Heart planning.

Pursuant to s18(3), Council could have extracted that total up to the date of Mr Smith's application, based on information in its possession at that time (for example, in its financial management or other systems).

- 20 I determine that information answering Item 3 was in the possession of Council when it received Mr Smith's original application.

### **Preliminary Conclusion**

- 21 For the reasons set out above, I determine that Council's decision in relation to Item 3 of Mr Smith's application to it for assessed disclosure was incorrect.
- 22 At the time Council received the application, it was in the possession of information from which it could have extracted under s18(3) the answer to Item 3, namely the *sum total [as at the time of receiving the application] expenditure on community engagement for City Heart planning*.
- 23 Pursuant to s47(1), I direct Council to determine Item 3 of Mr Smith's application, by providing the *sum total [as at the time of receiving his application – unless Council and Mr Smith agree to an alternative date]* of *expenditure on community engagement for City Heart planning*.

### **Submissions to the Preliminary Conclusion**

- 24 The above preliminary decision was adverse to Council, so a copy of it was forwarded to Council seeking its input before finalising the decision, as required by s48(1)(a).
- 25 On 8 April 2021, Mr Duncan Campbell, Council's Acting Manager – Governance, responded to the preliminary decision. Mr Campbell's submissions related to, and were accompanied by, the cost-based analysis (the analysis) attached to this decision. Mr Campbell said Council had prepared the analysis for, and provided it to, Mr Smith in response to questions 3 and 4 of his application. Mr Campbell said that he had emailed the analysis to Mr Smith on 10 April 2018.
- 26 In brief, as can be seen from it, the analysis itemises in a table format, and sums, the costs of:
  - Community Engagement (Consultation) on components of the Launceston City Heart project; and
  - Planning (Investigation and Design) for the Brisbane Street Mall Redevelopment.
- 27 The totals for community engagement and planning amount to \$191,547 and \$260,235, respectively.
- 28 The analysis comprehensively answered questions 3 and 4 of Mr Smith's request for information.
- 29 In response to the preliminary decision, Mr Campbell submitted [his emphasis] that the information Mr Smith had requested 'did not exist at the time of the making of

the application. Rather, Council created the new information in response to the application'.

- 30 Mr Campbell also said that Council's submission was made on the basis that:

*the information provided did not exist at the time the application was made, and was created for the purpose of the application. Whilst data was extracted by our finance department and provided to the major projects team, it was not simply a matter of the engagement information being included with other information that could be extracted through the use of computers or other equipment available to Council as envisaged by section 18(3). Rather, the data required significant interpretative work and human judgement in order to be correct and responsive to the request. ....; and,*

*but for the application made by Mr Smith, the information provided to Mr Smith would not have been created.'*

- 31 Mr Campbell also added extensive supporting comments from Council's former Director of Major Projects. While those comments are helpful in explaining the context and detail behind aspects of the analysis, I do not find it necessary to repeat them here.

### **Further analysis**

- 32 A key aspect of the analysis regarding the 'consultation' costs is summarised in Note I to Table I:

*The above costs for "consultation" on the Launceston City Heart represent approximately 1.0% of the total project budget. This is well below normal expected and planned project cost budget allocations for consultation activities. The reason for it being lower than*

*What [sic] might normally be expected is due to the fact it was conducted by only CoL staff and use of predominantly CoL resources rather than, as often the case, outsourced to more expensive specialist consultancies.*

- 33 For present purposes, the key point above is the fact [the consultation] was conducted by only CoL staff and use of predominantly CoL resources rather than, as often the case, outsourced to more expensive specialist consultancies.

- 34 This meant that, to calculate the total Mr Smith requested, at least for Question 3, Council had to do far more than merely add up invoices from consultants, which would have been within its duty under s18(3).

- 35 Rather, as I understand it, in order to calculate the total, Council had to undertake analysis, the results of which are set out in the amounts specified in Table I. To produce that table, Council needed, for example, to calculate from its records, the costs of the times its various staff involved in the consultations spent on different components of the project, as ultimately itemised in Table I.

- 36 On that basis, I accept Mr Campbell's submission(s) that:

- Council's analysis was created in response to Questions 3 and 4 of Mr Smith's application, in order to answer them; and
  - '*but for the application made by Mr Smith, the information provided to Mr Smith would not have been created.*'
- 37 I am consequently satisfied the totals Mr Smith requested in Question 3 (subject of this review) could not merely, in the words of s18(3)(b), 'be extracted from other information by the use of a computer or other equipment usually available to the public authority'.
- 38 Rather than mere extraction, analysis going beyond s18(3) was required to calculate the totals.
- 39 It follows that Council was entitled to make the decision it did in relation to Question 3, as set out at paragraph 9 of these reasons. I therefore reverse my preliminary decision and uphold Council's original decision in relation to Question 3.
- 40 It is to Council's credit that, following its decision, in order to provide the total Mr Smith had requested in Question 3, it:
- (a) undertook the analysis; and then
  - (b) on 10 April 2018, provided the results to Mr Smith in Table I. That table showed the total Mr Smith had requested, its component parts Council had calculated to produce the total, and two notes.
- 41 In so doing, Council (consistently with the Act, s12) went above and beyond its duty under s18(3), for which it is to be commended.

## **Conclusion**

- 42 Council was entitled to make the decision it did, as set out at paragraph 9 of these reasons, regarding Question 3 of Mr Smith's application for assessed disclosure.
- 43 Council subsequently undertook (consistently with s12) analysis above and beyond its duty under s18(3), from which it provided the results to Mr Smith. Those results comprised a table showing the total Mr Smith had requested, its component parts Council had calculated to produce the total, and two notes.
- 44 Council and its officers are commended for that analysis and their associated work in relation to this application.

**Dated: 14 April 2021**

**Richard Connock  
OMBUDSMAN**

**Attachment 1: Email from Council sending Mr Smith its response to his Questions 3 and 4**

**From:** Duncan Campbell <[Duncan.Campbell@launceston.tas.gov.au](mailto:Duncan.Campbell@launceston.tas.gov.au)>

**Sent:** Tuesday, 10 April 2018 1:22 PM

**To:** Robin Mark Smith <...>

**Subject:** RE: Robin Smith City Heart RTI - SF 6740

Dear Mr Smith,

As stated in my email of 4 April 2018, the analysis was being reviewed by Director of Major Projects. This has now occurred. The analysis provided in response to questions 3 and 4 of your RTI request is as follows:

**Table 1**

<b>Community Engagement (Consultation) on:</b>	<b>Amount</b>
LCH Masterplan and Original Strategy	\$62,819
Quadrant Mall Redevelopment	\$0
LCH St John Street Sth Redevelopment	\$57,734
LCH St John Street Nth Redevelopment	\$0
LCH Civic Square Redevelopment	\$31,331
Brisbane Street Mall Redevelopment	\$33,536
LCH Wayfinding	\$6,127
<b>TOTAL</b>	<b>\$191,547</b>

<b>Planning (Investigation and Design) for Brisbane Street Mall :</b>	<b>Amount</b>
Brisbane Street Mall Redevelopment	\$260,235
	<b>\$260,235</b>

Notes:

1. The above costs for "consultation" on the Launceston City Heart represent approximately 1.0% of the total project budget. This is well below normal expected and planned project cost budget allocations for consultation activities. The reason for it being lower than [sic]

What might normally be expected is due to the fact it was conducted by only CoL staff and use of predominantly CoL resources rather than, as often the case, outsourced to more expensive specialist consultancies.

2. The above costs for "planning" on the Brisbane Street Mall Redevelopment represents approximately 4.5% of the total project budget. This is well within normal expected and planned project cost budget allocations for investigation and design.

...

Regards,  
Duncan Campbell

**Attachment 2: Right to Information Act 2009, s18**

- (1) Information requested under this Act may be provided –
  - (a) by giving the applicant a reasonable opportunity to inspect the record containing the information; or
  - (b) in the case of information recorded or embodied in a record in a manner in which it can be reproduced, by providing the applicant with a transcript of the information; or
  - (c) by providing the applicant with a copy, including an electronic copy, of the record containing the information; or
  - (d) in the case of information contained in a record from which sounds or visual images can be reproduced, by giving the applicant a reasonable opportunity to hear the sounds or view the images.
- (2) A copy of information that is provided with exempt information deleted is to have included on it a note to the effect that the copy is not a complete copy of the original information.
- (3) If –
  - (a) information requested under this Act is included with other information; and
  - (b) the information requested can be extracted from that other information by the use of a computer or other equipment usually available to the public authority or Minister –

the information is to be extracted accordingly.
- (4) Without prejudice to subsection (1), if –
  - (a) a public authority or a Minister has information requested by an applicant in a particular form; and
  - (b) the applicant has indicated a preference for receiving the information in that particular form –

the public authority or Minister must provide that information by providing the applicant with the information or part of the information in the particular form unless it is impracticable to do so or to do so would breach copyright.
- (5) If –
  - (a) a request is made to a public authority or Minister for information of a medical or psychiatric nature concerning the person making the request; and
  - (b) it appears to the principal officer of the public authority or to that Minister that the provision of the information to that person might be prejudicial to the physical or mental health or wellbeing of that person –

the principal officer or Minister may direct that the information must not be provided to the person who made the request but must instead be provided to a medical practitioner nominated by that person.

(6) .....

# **OMBUDSMAN TASMANIA**

## **DECISION**

**Right to Information Act Review**

**Case Reference:** O1804-100

**Names of Parties:** Mr Robin Smith and Launceston City Council

**Reasons for decision:** s48(1)(b)

**Provisions considered:** s19

### **Background**

- 1 The Launceston City Council's City Heart project is a multi-million dollar development implemented in several stages across city spaces in Launceston. Mr Smith has held a keen interest in how the project affects local businesses.
- 2 On 21 March 2018, Mr Smith submitted an application for assessed disclosure to Council. His application sought information responsive to 15 specific questions.
- 3 Council identified the size of Mr Smith's application as significantly voluminous. On 22 March 2018, Council wrote to Mr Smith and informed him that it intended to refuse his application pursuant to s19 of the Act on the basis that, in its current form, the work involved in providing the information would be a substantial and unreasonable diversion of its resources from its other work having regard to the matters in Schedule 3.
- 4 Council offered Mr Smith the opportunity to revise the scope of his application (under s19(2)) before making a final determination in order to give him the opportunity to make an application that would remove Council's ability to rely on s19. Council did not inform Mr Smith as to the matters in Schedule 3 that applied to his request. Council suggested removing 11 of the 15 questions contained in the application.
- 5 Mr Smith responded on the same day and rejected Council's suggestion to remove 11 questions. At this point, Mr Smith was not aware volume of work Council expected it would need to carry out, which limited his ability to revise the scope of his application in a reasonable way.
- 6 Mr Smith clarified what he sought from each question and provided guidance to Council as to what he expected the volume of information for each given question might be. He also provided date ranges on some questions that were previously open-ended.

- 7 On 11 April 2018, Mr Michael Stretton, Council's General Manager and therefore its principal officer, released a decision to Mr Smith refusing his application under s19 on the basis that the work required to produce the information would substantially and unreasonably divert Council's resources from its other work.
- 8 Council's decision referred to most of the matters contained in Schedule 3. It identified Mr Smith's revised scope would still capture approximately 8,000 pages of information, but did not extend that to officer-time or salary cost.
- 9 On 11 April 2018, Mr Smith requested an external review of Council's decision. This was accepted on the same day under s45(1)(a) on the basis Mr Smith was in receipt of a decision made by the principal officer, the application fee had been paid, and it was submitted for external review within 20 working days of his receipt of the decision.

### **Issues for Determination**

- 10 There are three issues for determination relating to the use of s19 and this review:

When Council determined it was considering refusal under s19(1), did it give Mr Smith a reasonable opportunity to remove Council's grounds for refusal under s19 as required by s19(2)?

Did Mr Smith sufficiently revise his application to remove Council's ability to rely on s19?

Having regard to Schedule 3, would processing Mr Smith's request amount to a substantial and unreasonable diversion of Council's resources from its other work?

### **Relevant legislation**

- 11 Section 19 is the section relevant to this review, which incorporates Schedule 3. I have attached a copy of s19 and Schedule 3 to this decision.

### **Submissions**

- 12 Mr Smith rejects the assertion that the information responsive to his questions is of such a significant volume of information that processing it would be a substantial and unreasonable diversion of Council's resources. He also rejects Council's suggestion that by cutting 11 of the 15 questions out of his request, it will be in a position to process it. Specifically, he submits:

*You reject out of hand my RTI request and suggest dropping 11 of the questions. These grounds were used by council [sic] previously and it transpired that in that instance the actual work involved did not appear to have been anything of the sort.*

*I note you did not seek to suggest which questions were of concern, possibly because you have not considered it. And you can no more ask*

*for a time extension for the very same reason. You give it that they are all in the same basket.*

*Therefore, in light of the above and council's [sic] similar unfounded claims with previous applications, one can see that this is not an exceptional diversion to the holder of such public information and my request remains, with the clarifications above, firm.*

- 13 Considering all matters, Council maintained its preliminary decision to refuse Mr Smith's application on the basis it was a substantial and unreasonable diversion of its resources from its other work. Specifically, Council submits:

*In coming to the decision that the work involved in providing the information requested would substantially and unreasonably divert the resources of Council from its other work, I have considered each of the matters in Schedule 3 of the Act...*

- 14 Of significant relevance, Council advises:

*Initial searches revealed more than 8000 potentially relevant emails... each of the approximately 8000 documents would need to be checked for relevance. More certainty cannot be gained without expending significant resources.*

*Having considered the matters set out in Schedule 3 of the Act, I am satisfied that the work involved in providing the information requested would substantially and unreasonably divert the resources of Council from its other work.*

## ***Analysis***

*When Council determined it was considering refusal under s19(1), did it give Mr Smith a reasonable opportunity to remove Council's grounds for refusal under s19 as required by s19(2)?*

- 15 On 22 March 2018, Council emailed Mr Smith stating that it was considering refusing his application pursuant to s19(1). As noted, when refusing an application under this section, regard must be had to the matters contained in Schedule 3.

- 16 Schedule 3(1) sets out nine 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.*

- 17 Early analysis indicated that Council may not have had regard to Schedule 3 as required by s19(1) when considering refusal. On 8 May 2018, this possibility was raised with Council and it agreed to re-consult with Mr Smith to remove any confusion, providing him with its responses to the matters in Schedule 3 in clear terms.

- 18 On 16 May 2018, Mr Smith had a brief conversation with Council and expressed his surprise at the volume of information responsive to his request. Council advised Mr Smith said not to do any more work on it.
- 19 As at 31 May 2018, no further communication has occurred. I conclude that Mr Smith was satisfied that responding to his request would result in a substantial and unreasonable diversion of its resources away from its other work.

*Did Mr Smith sufficiently revise his application to remove Council's ability to rely on s19?*

- 20 This no longer falls to be considered.

*Having regard to Schedule 3, would processing Mr Smith's request amount to a substantial and unreasonable diversion of Council's resources from its other work?*

- 21 This too no longer falls to be considered.

### **Preliminary Conclusion**

- 22 I determine that Council may refuse to provide information responsive to the request pursuant to s19(1).

### **Submissions to Preliminary Decision**

- 23 This office provided the above preliminary decision and conclusion to both parties. Mr Smith was, pursuant to s48(1)(b), offered the opportunity to make a submission before I considered my final decision.
- 24 On 17 October 2019, Mr Smith wrote to this office, stating that, in view of the preliminary decision, he was 'dropping' questions numbered four and five from his application. Mr Smith stated:

*I would find it personally repugnant to ask, as I may have inadvertently done in my RTI in questions #4 & #5, for a council officer to collate, review/assess 8000 records of correspondence which were solely about – as Mr Campbell confirms by email 8/5/2018 – "the Brisbane Street Mall roof and Christmas Tree...". Those were individually tabulated as 2481 records for the Christmas Tree [Q#4] and the Roof [Q#5] being 5702.*

- 25 Mr Smith reiterated in the same correspondence to this office, regarding questions four and five [his **bold**, my emphasis underlined]:

*Without hesitation, I reaffirm to you that the advice I gave to Mr. Campbell in our brief telephone conversation was that I was surprised that these 2 innocent questions alone would cost over **fifty thousand dollars** and take him **the best part of a year** to answer and that this particular piece of work should not be considered.*

- 26 On 27 April 2020, this office wrote to Council asking whether it would maintain reliance on s19 now that Mr Smith had agreed to remove questions four and five.

27 Subsequent correspondence followed. Then, on 16 July 2020, Council wrote to this office stating '... we will not be relying on s 19.'

### **Further Analysis**

28 The extracts of the correspondence set out in the above submissions to the preliminary decision, relevantly demonstrate the following.

29 Mr Smith has now, by 'dropping' his questions four and five, in effect: *refined* (to use the wording of s13(7)) his application

in an effort to *remove the ground for refusal* (to use the wording of s19(2)) under s19(1).

30 Council has, in turn, confirmed that, with Mr Smith's removal of his questions four and five, it will no longer be relying on s19.

31 Consequently, this matter now requires return to Council, for it to process the balance of Mr Smith's application assessed disclosure, its scope refined to exclude his questions four and five.

### **Conclusion**

32 This matter is returned to Council, without Mr Smith's questions four or five, for it to process the remaining balance of his application for assessed disclosure pursuant to the process set out in Division 2 of Part 2 of the Act.

33 I apologise to the parties for the delay in finalising this matter.

**Dated:** 31 March 2021

**Richard Connock**  
**OMBUDSMAN**

## **Section 19**

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

having regard to –

- (c) the matters specified in Schedule 3 –

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

- (2) A public authority or Minister must not refuse to provide information by virtue of subsection (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**

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

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

# OMBUDSMAN TASMANIA

## DECISION

**Right to Information  
Act Review**

**Case Reference:** O1905-143  
R2202-020

**Names of Parties:** Rosalie Woodruff MP and the Department of Natural Resources and Environment Tasmania

**Reasons for decision:** s48(3)

**Provisions considered:** s19

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### Background

- 1 The Ocean Monarch is a 107 metre long, 21,000 tonne drilling rig that was moored in Hobart for three months for maintenance and repairs in late 2018/early 2019. Environmental groups raised concerns about the rig's presence and the potential detrimental effects it might have on marine wildlife in the River Derwent. Dr Rosalie Woodruff MP has been the Tasmanian Greens Member for Franklin since 2015.
- 2 On 19 December 2018, Dr Woodruff lodged an application for assessed disclosure under the *Right to Information Act 2009* (the Act) with the former Department of Primary Industries, Parks, Water and Environment (DPIPWE), now the Department of Natural Resources and Environment Tasmania (the Department). Dr Woodruff sought:

*Any correspondence related to or regarding Diamond Offshore and the Mobile Offshore Drilling Unit, Ocean Monarch.*
- 3 On 8 March 2019, Ms Katrina Oakley, a delegated officer under the Act wrote to Dr Woodruff about her application. Ms Oakley advised she had identified 912 pages of information responsive to the request and asked Dr Woodruff to *confirm what information [she] would like to be assessed*. Ms Oakley noted some of the information was *already publicly available on the EPA [Environment Protection Authority] website* and further that she had *broken down the 912 pages* [the Department's emphasis] *into tranches* so that Dr Woodruff could more easily specify the information she required. Ms Oakley concluded that taking into account the factors in Schedule 3, she was satisfied the application met the requirements of s19(1)(a). Accordingly, she offered Dr Woodruff the opportunity of *modifying [her] application such that the ground for refusal is removed*, pursuant to s19(2) of the Act.
- 4 Also on 8 March 2019, Dr Woodruff's office emailed Ms Oakley seeking an extension beyond the five business days provided to respond. An extension was negotiated to 25 March 2019.

- 5 On 25 March 2019, Dr Woodruff's office sent an email to Ms Oakley saying the two environmental plans and *any other documentation which is already available and will continue to be available publicly* were not needed.
- 6 On 26 March 2019, Ms Oakley released a decision to Dr Woodruff. Ms Oakley noted Dr Woodruff had not provided any further refinement of scope beyond the two environmental plans already in the public domain and identified 863 pages of information remaining. She determined that, *having consulted with [her] pursuant to s19(2)*, Dr Woodruff had been afforded reasonable opportunity to refine [her] request and [had] not done so. She then considered the factors in Schedule 3 of the Act and the requirement to consult with third parties affected by the request pursuant to s37. Ms Oakley concluded that *the work involved in providing the information requested fulfils the requirements of section 19(1)(a) and would result in a substantial and unreasonable diversion of resources*, thereby refusing Dr Woodruff's application.
- 7 Dr Woodruff sought internal review of this decision on 18 April 2019. In her request for internal review, she disputed the Department's claim that she had not refined the scope of her application, noting that she had agreed to remove tranches 9 and 10 from her request, which reduced the information by 49 pages. She also alleged insufficient weight had been given to factor (b) in Schedule 3 given *the requested documents have a demonstrable importance to [her], based on the very high level of public interest in the Ocean Monarch*.
- 8 On 7 May 2019, Ms Alison Scandrett, a delegated officer under the Act, released an internal review decision to Dr Woodruff. Ms Scandrett found that section 19(2) [had] been properly applied and affirmed the original decision. She determined that *the work required to be undertaken by DPIPWE to provide the information requested would substantially and unreasonably divert DPIPWE's resources from its other work and may be refused pursuant to section 19*.
- 9 Dr Woodruff applied for external review of this decision on 21 May

## **2019. Issues for Determination**

- 10 There are two issues for determination relating to the application of s19 and this review:
  - When the Department was considering refusal under s19(1), did it give Dr Woodruff a reasonable opportunity to remove the Department's grounds for this refusal as required by s19(2)?
  - Having regard to Schedule 3, would processing Dr Woodruff's request amount to a substantial and unreasonable diversion of the Department's resources from its other work?

## **Relevant legislation**

- 11 Section 19 is the section of the Act relevant to this review, which incorporates Schedule 3. I attach copies of s19 and Schedule 3 to this decision as Attachment 1.

## **Submissions**

### **Dr Woodruff**

- 12 Dr Woodruff rejects the claim by the Department that she did not refine the scope of her request. She submitted in her internal review request to the Department dated 18 April 2019:

*Firstly, I must address the claim by your Departments [sic] representative that following the Letter dated 8 March 2019, no modification or refinement was made by me to the original request, this is incorrect. Ms Oakley requested I confirm what information I would like to have assessed and I was provided with a list of 18 Tranches, totalling 912 pages. In my email dated 25 March 2019 I advised that we did not require Tranche 09 or Tranche 10, a reduction of 49 pages and a modification of the original request. Ms Oakley also stated in her letter of 26 March 2019 that 'No further refinement of scope was provided', a clear acknowledgement that the scope had indeed been refined by the applicant.*

- 13 Dr Woodruff then referred to s19 of the Act and noted that the authority must be satisfied that the request is both unreasonable and a substantial diversion of resources, having regard to Schedule 3 of the Act. In this regard she said:

*Given the applicants [sic] inability to determine, based on the information provided from the Department, which Tranches may contain significant information and which may not and the very high level of public interest in the matter I put that the request was not unreasonable.*

*Further, it is clear that the requested documents have a demonstrable importance to the applicant, based on the very high level of public interest in the Ocean Monarch, and that insufficient weight has been given to Schedule 3.1(b) by the officer in forming her determination (see below).*

#### **Schedule 3.**

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

*In conclusion, Ms Oakley has failed to give proper regard to Schedule 3 in making her decision and erred in her assessment that the request was both unreasonable and a substantial diversion of resources.*

*As a final point I note, as per Section. 3. Object of the Act (4)(a), in interpreting Section 19 the objective of the Department should have been to provide the maximum amount of official information possible to the applicant, not the minimum.*

- 14 Dr Woodruff then included a list of *titles, publications and dates of news reports on the topic ... to demonstrate the public interest in the matter.*
- 15 Dr Woodruff did not provide any additional submissions with her application for external review.

*The Department*

- 16 The Department did not provide specific submissions in response to this external review, beyond the reasoning of its decisions.
- 17 In her **internal review decision**, Ms Scandrett identified Dr Woodruff's submissions to be:
  - (i) *That the category descriptions provided by DPIPWE were high level and did not assist the appellant in being able to identify what information they may want; and*
  - (ii) *That insufficient weight has been given to Schedule 3.1 (b) as there is a high level of public interest in the Ocean Monarch.*
- 18 Ms Scandrett then addressed each submission individually. In relation to submission (i), she said:

*Section 19 allows refusal to occur without taking the trouble to identify, locate or collate the information.*

...

*I note that section 19 does not require DPIPWE to have identified, located or collated any information prior to a refusal under section 19. Despite not being required to do so, DPIPWE spent approximately 22.5 hours identifying and locating information. Ms Oakley spent approximately another 10 hours collating the information in order to categorise the information to assist the applicant to determine the information sought. Information was sorted into 19 different categories.*

*The appellant was provided with 10 working days in which to provide a refinement, double the time usually provided in such instances.*

*The appellant has been unable to identify anything she specifically seeks and the request remains a broad and general request to see what activities DPIPWE has been engaged in, who they have corresponded with and what deliberations they have undertaken. The request lacks any specificity.*

*I find that the appellant has been afforded a reasonable opportunity to consult with DPIPWE with a view to being helped to make an application in a form that would remove the ground for refusal. As such, section 19(2) has been properly applied.*

19 In relation to submission (ii), Ms Scandrett said:

*It could be the case that the importance of the information to the appellant is such that a substantial diversion of resources to locate the information is warranted.*

*The appellant seeks to introduce a public interest test to this element, arguing that because the public is interested in the information, it is important to the appellant that she receive the information. The public interest test in the Act operates in relation to certain exemptions contained within Part 3, Division 2 of the Act. Section 19 is not subject to the public interest test under the Act. There may be an underlying social or cultural context to the ‘public interest’ test in broader terms, to help achieve the object of the Act, as outlined in section 3. As such, I will consider if that applies here.*

*As I have discussed above, the appellant’s request was vague and lacking in specificity. As such, it is difficult to ascertain the importance of the information requested, as the request is very broad and all encompassing, with the information found covering all aspects of the Ocean Monarch’s presence in Tasmania. The Environment Protection Authority Tasmania actively disclosed some information about the Ocean Monarch on its website prior to the appellant submitting her right to information request. I am not satisfied that the appellant has demonstrated any broader public interest in the voluminous amount of information requested.*

20 Finally, Ms Scandrett provided the following comments in relation to Ms Oakley’s application of section 19:

*The information to be assessed totals 863 pages. Applying the suggested time per page for assessment of 7 minutes per page, assessment would take approximately 7.2 days. The time already spent on the request is approximately 4.5 days. There is a significant amount of third party business information contained within the information sought, which will require numerous third parties to be consulted. The work associated with preparing this third party consultation is likely to take a minimum of 2 days. Depending on the nature of the responses received, an additional 2 days to read and apply these responses is likely to be required. This will represent 15.5 days of officer time.*

*I am satisfied with Ms Oakley’s application of Schedule 3 of the Act, and am therefore satisfied overall that the application of section 19 was appropriate.*

## **Analysis**

*When the Department was considering refusal under s19(1), did it give Dr Woodruff a reasonable opportunity to remove the Department's grounds for this refusal as required by s19(2)?*

- 21 The Department has made a determination under s19(1) that the work involved in providing the information requested by Dr Woodruff would substantially and unreasonably divert its resources from its other work. Section 19(2) requires that, before making such a determination, the applicant is to be given a reasonable opportunity to consult the relevant public authority with a view to the applicant being helped to make an application in a form that would remove the ground for refusal.
- 22 I note at the outset that the Department made significant efforts to divide Dr Woodruff's request into identifiable categories in order to assist refinement of scope pursuant to s19(2). In her initial letter to Dr Woodruff, dated 8 March 2019, Ms Oakley said she had *broken down the 912 pages into tranches* so Dr Woodruff could *advise what specific information* she required. Ms Oakley included a table which clearly set out a description and corresponding number of pages for each tranche. She also identified which tranches belonged to which particular departmental division, including the EPA Division, Biosecurity Tasmania and the Office of the Secretary.
- 23 Ms Oakley said in her subsequent letter, dated 26 March 2019, that this process involved *two days sorting through two boxes of information* and further that *the search time spent on this matter to date is 22.5 hours in total*, as well as *approximately 10 hours of officer time processing [Dr Woodruff's] request*. The Department is to be commended for its efforts in this respect, particularly given, as Ms Scandrett recognised in her internal review decision, it is not mandatory to provide this level of detail under the Act.
- 24 Although in her application for internal review, Dr Woodruff referred to her *inability to determine, based on the information provided from the Department, which Tranches may contain significant information and which may not*, I agree with Ms Scandrett and do not believe this claim has any sound basis. I am satisfied that the Department provided enough information to assist Dr Woodruff in making an informed decision in relation to any refinement of the scope of her application.
- 25 While a more detailed analysis could have been made, Ms Oakley referred to her consideration of Schedule 3 and referred to matters (a), (c) and (d):

*Providing all correspondence may have commercial in confidence and personal information issues and conducting third party consultation on the information sought would not be within a reasonable time and with the exercise of reasonable effort (matter (a)). The request requires collating and analysing substantial records, which will take a significant amount of time and resources (matters (c) and (d)) and would not be reasonable.*

- 26 Overall, I am satisfied that the Department has correctly applied s19(2) by giving Dr Woodruff a reasonable opportunity to refine the scope of her request in order to thereby remove the grounds for refusal under s19.
- 27 Dr Woodruff is not obligated to accept the Department's position and refine her application, and she ultimately declined to do so. In her email to Ms Oakley, dated 25 March 2019, she confirmed she was *not interested* in the two environmental plans or *any other documentation which is already available and will continue to be available publicly*. In this regard, I agree with Ms Oakley that is not a significant refinement of the request because there are still **863 pages** [the Department's emphasis] to assess of internal and external correspondence about the Ocean Monarch Oil rig.
- 28 I must now determine whether Dr Woodruff's request was in fact overly broad and unable to be reasonably processed by the Department.

*Having regard to Schedule 3, would processing Dr Woodruff's request amount to a substantial and unreasonable diversion of the Department's resources from its other work?*

- 29 For a request for information to be refused under s19, the public authority in possession of the information must be satisfied that the work involved in providing the information would be a substantial and unreasonable diversion of its resources from its other work. It must also have regard to the nine matters in Schedule 3 in coming to this decision.
- 30 The Department was satisfied that the work required to process the information it had found to be responsive to Dr Woodruff's request would be a substantial and unreasonable diversion of its resources. In both its decisions, the Department could have provided a more thorough reasoning regarding its consideration of the matters in Schedule 3, though I am satisfied that it considered these matters.
- 31 In her decision, Ms Oakley listed matters (b), (c), (d), (e), (h) and (i) as matters she had *taken into account* but only provided limited discussion regarding how those matters related to Dr Woodruff's application and her decision to refuse it under s19.
- 32 In her internal review decision, Ms Scandrett affirmed Ms Oakley's analysis of the matters in Schedule 3 and did not provide additional reasoning except in relation to matter (b). This was in response to Dr Woodruff's submission in her internal review application that insufficient weight has been given to this factor. Ms Scandrett's comments in relation to matter (b) are centred around her interpreting Dr Woodruff's submissions as attempting to introduce a public interest test to matter (b), *arguing that because the public is interested in the information, it is important to the appellant that she receive the information.*
- 33 Ms Scandrett notes that s19 is not subject to the public interest test under the Act, but identifies the potential for *an underlying social or cultural context to the 'public interest' test in broader terms, to help achieve the object of the Act, as outlined in section 3*. Ms Scandrett further notes that given Dr Woodruff's

*request was vague and lacking in specificity... it is difficult to ascertain the importance of the information requested, as the request is very broad and all encompassing, with the information found covering all aspects of the Ocean Monarch's presence in Tasmania. She therefore concludes that she is not satisfied that the appellant has demonstrated any broader public interest in the voluminous amount of information requested.*

- 34 Although the Act does not require an applicant to prove the importance of the information to them, it is unlikely that matter (b) will be persuasive to a public authority in indicating that additional allocation of resources is appropriate to process a large request for information, if this does not occur. The only reference to the importance of the information in Dr Woodruff's internal review application is when she says *it is clear that the requested documents have a demonstrable importance to the applicant, based on the very high level of public interest in the Ocean Monarch*. The only other reference appears to be in an email from her office to Ms Oakley, which sets out that *the RTI relates to a time-sensitive issue with the Ocean Monarch due to depart shortly, and with considerable concern from the community*.
- 35 It is known that Dr Woodruff is a Member of Parliament for a party that is premised on environmental advocacy and that a large oil rig visiting Tasmania would result in concerns regarding potential environmental risks. However, I consider that it was open to the Department to consider that the *demonstrable importance* of the documents to Dr Woodruff had not been sufficiently explained, and consequently this consideration did not change its assessment of the amount of time and effort which would be reasonable to expend on the application.
- 36 Although not mentioned by the Department, I consider factor (a) to be relevant in the sense that Dr Woodruff's request was clearly *of a global kind and generally expressed*. However, it was not so imprecise as to make it impractical to locate and assess the information, as the Department has already done this as a result of the application.
- 37 I agree with Ms Oakley that factor (c) is relevant, as the request is broad and would require the assessment of a large amount of information. The Department is large and well resourced, though I note Ms Oakley's comments that she is the *only full time delegated officer working on RTIs and focussing all [her] efforts on this one request is simply not justifiable*. This also relates to factor (i), the *extent of the resources available to deal with the specified application*, which Ms Oakley has included in her list of relevant factors, but in this regard I note that it is vital that public authorities allocate adequate resourcing to enable them to respond to requests under the Act. Factor (i) does not enable public authorities to deny reasonable requests due to limited resourcing being allocated. Conversely, the Act does not require even the largest public authorities to respond to any and all applications under the Act due to their size and greater resources. It is reasonable to impose limits on the manageable size of an application and I agree that this request is at or beyond the limit of

what would be reasonable to process. It could be completed within the statutory timeframe but the amount of officer time required to process the request means that it is open to the Department to make a finding that the request is not a reasonably manageable one.

- 38 I agree that factors (e), *the timelines binding the public authority or Minister*, and (h), *the outcome of negotiations with the applicant in attempting to refine the application or extend the timeframe for processing the application*, are relevant and these have been discussed above.
- 39 Most importantly, in relation to the substantial and unreasonable impact on its resources, the Department ultimately claimed it would take approximately 7.2 days to process the 863 pages of information responsive to the request. The Department also noted *time already spent on the request is approximately 4.5 days* and estimated an additional 4 days to undertake third party consultation. This is therefore a total of 15.7 days (although the Department reached the figure of 15.5). As outlined above, the Department reached its estimate of approximately 15.5 days to process 863 pages by applying a time period of seven minutes per page to assess each document against the Act, adopting the method used by the Australian Information Commissioner and used in previous decisions I have made.<sup>1</sup> This full estimate was provided by Ms Scandrett and, although she did not make specific reference to factor (d), this is the relevant Schedule 3 matter in this regard.
- 40 Before concluding, I note in her internal review request, Dr Woodruff refers to the object of the Act in s3 and said *the objective of the Department should have been to provide the maximum amount of official information possible to the applicant, not the minimum*. It is true that, although this request is large, it is perhaps on the cusp of what might be regarded as reasonable and it would have been open to the Department to have either assessed the application or assessed it in stages after seeking an extension of time under s15(4) of the Act.
- 41 Overall, despite this, I am satisfied that it was reasonable for the Department to conclude that the assessment of the 863 pages responsive to Dr Woodruff's request, amounting to over 15 days of work, is a substantial and unreasonable diversion of its resources from its other work.

### **Preliminary Conclusion**

- 42 In accordance with the reasons set out above, I determine that the Department is entitled to refuse, pursuant to s19, to provide information in relation to Dr Woodruff's application.

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<sup>1</sup> See *Carlo di Falco and Tasmania Police* (August 2020) and *Damien Matcham and Brighton Council* (January 2018), available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions)

## **Conclusion**

- 43 The above preliminary decision was provided to the Department and Dr Woodruff for input pursuant to s48(1)(b) and both parties declined to provide any submissions.
- 44 Accordingly, for the reasons set out above, I determine that the Department is entitled to refuse, pursuant to s19, to provide information in relation to Dr Woodruff's application.
- 45 I apologise to the parties for the inordinate delay in finalising this decision.

**Dated:** 17 November 2022

**Richard Connock  
OMBUDSMAN**

## **Attachment I – Relevant legislation**

### **Section 19**

- (1) If the public authority or Minister dealing with a request is satisfied that the work involved in providing the information requested –
- (a) would substantially and unreasonably divert the resources of the public authority from its other work; or
  - (b) would interfere substantially and unreasonably with the performance by that Minister of the Minister's other functions –
- having regard to –
- (c) the matters specified in Schedule 3 –
- the public authority or Minister may refuse to provide the information without identifying, locating or collating the information.
- (2) A public authority or Minister must not refuse to provide information by virtue of subsection (1) without first giving the applicant a reasonable opportunity to consult the public authority or Minister with a view to the applicant being helped to make an application in a form that would remove the ground for refusal.

### **SCHEDULE 3**

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

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

# OMBUDSMAN TASMANIA

## DECISION

**Right to Information Act 2009 Review**

**Case Reference:** O1801-016

**Names of Parties:** Simon Cameron and Department of Natural Resources and Environment Tasmania

**Reasons for decision:** s48(3)

**Provisions considered:** s30, s31, s35, s36 and s39

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### **Background**

- 1 Mr Simon Cameron (the applicant) is the owner of a property named 'Kingston' at Conara in Tasmania at which he farms sheep, including merino, for wool. Invasive species are problematic at the property and are required to be managed to conserve lowland native grasslands and to effectively farm sheep. In 2011 officers of the then Department of Primary Industries, Parks, Water and Environment, now the Department of Natural Resources and Environment Tasmania (the Department), alleged that actions taken broadly in the management of feral deer on the property were in breach of various provisions of the *Wildlife (General) Regulations 2010*. Charges were eventually laid against the applicant's property manager, Ms Lyndel Poole (the complainant) and two others, the charges against the complainant being discontinued part-way through their hearing in the Magistrates Court of Tasmania in May 2013.
- 2 The complainant and the applicant were dissatisfied with the conduct of the Department's officers during the investigation and prosecution of the alleged regulation breaches. This resulted in a complaint (the complaint) being lodged by the complainant with the Integrity Commission (the Commission).
- 3 The Commission subsequently referred the complaint to the Department for investigation and action. In May 2015, the then Secretary of the Department (the Secretary) authorised and instructed James Cumming (the investigator) of James Cumming Investigation Services Pty Ltd, to investigate the complaint and report to the Secretary.
- 4 On 11 December 2015, the investigator presented his report to the Secretary.
- 5 On 14 November 2017, the applicant made an application for assessed disclosure of information to the Department under s13 of the *Right to Information Act 2009* (the Act). In particular he sought:

*A report produced by James Cumming of James Cumming Investigation Services Pty Ltd on about 14 December 2015.*

*Documentation related to any matters raised in or related to matters pertaining to the subject matter of James Cumming's report.*

- 6 On 12 December 2017 the Secretary, as the Department's principal officer, determined the application and released his decision to the applicant.
- 7 In his decision the Secretary identified 766 pages of information relevant to the application and determined that it was all exempt information within the meaning of Part 3 of the Act. Specifically the Secretary relied on the following provisions of Part 3:
  - s30 – information relating to enforcement of the law;
  - s31 – legal professional privilege;
  - s35 – internal deliberative information;
  - s36 – personal information of a person (in the alternative); and
  - s39 – information obtained in confidence.

The Secretary also applied the 'public interest test' as expounded in s33, so far as it related to internal deliberative information and information obtained in confidence<sup>1</sup>.

- 8 On 2 January 2018, the applicant applied to this office under s45(1)(a) for external review of the Secretary's decision.
- 9 On 8 July 2020, the complainant granted permission for the applicant to have 'any and all information in relation to the RTI request' concerning the investigation of her complaint to the Commission.
- 10 On 5 May 2021, following a direction pursuant to s47(1)(n) by this office by my delegate, Ms Leah Dorgelo, the Department provided better reasons for decision. This included a schedule of documents and identification of which exemption the Secretary had applied to which part of the information found to be responsive to the applicant's request.

### **Issues for Determination**

- 11 I must determine whether the information is eligible for exemption under ss30, 31, 35, 39 or any other relevant section of the Act.
- 12 As ss35 and 39 are contained in Division 2 of Part 3 the Act, my assessment is subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under these sections, I am then required to determine whether, after taking all relevant matters into account and at the least the matters referred to Schedule 1, it is contrary to the public interest to disclose it.

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<sup>1</sup> Relevantly, only ss35 and 39 appear in Part 3 Division 2 of the Act.

## **Relevant provisions of Part 3 of the Act**

- 13 As noted, the Department relies on ss30, 31, 35 and 39. As ss35 and 39 in its decision to exempt information. It also discusses s36 as an alternative. I attach copies of these sections to this decision at Attachment I.
- 14 Copies of s33 and Schedule I are also attached.

## **Submissions**

- 15 For the purposes of the application for review, the Department did not make any additional submissions, relying on its reasons set out in the Secretary's original decision. These reasons are summarised as follows.
- 16 In relation to s30, in his original decision the Secretary stated that much of the information Mr Cameron had requested comprised communications and draft communications with (and exchanged between) Department staff regarding the investigation into their conduct following the receipt of a complaint from a third party. The Secretary decided that this information was exempt information under s30(1)(d), noting that under that provision information is exempt if its disclosure would or would reasonably be expected to endanger the emotional or psychological safety of a person.
- 17 The Secretary continued:

*It is crucial that DPIPWE can assure members of staff that sensitive information in relation to allegations and investigations about their performance will not be disclosed to external parties. I note that the applicant is the person who owns the farm where it was alleged that DPIPWE staff acted improperly. To provide the applicant with information in relation to the DPIPWE employees who were investigated would cause these employees substantial emotional and psychological harm, and may lead to their harassment, or discrimination against them, were this information released into the public domain. These factors are compounded by the fact that it was concluded that the staff had not acted improperly.*

- 18 In relation to s31, the Secretary claimed that one document requested was subject to legal professional privilege and that 'this information' was exempt pursuant to that provision. It is clear from the Schedule of Documents, however, that this provision was relied upon in respect of more than one document.
- 19 Section 35 was also relied upon by the Secretary in claiming some of the relevant information to be exempt information, it falling within s35(1)(a) and (b), it not being purely factual information, it not falling within s35(3) and it being less than 10 years old.

- 20 In considering the s33 ‘public interest test’ in respect of this information<sup>2</sup>, in particular Schedule 1 to the Act, the Secretary considered paragraphs (a), (b), (c), (d), (f), (m) and (u) of Schedule 1 were the most relevant. He assessed these matters as follows:

*It is my view that the subject matter in question is of interest only to the small number of parties involved in the investigation proceedings. As such, there is no broad public interest in the information, so its disclosure would not contribute to debate on a matter of public interest (matter b).*

*The communications do not aid in understanding decisions made by government (matters c, d and f).*

*The disclosure would harm the interests of a group of individuals, being the DPIPWE staff who were referred for investigation (m).*

*The information contains details of allegations, which were not upheld, about DPIPWE staff. To release these unproven allegations would be to release information that paints an incorrect and inaccurate picture of the individuals involved (u).*

*On balance I find that it is not in the public interest to release this information....*

- 21 In relation to the investigator’s report itself, the Secretary claimed that the entire document was exempt information under s39, both of paragraphs 1(a) and (b) applying to it. He gave the following reasons:

*The report contains the words ‘confidential’ clearly on the first page and states very early in the document that no participant has given permission for their statements or information that they provided to the investigation to be disclosed to third parties. The attachments to the report contain material related to the terms of engagement of the investigator as well as statutory declarations and relevant court documents.*

*The report was communicated in confidence to me by the investigator. This is evidenced by the notation on the report ‘Confidential’ and also due to the nature of the report being an investigation into allegations of misconduct and possible breaches of the law. The statement that no individuals that participated in the inquiry have given permission for their information to be released outside of the purpose for which the information was given lends further weight to the argument that much of the material was communicated in confidence. Whilst the report contains some information provided by the applicant and some information that is otherwise publicly available this information is inextricably linked to the*

<sup>2</sup> The relationship between s35 of the Act and the s33 ‘public interest test’ is discussed in *Gun Control Australia Inc v Hodgman and Archer [2019] TASSC 3* by Brett J at paragraph 3.

*report itself, including findings and recommendations and cannot be disclosed without also disclosing the confidential material of the report.*

- 22 In relation to s39(1)(a), the Secretary claimed that the relevant considerations are contained in s35. He continued (footnote omitted):

*The information contained in the report consists of the results of the investigation conducted [by] the investigator and contains the opinions, advice and recommendations of the investigator in relation to the matters that he was instructed by me to report upon. The report was provided to me as Secretary, DPIPWE as the Integrity Commission's 'appropriate person' to make decisions in relation to findings of the Commission. This is clearly a 'deliberative' process for me in that the information contained in the report was provided to aid my consideration of what, if any, further action is required in relation to the issues identified by the Integrity Commission.*

- 23 The Secretary reasoned that he did not therefore need to rely on s39(1)(b), but in any event the report would also amount to exempt information under that provision. The Secretary continued:

*On occasion DPIPWE engages consultants to investigate issues and report their findings and recommendations to aid in decision making and future action. It is imperative that all relevant information is recorded, and that consultants are able to provide their opinions and recommendations for consideration. As stated above, the investigator clearly marked the report 'confidential' and made statements in relation to the confidential nature of some of the information contained in the report. In my view disclosure of the report would be reasonably likely to impair the ability of the Agency to retain the investigator for future matters, and if it were to become more widely known that confidential reports may be disclosed, it is conceivable that the Agency would have difficulty in engaging other consultants to produce similar reports.*

- 24 The Secretary then considered, in accordance with s33, whether it would be contrary to the public interest to release the investigator's report. Specifically, in determining that it would be contrary to the public interest to release the report, the Secretary relied upon paragraphs (a), (j) and (n), stating that paragraph (a) [the general public need for government information to be accessible] weighed in favour of disclosure of the information. He continued:

*Matters (j) [whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law] and (n) [whether the disclosure would prejudice the ability to obtain similar information in the future] of Schedule 1 to the Act weigh against disclosure of the information. The serious allegations made in relation to the conduct of several DPIPWE employees warrant thorough and accurate investigation that includes fair and proper procedures for determining what, if any action should be*

*taken. As stated above, no individuals that participated in the inquiry have given permission for their information to be released outside of the purpose for which the information was given. The report found that there was no misconduct by DPIPWE employees, as such releasing the report would lead to information that is wrong or inaccurate entering the public domain (matter u).*

*As stated above I have formed the view that disclosure would be reasonably likely to impair the ability of DPIPWE to obtain investigation reports from the investigator or other consultants in the future. That finding is relevant to the consideration of matter (n) of Schedule 1 of the Act.*

- 25 The Secretary further stated that it was his opinion that the information contained in the report would also be capable of exemption pursuant to section 30(1)(d).
- 26 I note that in the Schedule of Documents there was reliance upon s39 in relation to several individual documents in addition to the investigator's report. However, no other document is mentioned in the context of reliance upon this provision in the original decision.
- 27 The Department Secretary also provided the following confirmation on 5 May 2021 that its 2017 reasoning had not changed:

*I maintain the view that the information concerned is highly sensitive and should not be released. Disclosure of the information would undermine the Department's ability to assure staff members that sensitive information in relation to allegations and investigations about their performance will be kept confidential. To that end, disclosure of the information may deter staff members from actively participating in investigations in the future.*

- 28 For the purpose of the application for review, on 21 April 2021 the applicant provided detailed submissions. These are summarised and set out as follows.
- 29 In relation to s30, the applicant disputed that this provision was a sufficient basis to refuse access to the whole of the subject documents. He stated, should s30 be applicable, that relevant information could be instead redacted, for example with respect to the names of persons.
- 30 In relation to s31, the applicant did not pursue the release of information subject to legal professional privilege, unless it related to the investigator's report.
- 31 The applicant stated the following, through his legal representative, in relation to s35:

*The Respondent [the Department] then claims that the report is exempt relying on section 35(1)(a) of the Act...[reproduction of provision omitted]*

*All of the requested information has not been prepared by the Respondent. For example, the report was not prepared by an officer of a public authority and, as a result, s35(1)(a) does not apply to it.*

*Similarly, the report (and other sought documents) would include purely factual information and is not exempt from release.*

*Also, the report is a document that is a reason [sic] which explains a decision of the Integrity Commission. As a result, it is not exempt in accordance with s35(3)(b) of the Act.*

*The Respondent states that the release of the report is not in the public interest. ‘The report goes to one of the very objects of the Act which is to increase the ability of the people of Tasmania to participate in their governance (s3(1)(b)). The Applicant is entitled to information held by the Respondent about the operations of government (s3(2) and (3)). Investigations into the conduct or misconduct of the Respondent is a matter of great public interest and goes to the core of the government’s operations.*

*Contrary to the Respondent’s position, the communications, particularly the report, do aid in understanding decisions made by the government (c, d and f). On the Respondent’s own admission, the report was prepared to allow the Respondent to make a decision about an Integrity Commission complaint. That was its very purpose. The report falls squarely within (c), (d) and (f) of Schedule 1 and must be released.*

*If there is any concern for the staff of the Respondent as alleged, relying on (m) of Schedule 1, their personal identification information can be redacted.*

*By reference to (m) of Schedule 1, the Respondent is suggesting that the report made findings which the Respondent did not accept and which do not support the ultimate decision of the Respondent. The Applicant is concerned that this is the very reason that the Respondent is concerned to keep the sought information confidential. The Respondent’s ultimate decision vis a vis the report goes to the very nature of why the production of the report is in the public interest and should be released.*

*Controlling feral deer in Tasmania and the conduct of the Respondent in the course of doing so and in related matters is a matter of public interest to the people of Tasmania, not just to the Applicant or a small number of people as the Respondent suggests.*

- 32 In relation to s39(1)(a), the applicant disputed that the marking of ‘confidential’ on the first page of the report should *prima facie* mean that the document is confidential.
- 33 The applicant further submitted:

*The alleged exemption turns to if the report had been generated by the Respondent, would it be exempt. The question is not would it be exempt for being confidential, but rather would it be exempt for any other reason under the Act.*

*As referred to above, the Respondent claims the report is exempt relying on section 35(!)(a) of the Act. The report was not prepared by an officer of a public authority. As a result, s35(!)(a) does not apply.*

*Having regard to the submission in respect of the other claimed exemptions above, the whole of the report cannot be said to be exempt for confidentiality because the whole of the report would not otherwise be exempt under the Act.*

*The Respondent makes much of the allegation that no individual who participated in the investigation gave permission for their information to be released. The individuals can simply be asked if they object to their information being released. If they object, information such as their personal identification information can be redacted.*

34 In relation to s39(!)(b), the applicant submitted:

*The Respondent claims to satisfy s39(!)(b) generally on the basis that the investigator marked the report confidential and the investigator may not agree to be engaged by the Respondent in future.*

*There is not mention by the Respondent as to why the investigator marked the report confidential. The Respondent should be asked if it asked the investigator to mark the report confidential. The investigator should be asked why the report was marked confidential. The investigator should also be asked if the investigator would refuse to work further for the Respondent if the report was released, in whole or in part.*

*The Applicant is concerned that the Respondent specifically asked for the investigator to mark the report confidential for the purpose of attempting to keep the report to itself to protect the conduct of the Respondent and the finding that there was no misconduct despite what the report opined. A reason that the Act exists is to avoid such secrecy and conduct being kept from exposure.*

*In any event, the Applicant knows who prepared the report as the Applicant was interviewed for the report by the investigator.*

*Also, the Respondent could redact names of investigators when producing report to persons such as the Applicant in the future, if the Respondent is so concerned that other investigators would not accept a government contract for fear that the resultant report would include that investigator's name.*

*The s39(!)(b) exemption has not been made out and the report should not be found to be exempt under this exemption.*

- 35 In relation to s39(2), the applicant submitted:

*In any event section 39(2) of the Act applies.*

*Section 39(2) provides that s39(1) does not include information that (a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking and (b) relates to trade secrets or other matters of a business, commercial or financial nature and (c) was provided to a public authority or Minister pursuant to a requirement of any law.*

*The report was obtained from James Cummings [sic] Investigations Pty Ltd. It is a business. As a result, s39(2)(a) is made out.*

*The report relates to other matters of business, being the business of the Applicant. As a result, s39(2)(b) is made out.*

*The report was provided to the Respondent pursuant to a requirement of any law. On the Respondent's own admission in the decision, the report was prepared for the purpose of the Respondent complying with statutory obligations related to an Integrity Commission inquiry.*

*Consequently the report is not exempt for being information obtained in confidence.*

- 36 In conclusion, the applicant submitted:

*It is entirely unsatisfactory for the Respondent to refuse to release any documents at all in response to the Applicant's request. As a matter of law, documents should be released to the Applicant, including the report, even if some parts of them should be redacted.*

## **Analysis**

### **Section 30**

- 37 The Secretary claimed a significant amount of information (comprising draft communications and communications with Department staff regarding the investigation into their conduct) was exempt information pursuant to s30(1)(d). Further he said that the exempt information consisted of sensitive information contained within communications exchanged between Department officers in relation to the complaint and it was crucial that the Department could assure staff that such information will not be disclosed to third parties. This message was essentially repeated by the Secretary in the letter that covered the submission of the Schedule of Documents.
- 38 The expression 'sensitive information' does not appear in the Act, either in isolation or in the context of 'personal information'<sup>3</sup>. I am assuming that in using the expression 'sensitive information' (or 'highly sensitive information') the

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<sup>3</sup> By contrast see s3 of the Personal Information Protection Act 2004, where 'sensitive information' is defined as a sub-category of 'personal information'.

Secretary was doing so in a general sense and was not suggesting that information of that character was exempt by virtue of its sensitivity.

- 39 Further, while it might be crucial from a Departmental point of view that staff be assured that information of that kind will not be disclosed to third parties, whether for the purpose of not deterring staff members from participating in similar investigations or for some other reason, such perceived need for confidentiality does not provide a basis for exemption under s30.
- 40 Finally the Secretary claimed that the information contained within the investigator's report was *capable of exemption* under s30(1)(d).
- 41 In the Schedule of Documents subsequently provided by the Secretary, there was reliance solely on s30 to claim information as exempt at pages 18-93 inclusive and at page 116. In respect of other information exemption was claimed under s30 in combination with one or more other provisions.
- 42 Plainly some of the documents referred to in the Schedule of Documents, and in respect of which exemption was claimed under s30, do not fall within the first category of documents referred to in the Secretary's decision (internal Department communications); e.g. pages 134-135 which comprise emails between the Department and the complainant's legal representative. However, it does not appear, from the original decision at least, that there was reliance by the Secretary on any part of s30 other than sub-section (1)(d).
- 43 In s30(1)(d) the phrase 'emotional or psychological safety' needs to be read in its context, including the words preceding it, namely,
  - (d) *endanger the life or physical, emotional or psychological safety of a person, ...*
- 44 In my view the words 'emotional or psychological safety' denote a risk of harm sufficiently serious as to be commensurate with the endangerment of a person's life or physical safety.
- 45 Similarly, the words 'increase the likelihood of harassment or discrimination of a person'<sup>4</sup> should be read in the same context.
- 46 This interpretive approach is consistent with Parliament's expressed intention that the Act 'be interpreted so as to further the object set out in subsection [s3](1)'<sup>5</sup>. That object (of the Act) is to improve democratic government in Tasmania by:
  - (a) *increasing the accountability of the executive to the people of Tasmania; and*
  - (b) *increasing the ability of the people of Tasmania to participate in their governance; and*

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<sup>4</sup> See the latter part of s30(1)(d).

<sup>5</sup> S3(4)(a).

*(c) acknowledging that information collected by public authorities is collected for and on behalf of the people of Tasmania and is the property of the State.*

- 47 The object is to be pursued by giving members of the public the right ‘to obtain information held by public authorities and Ministers’<sup>6</sup> and ‘to obtain information about the operations of Government’<sup>7</sup>.
- 48 The words ‘would, or would be reasonably likely to’ in s30(1)(d) require an objective assessment of whether there is a reasonable possibility of endangering a relevant aspect of a person’s safety, as opposed to a possibility that is irrational, absurd or ridiculous<sup>8</sup>.
- 49 In claiming information contained within the relevant communications (and the investigator’s report itself) to be exempt information under s30(1)(d), the Secretary concluded that as the applicant owned the farm where the alleged misconduct took place, the provision to him of the relevant information, in particular concerning the investigated employees, would cause those employees substantial emotional and psychological harm.
- 50 As the owner of the relevant property, the applicant is already well aware of the complaint to the Commission by the manager of his property (having had input into it), and the identities of those against whom it was made.
- 51 Given that, I am unable to agree that the release under the Act of the information claimed to be exempt under s30(1)(d) would cause the staff who were investigated *substantial emotional and psychological harm*, as the Secretary asserted (the Secretary overstating the test). Nor do I agree (to state the test correctly) that the release of the relevant information would (or would be reasonably likely to) endanger the emotional or psychological safety of any such staff.
- 52 I have no doubt that, at times, staff members in the Wildlife Management Branch engage in difficult and sometimes dangerous work, considering the type of offender they would sometimes have to deal with. I consider that they would not be placed in that line of work without being provided with necessary training and support and accordingly they ought be relatively immune from the type of damage contemplated by s30(1)(d) that *might* arise (if it arose at all) with the release of the relevant information under the Act.
- 53 In any event, I have no independent material that would support any suggestion that any staff member who was investigated might be even reasonably likely to have their emotional or psychological safety endangered by the release of the relevant information. The Secretary’s assertion stands alone in that regard. In particular I note that the documents at items 5, 6, 8, 17 and 18 of the Schedule of Documents substantially consist, to one degree or another, of a repetition of

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<sup>6</sup> S3(2).

<sup>7</sup> S3(3).

<sup>8</sup> *Centrelink v Dykstra* [2002] FCA 1442 at [24]-[25], the Federal Court considering the equivalent provision in the *Freedom of Information Act 1982* (Cth)-s37(1)(c).

the allegations originally made by the complainant, of which she and the applicant are obviously well aware already.

- 54 Further there is nothing before me, in particular with respect to any conduct of the applicant or the complainant, that supports the Secretary's assertion that should the relevant information be released it may lead to the investigated employees' harassment, or discrimination against them.
- 55 While it would doubtless be unpleasant to be subject to investigation in respect of alleged misconduct, it does not follow as a matter of course (as the Secretary would appear to assert) that disclosure of information pertaining to the investigation, in particular to the applicant, would, or would be likely to, endanger the emotional or psychological safety of any relevant employee, or increase the likelihood of harassment or discrimination of such a person.
- 56 The Secretary further stated the factors he had discussed were compounded by the fact that it was concluded (by him) that the investigated staff had not acted improperly.
- 57 In my view, if anything, the Secretary's conclusion mitigates *against* the likelihood of endangerment of the emotional or psychological safety of any relevant employee, or an increase in the likelihood of harassment or discrimination against such person, upon the release of the relevant information now.
- 58 In particular I note that item 25 of the Schedule of Documents consists virtually entirely of copies of the following documents; the complaint, a summary of the 33 allegations of misconduct prepared by the Commission, the reference by the Commission of the complaint to the Secretary for investigation, the Secretary's report to the Commission of his findings (of no misconduct by anyone) at the conclusion of the investigation and letters to each of the investigated officers advising them of such. I note that the Secretary communicated with the Commission and to each of the investigated officers (as to his finding of no misconduct) on 14 December 2016.
- 59 Given their exoneration by the Secretary in respect of all allegations and the lack of explanation to the contrary from the Department, I am quite unable to see how it can be maintained that the release of this information, in particular now, might endanger the emotional or psychological safety of any of the investigated officers or increase the likelihood of harassment or discrimination against any such person.
- 60 In the same vein, the fact that the allegations of misconduct (in any event unsubstantiated) are now some 10 years old would have had a similar mitigatory effect.
- 61 I have examined all the documents referred to in the Schedule of Documents in respect of which the Secretary claims exemption under s30, in isolation or in combination with other provisions, including the investigator's report. I note that in respect of that report, the Secretary said in his decision, almost as a post-script to his discussion of s39, that the information contained in the report would

also be *capable of exemption* under s30(1)(d), without further elaboration. Suffice to say that the Department has not discharged its onus under s47(4) to show that any information in the report that is capable of being exempted under s30, in particular pursuant to sub-section (1)(d).

- 62 Accordingly I determine that none of the information responsive to the applicant's original request, as contained within the documents referred to in the Schedule of Documents in the context of reliance upon s30, is exempt information under that provision. Different considerations apply for Annexure D to the investigation report and the application of s30(1)(a)(ii) is discussed in the context of the annexures to the report later in this decision.
- 63 In his original decision the Secretary concluded his consideration of s30 by adding:

*Further, much of the information I have exempted pursuant to s30 would also be eligible for exemption pursuant to sections 35 or 36 of the Act, however section 30 is the most relevant exemption.*

- 64 I accept that there is some information which may be eligible for exemption under ss35 and 36, so I will review this information in that context in my analysis of these sections below. Where not further reviewed, information claimed to be exempt under s30 is to be released to Mr Cameron.

### *Section 31*

- 65 In his original decision, the Secretary correctly stated that s31 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.
- 66 The Secretary further stated that only one document within the purview of the application was subject to legal professional privilege, without specifying the document, nevertheless claiming that the information contained in the document was exempt under s31.
- 67 When better reasons for decision were provided to this office in the form of the Schedule of Documents, it was apparent that s31 was relied upon in respect of several additional documents, namely *all* those documents referred to under items 23-25 inclusive.
- 68 I note that the applicant (in his submissions) does not press for the release of the document claimed to be privileged unless it is the investigator's report. As there were significant additional documents actually claimed to be exempt under s31 (contrary to the Secretary's original assertion), I have nonetheless assessed these.
- 69 It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal

advice or the provision of legal services, including representation in legal proceedings<sup>9</sup>.

- 70 I have examined all the documents falling under items 23-25 inclusive of the Schedule of Documents. Some of these documents:
- wholly or partially comprise the Secretary's request or draft request for legal advice;
  - recommend legal advice be obtained;
  - contain advice received by the Secretary from the Office of the Solicitor-General, or references to it; and
  - express re-statements of parts of the Solicitor-General's advice in a summary form.
- 71 I am satisfied that these contain exempt information within the meaning of s31 and are therefore not eligible for release.
- 72 I am not persuaded that the Department has discharged its onus to show that remaining information sought to be exempted pursuant to s31 should not be disclosed. Accordingly, I determine that only the information listed in the following paragraph is validly exempt under s31 and the remainder is not eligible for exemption under this section. It is to be released to Mr Cameron, subject to any other relevant exemption I may find.
- 73 The information that is exempt is contained in the following documents or part-documents:
- All of pages 139-140, 144-147, 151-152, 156-157 and 203-208 inclusive;
  - Page 136 - all the information in the first bullet-point;
  - Page 137 - all the information in the penultimate bullet-point;
  - Page 138 - all the information in the last bullet-point;
  - Page 141 - all the information in the first bullet-point;
  - Page 142 - all the information in the third-last bullet-point;
  - Page 143 - all the information in the last bullet-point;
  - Page 148 - all the information in the first bullet-point;
  - Page 149 - all the information in the third-last bullet-point;
  - Page 150 - all the information in the last bullet-point;
  - Page 153 - all the information in the first bullet-point;
  - Page 154 - all the information in the penultimate bullet-point;

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<sup>9</sup> See *Daniels Corporation International Pty Ltd v ACCC* 213 CLR 543 at paragraph 9-majority of the High Court, re-affirming the 'dominant purpose test' as established in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* 201 CLR 49.

- Page 155 - all the information in the last bullet-point;
- Page 165 - the last sentence of the last bullet-point;
- Page 166 - all the information in the first bullet-point and the four words immediately before the words 'and indicative' in the second line of the second bullet-point;
- Page 167 - the fourth line of the information in the second bullet-point and the description of Document C;
- Page 168 - the last sentence of the third paragraph, the fourth paragraph and the three words immediately before the words 'and can now inform you' in the fifth paragraph of the letter;
- Page 209 - all of the information under the heading 'Legal Advice' in the second column and all of the information in the second bullet-point under the heading 'Main Reasons for Indication of Misconduct' in the third column;
- Page 210 - all of the information under the heading 'Legal Advice' in the second column and in the paragraph commencing 'The complainant contends' in the third column, all of the remainder of that paragraph;
- Pages 211-214 inclusive - all of the information under the heading 'Legal Advice' in the second column; and
- Page 216 - the last sentence of the third paragraph, the fourth paragraph and the three words immediately before the words 'and can now inform you' in the fifth paragraph of the letter.

## **Section 35**

- 74 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,<sup>10</sup> or
  - a record of consultations or deliberations between officers of public authorities.<sup>11</sup>
- 75 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.
- 76 The outlined exemption above does not apply to the following:
- purely factual information<sup>12</sup>;

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<sup>10</sup> Section 35(1)(a).

<sup>11</sup> Section 35(1)(b).

<sup>12</sup> Section 35(2).

- a final decision, order or ruling given in the exercise of an adjudicative function<sup>13</sup>; or
  - information that is older than 10 years.<sup>14</sup>
- 77 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)*<sup>15</sup> 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.
- 78 The meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has also been considered by the AAT. In *Re Waterford and Department of Treasury (No 2)* it adopted the view that these are an agency's 'thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.<sup>16</sup>
- 79 The Department has claimed exemption pursuant to s35 in relation to the information contained at items 1, 3, 9, 14, 15, 17, 20 and 23-25 in its Schedule of Documents.
- 80 Contrary to the applicant's submission, it is apparent that the Secretary does not claim in his original decision that the investigator's report as a whole comprised exempt information under s35. Nor is such a claim evident from the Schedule of Documents, ss30 and 39 only being relied upon in respect of the report itself.<sup>17</sup>
- 81 The only discussion by the Secretary of s35 in the context of the report occurs when he addresses s39(1)(a), thereby being required to consider the *hypothetical* application of s35(1) for the purposes of the first-mentioned provision; i.e. had the report been generated by a public authority. Plainly the Secretary does not suggest that the report was *in fact* prepared by an officer of a public authority.
- 82 To the extent that the applicant's submission in respect of s35 is directed at the report as a whole, exemption said to have been claimed in respect of it, it is misconceived. I will address the investigator's report and attachments under s39 following and restrict this analysis to the documents the Department has claimed are exempt under s35 only.
- 83 In his original decision the Secretary claims that *some* of the information sought (not specifying which) falls under s35(1)(a) or (b)<sup>18</sup>, consisting of opinion, advice or recommendations prepared by Department staff or records of consultations between Department staff.
- 84 In respect of the relevant information, the Secretary concluded that none of the information was purely factual, was a final decision, order or ruling (or the

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<sup>13</sup> Section 35(3).

<sup>14</sup> Section 35(4).

<sup>15</sup> *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at 14.

<sup>16</sup> *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.

<sup>17</sup> See item number 26 in the Schedule of Documents.

<sup>18</sup> The Secretary makes no reference to s35(1)(c) and presumably does not rely upon it.

reasons for such), and was not created more than 10 years ago. The remainder of the Secretary's decision in respect of s35 concerned the application of the public interest test embodied in s33, to which I will turn in due course.

- 85 In the Schedule of Documents, the Secretary better identifies the information in respect of which exemption is claimed under s35, referring to a number of documents at items 1, 3, 9, 14, 15, 17, 20 and 23-25. I have examined all of these documents. I accept the Secretary's assertion that at least some of the information contained in these documents meets the description set out in s35(1)(a) and/or (b).
- 86 I am quite satisfied that none of the information contained in these documents meets the description set out in s35(3) of being a final decision, order or ruling given in the exercise of an adjudicative function or a reason which explains the same. In this respect the applicant submitted that the investigator's report itself is a document that is 'a reason which explains a decision of the Commission'. The submission is misconceived. The investigator is not the final decision maker and, while the findings of the investigation report inform the final decision as important evidence, the report does not comprise an explanation for that decision in the required sense. The Commission also did not make the substantive decision in this matter, as it referred Ms Poole's complaint to the Secretary of the Department for action and investigation. While the Secretary's decision on whether misconduct had occurred could have been audited by the Commission, it was not the ultimate decision maker on Ms Poole's complaint following the referral to the Department.
- 87 Having reviewed all the relevant documents, I accept the Secretary's statement that the information considered in relation to s35 is less than 10 years old, the applicant taking no issue with that assertion in his submissions.
- 88 As to the Secretary's claim in his original decision that no part of the relevant information is purely factual, in that it is not capable of standing alone, the applicant said that the relevant documents would include purely factual information and that information is therefore not exempt.
- 89 I have reviewed all the documents claimed to be exempt under s35 and consider that two documents are entirely comprised of purely factual information, namely the timeline document on page 160 and an email advising that letters have been sent on page 94. These documents are not exempt pursuant to s35 and are to be released to Mr Cameron.

*Page 1*

- 90 This is an email from one Departmental officer to another with an attached copy of a letter for filing. This is not opinion, advice, recommendation, consultations or deliberations and does not relate to deliberative processes. This is not exempt pursuant to s35 and is to be released to Mr Cameron.

*Page 2*

- 91 This is a letter to the Commission from the Secretary providing an update on Ms Poole's complaint and another referred matter. The other matter is out of scope and should be redacted, the remainder is not consultative or deliberative and is not exempt pursuant to s35.

*Page 11*

This is an email exchange between one Departmental officer and another about how to process an account from the investigator due to the additional confidentiality requirements. This involves consultations between officers of public authorities regarding an investigation and is *prima facie* exempt pursuant to s35(1)(b).

*Pages 12-15*

- 92 These pages contain a covering email from the investigator to a Departmental officer and an account for his services which was attached to the email. This is not exempt pursuant to s35 as the investigator is not a public officer and, as with the investigator's report, will be discussed under s39.

*Pages 95-98*

- 93 This is an email trail between the investigator, the Human Resources Manager and one of the Departmental officers being investigated following Ms Poole's complaint. It relates to how the officer can be contacted and the provision of a copy of a statutory declaration made by the officer to him, as this was referred to by the investigator.
- 94 The first three emails by date at pages 97-98 are between the Human Resources Manager and the officer and are *prima facie* exempt under s35(1)(b) as consultations between officers regarding the investigation.
- 95 The fourth, fifth and sixth emails at pages 95-96 are between the investigator and the Human Resources Manager and will be dealt with under s39.

*Pages 108-110*

- 96 This is a series of emails between Departmental officers consulting in relation to how to obtain and provide information requested by the investigator about the prosecution of the complainant to inform his investigation. The emails are *prima facie* exempt pursuant to s35(1)(b).

*Pages 111-112*

- 97 This is an email exchange between a Departmental officer and officer of the Department of Premier and Cabinet (a former Departmental employee) regarding potential assistance in the investigation of Ms Poole's complaint. This falls with s35(1)(b) and is *prima facie* exempt.

*Pages 114-116*

- 98 This is an email exchange between the investigator and the Department's General Manager, Natural and Cultural Heritage arranging a meeting to provide more information about the general allegations made by the complainant against the Department. This is not exempt under s35 as the investigator is not a public officer. However, there is an inconsistency in the relation to exemptions claimed by the Department, as the following email exchange at pages 117-121 is almost identical but not claimed to be exempt under s35. Due to this being a potential oversight, I will consider both email exchanges under s39.

*Page 126*

- 99 This is a memorandum to the Secretary providing an update on the investigation and seeking approval for payment of the investigator's invoice, which is attached. While borderline, this is tentatively exempt under s35(1)(a) as advice prepared by a public officer in the course of a deliberative process of investigating Ms Poole's complaint.

*Pages 127-131*

- 100 This is the investigator's account for his work done to 14 August 2015. It is not exempt pursuant to s35 and will be considered under s39.

*Pages 136-152*

- 101 These pages contain three drafts of a Minute to Secretary regarding seeking legal advice and investigating further matters raised by Ms Poole. Parts of this information I have already found exempt under s31, the remainder is *prima facie* exempt pursuant to s35(1)(a).

*Pages 153-164*

- 102 This is the final signed version of the Minute to Secretary (pages 153-155) and attachments (pages 156-164). Parts of this information I have already found exempt under s31, see my previous analysis above. I also found page 160 not to be exempt under s35, due to its purely factual nature, and the Background section of the Minute is not exempt for the same reason. The remainder of the body of the Minute is *prima facie* exempt under s35(1)(a).

- 103 The attachments consist of letters between the Department and the Commission and between the Department and Bleyer Lawyers, solicitors for Mr Cameron and Ms Poole. Some letters from the Department at pages 159, 161, 162, and 164 are unsigned and undated and it is unclear whether these are drafts or copies of correspondence sent. As final versions have not been produced by the Department, however, I will assume that these are copies of final letters.

- 104 The letters are not consultative or deliberative and are not exempt pursuant to s35. This is particularly the case with correspondence to and from Bleyer Lawyers, I can see no reason why this should be considered exempt or withheld

from the applicant, other than on the basis that this information is already available to him.

*Pages 165-167*

- 105 These pages consist of a signed Minute to Secretary which adopts the recommendations around the making of a final decision on the outcome of the investigation. Some parts I have already found exempt pursuant to s31. The remainder is *prima facie* exempt pursuant to s35(1)(a).

*Pages 168-175*

- 106 This is a draft letter from the Departmental Secretary to the Commission providing the outcome and findings of the Department's investigation into Ms Poole's complaint, which was attached to the Minute to Secretary. As it is in draft form, this is *prima facie* exempt pursuant to s35(1)(a).

*Pages 176-188*

These pages comprise draft letters from the Departmental Secretary to each investigated officer providing the outcome of the investigation into their alleged misconduct, which were attached to the Minute to Secretary. As these are in draft form, they are *prima facie* exempt pursuant to s35(1)(a).

*Page 189-190*

- 107 This is the letter from the Commission to the Departmental Secretary referring Ms Poole's original complaint for action. This does not consist of consultations or deliberations between officers of public authorities and is not exempt pursuant to s35.

*Pages 191-202*

- 108 This is Ms Poole's complaint to the Commission. This is not exempt and there is no reason it could not be provided to the applicant, other than it already being available to him.

*Pages 203-208*

- 109 This is a legal advice from the Solicitor-General to the Departmental Secretary. I have already found this to be exempt pursuant to s31.

*Pages 209-215*

- 110 This is a copy of a table which summarises the investigator's report and provides analysis which forms the basis of the recommendations made to the Secretary as to whether he should find that misconduct had occurred. Part of the table I have already found to be exempt under s31, as it contains legal advice, the remainder is *prima facie* exempt under s35(1)(a).

*Pages 216-223*

- 111 This is the signed letter from the Departmental Secretary to the Commission providing the findings of the investigation into Ms Poole's complaint. This is not

consultative or deliberative, but is the final decision of the Department. It is not exempt under s35 and should be released to Mr Cameron.

Pages 224-238

112 These are the signed letters from the Department to each employee providing the findings of the investigation into whether they committed misconduct. These are not consultations or deliberations but the communication of a final decision. These are not exempt under s35, but will be considered under s36.

#### Section 33 - Public interest test

113 I now turn to the assessment of whether the disclosure of the documents I have identified above as being prime facie exempt under s35 should in fact be released, following the application of the public interest test.

114 I note that in dealing with the public interest test, in his original decision the Secretary misstates it twice, saying he was required to consider whether the release of information subject to s35 would be *in the public interest* and concluding that it would not. The Act actually requires consideration of whether it is *contrary to the public interest to disclose the information*. This is not the same test. The pro-disclosure model in Tasmania does not require that an applicant prove it is in the public interest to obtain information, there is a right to obtain information unless it would be contrary to the public interest for it to be released. This is a lower threshold and the lens through which the public interest factors should be analysed.

115 In his assessment of the public interest test, the Secretary identified factors (b), (c), (d), (f), (m) and (u) in Schedule 1 to the Act as *the most relevant in this instance*.

116 I tend to agree with the Secretary (referring to factor (b)) that the investigation of the officers' alleged misconduct and related matters is primarily of interest only to the relatively small number of persons involved and from that I conclude that the disclosure of the relevant information would neither contribute to nor hinder debate on a matter of public interest. I do accept Mr Cameron's submission that there is some broader public interest in relation to the control of feral deer and whether the Department is conducting itself appropriately, but remain of the view that the matter is primarily of interest to the parties.

117 In relation to paragraphs (c), (d) and (f), the Secretary concluded *the communications* do not aid in understanding decisions made by government. I am unable to see how the Secretary reached this conclusion. Further information about the deliberative process leading to an outcome on an investigation for misconduct clearly provides information about the reasons for a decision, provides contextual information and would lead to greater scrutiny of government decision-making processes. Mr Cameron and Ms Poole have major concerns about the conduct of officers of the Department and are seeking further information to understand how their concerns were addressed by the Department. I do not agree with the Department's analysis and consider that these factors are strongly in favour of release.

118 As to factor (m), I accept that the Department is concerned that the interests of its staff might be harmed by disclosure of this information and details of their investigation for misconduct. However, I do not consider that this is a factor of significant weight in these circumstances. The relevant officers were not found to have committed any misconduct and communication of their exoneration could be seen to be advancing rather than harming their interests. The interests of Mr Cameron would also be promoted, as this matter relates to his property, his property manager and the response to Ms Poole's complaint.

119 In relation to paragraph (u), the Secretary states that 'to release...unproven allegations would be to release information that paints an incorrect and inaccurate picture of the individuals involved.'

120 This was considered by the Queensland Information Commissioner in the decision of Marshall and Department of Police<sup>19</sup>, explaining:

*... information of this kind is by its very nature an individual's particular version of events, and will obviously be shaped by factors such as the individual's memory of relevant events and subjective impressions. This inherent subjectivity does not, however, mean that the resulting account or statement is necessarily incorrect or 'false and misleading'. It simply comprises a personal interpretation of relevant events, which an investigator must then balance against other (often competing) statements and other evidence in reaching a conclusion in a particular case.*

121 I agree and consider that the Secretary was mistaken in his analysis. It is not a question of whether the released information would paint an incorrect and inaccurate picture of the investigated officers. It is a question of the relevant information being wrong or inaccurate in itself. That the allegations were found to be unsubstantiated does not render the allegations wrong or inaccurate, they were only ever allegations which were subject to further investigation. If anything, the release of further information about the investigation which found the allegations unsubstantiated would appear to correct any inaccurate picture, from the Secretary's perspective, showing that it did not consider that the evidence supported the allegations.

122 Though I presume all factors were considered, the Department did not mention factors which I consider of particular relevance. These are factors (j), whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law, (n), whether the disclosure would prejudice the ability to obtain similar information in 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.

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<sup>19</sup> [2011] QICmr 4 at paragraph [18].

123 Release of this information may result in a cooling effect on the fulsome participation of staff in investigations and the provision of the much vaunted ‘frank and fearless’ advice from public servants in relation to such investigations, which are usually highly sensitive. That misconduct and disciplinary proceedings are usually conducted in a confidential manner also weighs against disclosure. However, the fairness and justice considerations of providing Mr Cameron with information about the reasons and deliberative process explaining why the complaint was found to be unsubstantiated are also significant.

124 This is a difficult balance to strike. However, after considering all relevant matters, including all those set out in Schedule 1 and none of those set out in Schedule 2, I determine that it is not contrary to the public interest to disclose the following information which was *prima facie* exempt under s35. This is pages 11, 126, 153-155 (with the exception of information already found to be exempt under s31) and 165-167. This should be released to Mr Cameron.

125 The remainder of the information, pages 97-98, 108-112, 136-152, 168-188 and 209-215 is validly exempt pursuant to s35 and is not to be released to Mr Cameron.

### **Section 36**

126 As stated previously, I do not consider that the Department has discharged its onus to show that s30(1)(d) should apply to any of the information responsive to Mr Cameron’s request. However, I accept that its alternative proposed in this event, s36, should be considered. Section 36 relates to the personal information of a person other than the applicant and has particular application here due to the significant number of persons whose personal information appears in the information responsive to Mr Cameron’s request who are not public servants performing their regular duties.

#### *Ms Poole*

127 As Ms Poole has given her consent for all information relating to her in the documents to be provided to Mr Cameron, I consider that her personal information should accordingly be treated as if she were the applicant and released in full unless exempt under a different section of the Act.

#### *Public servants performing their regular duties*

128 Consistent with my previous decisions<sup>20</sup> and the standard Australian practice<sup>21</sup>, the default position is that personal information of public servants which relates to the performance of their regular duties (i.e. name, position information, work contact details) is not exempt from release. Such information will only be considered exempt when there are specific and unusual circumstances identified which justify this, and the Department has not provided any such reasons or

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<sup>20</sup> See Camille Bianchi and the Department of Health (November 2021), Clive Stott and Hydro Tasmania (February 2021), C and Department of Primary Industries, Parks, Water and Environment (December 2021) at <https://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions>.

<sup>21</sup> See Hunt and Australian Federal Police [2013] AICmr 66 (23 August 2013) at [72]-[74].

discharged its onus under s47(4) to show why this information should be exempt. Accordingly, all personal information regarding public servants performing their regular duties should be released in full to Mr Cameron, unless otherwise exempt. While Mr Cameron has indicated that he is accepting of the redaction of staff names if there are concerns for their psychological wellbeing, I do not consider that this is necessary in line with my analysis regarding s30.

*Public servants under investigation or assisting investigation*

I29 It is clear that there are different considerations for the Departmental officers who were alleged to have committed misconduct and were investigated, and for those who assisted with the investigation.

I30 There are some home addresses, personal email addresses and personal telephone numbers included in the information and I consider that it would be contrary to the public interest to release this information. The information is intelligible without these personal details and its release would be detrimental to the interests of these individuals.

I31 I am not satisfied, however, that the names of these public servants should be redacted in any information I find is otherwise able to be released. The identity of the individuals is known to Ms Poole and Mr Cameron, they are named in the complaint and have directly dealt with them in the past. Many have made statements or appeared as witnesses in the abandoned prosecution of Ms Poole, which occurred in open court. While there is no restriction on the use of the information following its release, the public nature of the work of the officers under investigation, including giving evidence in court in relation to this matter, and that they have been cleared of misconduct, persuades me that their names may be released unredacted.

I32 While I consider that their names are not required to be redacted, it does not follow that all of the documents in which those names appear are also not exempt under s36. I consider that the draft and final letters to the employees being investigated at pages 30-56 and 58-93 advising them of the investigation and the draft and final letters at pages 176-188 and 224-238 advising them of the findings of the investigation are validly exempt (though I have already found the letters at 176-188 to be exempt under s35). This is correspondence between an employer and employee regarding a workplace investigation and the balance of public interest factors does not favour the release of these letters. I consider factor (p) to be of particularly high weight and that the adverse impact of the release of such correspondence on the management of the Department's staff would be significant. It is appropriate that staff management and disciplinary processes are able to be conducted confidentially unless there is a particular justification for this not to occur (such as is detailed in my decision of *Camille Bianchi and the Department of Health*<sup>22</sup>). The letters also do not provide any particular insight into the investigation or decision making process or contain

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<sup>22</sup> Available at [www.ombudsman.tas.gov.au/\\_data/assets/pdf\\_file/0006/638412/O2006-133-Bianchi-and-DoH-Final-Decision.pdf](http://www.ombudsman.tas.gov.au/_data/assets/pdf_file/0006/638412/O2006-133-Bianchi-and-DoH-Final-Decision.pdf), particularly paragraphs 118-126 and 194-196.

information which is not available in other documents responsive to Mr Cameron's request. I am accordingly satisfied that it would be contrary to the public interest to release this information and it is exempt under s36.

- 133 This is not the case in relation to the summary of the findings at pages 216-223 regarding all of Ms Poole's allegations which was sent to the Commission. I consider that the public interest test strongly favours the release of this letter to Mr Cameron, most particularly factors (c) that the disclosure would inform him of the reasons for a decision and (d) that it would provide contextual information to aid in the understanding of government decisions. All Department staff were found not to have committed misconduct, so I do not consider that any significant harm to their interests is likely through the release of this reasoning for so finding. Mr Cameron has stated that no reasons for the findings made following the investigation have been provided to him or Ms Poole by the Department. It is a basic tenet of administrative law that reasons for decision should be given by public bodies and the apparent failure to do so greatly increases the public interest in releasing this information. Accordingly, I consider that refusal to provide of a copy of the reasons given to the Commission is not justified and this information is not exempt under the Act. It should be released to Mr Cameron in full.

#### *Members of the public*

- 134 There are some members of the public whose personal information is included in the information responsive to Mr Cameron's request, primarily in the annexures to the investigation report. These are the 'shooters', the two men also charged with offences under the *Wildlife (General) Regulations 2010*, and two witnesses interviewed by Mr Cumming as part of his investigation.
- 135 All of these people are known to Ms Poole and/or Mr Cameron, working or shooting at 'Kingston' farm or in the associated community. Unfortunately, the Department has not consulted with any of them under s36(2) to receive their view on whether the release would be of concern. It is unclear why this has not occurred, as it is by no means apparent that there would be any objection and that the release would cause psychological harm appears highly unlikely.
- 136 I do not consider that there is any need to provide the addresses, dates of birth and telephone numbers of these members of the public to Mr Cameron and am satisfied that this would be contrary to the public interest. I consider that the release of this information would not aid understanding of the information or government decisions and would be detrimental to the interests of individuals.
- 137 I will assess the names of the members of the public in my assessment of the annexures to the investigation report claimed to be exempt under s39, as a finding or further consultation may be unnecessary if the information is otherwise exempt or available.

### *The investigator*

- I38 Mr Cumming's personal information is in the information responsive to Mr Cameron's request, including his name, position title, professional contact details, and workplace address.
- I39 While this does constitute personal information under s36, no reason has been advanced by the Department as to why it is necessary to exempt this information. Mr Cumming is acting in his professional capacity as a workplace investigator, and it is not apparent why any disclosure would be of concern to him or contrary to the public interest.
- I40 I determine that Mr Cumming's personal information is not exempt under s36 and is to be released to Mr Cameron in documents otherwise eligible for release.

### **Section 39**

- I41 In his original decision the Secretary only relied on s39 in the context of claiming that the entire investigator's report comprised exempt information. In the Schedule of Documents however, the reliance upon s39 was significantly broader, with all correspondence with the investigator or accounts for his services being included.
- I42 The Department primarily relied on s39 (1)(a) - that the disclosure would divulge information communicated in confidence which would be exempt had it been generated by the public authority. The Secretary also considered that, while it was not necessary to rely on it as 39(1)(a) applied, 39(1)(b) was also applicable. While I agree that it is not necessary to rely on this subsection, I will note that I do not consider that the Secretary has discharged his onus to show that 39(1)(b) would apply. That the disclosure would be reasonably likely to impair the ability of a public authority to obtain similar information in future is not apparent and I am not persuaded that this is the case. An investigator paid to perform investigations is highly unlikely to decline to provide services if their contact with the public authority or final report may be released under the Act.

### *Emails and accounts*

#### *Pages 3-10*

- I43 The first six emails by date in this email trail are between the investigator and Bleyer Lawyers. These would not be exempt if generated by the Department, so are not exempt under s39. They should be released in full to Mr Cameron.
- I44 The remaining four are between the investigator and a Human Resources Manager at the Department. All of the emails relate to whether communication between Bleyer Lawyers and the Commission may result in the resolution of the complaint. I am satisfied these four emails fall within s39(1)(a), as if the information were generated by another officer within the Department it would be exempt information under s35(1)(b), subject to the public interest test.

Pages 11-15

I45 The first email in this trail is from the investigator to the Human Resources Manager of the Department, enclosing his invoice and running sheet of work done to date on his investigation and continuing the discussion around whether the matter will finalise. I am satisfied that the email falls within s39(1)(a) and the attachment s39(1)(b), and both are *prima facie* exempt subject to consideration of the public interest test.

I46 The following emails are between Departmental officers discussing how to pay the invoice due to the confidentiality requirements. These are not exempt under s39 and have already been considered under s35.

Pages 16-17

I47 This is an email from the investigator to the Manager Human Resources consulting on how to proceed with information supplied by the complainant and upcoming interviews of Departmental officers. I am satisfied the information in this document falls within s39(1)(a), as if the information were generated by another officer within the Department it would be exempt information under s35(1)(b), subject to the public interest test.

Pages 95-96

I48 This is the final three emails in a trail between the investigator, the Human Resources Manager and one of the Departmental officers being investigated following Ms Poole's complaint. It relates to how the officer can be contacted and the provision of a copy of a statutory declaration made by the officer to him, as this was referred to by the investigator.

I49 These emails are between the investigator and the Human Resources Manager and are consultative regarding the best method to provide the statutory declaration to the relevant officer. I am satisfied the information in these documents falls within s39(1)(a), as if the information were generated by another officer within the Department it would be exempt information under s35(1)(b), subject to the public interest test.

Pages 99-101

I50 This is an email trail which comprises two emails from pages 97-98 above, which have already been found to be exempt under s35, and a further email from the investigator and the Departmental officer under investigation, carbon copying the Manager Human Resources.

I51 The further email provides the statutory declaration and advises that the investigator will contact the officer under investigation soon. The statutory declaration attached is at page 101. I am satisfied the information in the email falls within s39(1)(a), as if the information were generated by another officer within the Department it would be exempt information under s35(1)(b), subject to the public interest test.

152 I am not so satisfied in relation to the statutory declaration and, as the investigator states that he received this copy from the complainant, I can see no reason why this should not be provided to Mr Cameron other than he would already be in possession of it.

Pages 102-103

153 This is an email from the investigator to a Departmental officer under investigation regarding the way the investigation will proceed. I am satisfied the information in this document falls within s39(1)(a), as if the information were generated by a public officer it would be exempt information under s35(1)(b), subject to the public interest test.

Pages 104-105

154 This is an email from the investigator to the complainant's lawyer (copied to a Departmental officer) regarding the progress of the investigation. This is not exempt under s39 and there is no reason it could not be provided to Mr Cameron.

Pages 106-107

155 This is an email from the investigator to the Manager Human Resources regarding the complainant's provision of further material. I am satisfied the information in this document falls within s39(1)(a), as if the information were generated by another officer within the Department it would be exempt information under s35(1)(a), subject to the public interest test.

Pages 114-116

156 This is an email from the investigator to a Departmental officer regarding the investigation and the officer's response agreeing to a meeting. The officer is not a respondent to the allegations but is contacted due to having knowledge of the relevant events and broader allegations against the Department. I am satisfied the information in this document falls within s39(1)(a), as if the information were generated by another officer within the Department it would be exempt information under s35(1)(b), subject to the public interest test.

Pages 117-121

157 This is the same email from the investigator as appears at page 115-6, though to a different public officer at another department (who used to work at the Department). Then follows an exchange between the investigator and the officer regarding the interview format and details. As with pages 114-116, I am satisfied the information in this document falls within s39(1)(a), as if the information were generated by another officer within the Department it would be exempt information under s35(1)(b), subject to the public interest test.

Pages 122-123

158 This is an email from the investigator to a Departmental officer who is a respondent to the complaint regarding the investigation and previous emails to

the complainant. I am satisfied the information in this document falls within s39(1)(a), as if the information were generated by another Departmental officer it would be exempt information under s35(1)(b), subject to the public interest test.

*Pages 124-125*

159 These pages comprise an email from Ms Poole in 2011 to the respondent officer and an email in which this is forwarded to the investigator in 2015. I am not satisfied that either meet the requirements to be *prima facie* exempt under s39 and they are to be released to Mr Cameron subject to any other exemption I may find relevant.

*Pages 132-135*

160 These pages comprise emails between the investigator and the complainant's lawyers and the Department and the same. These are not exempt under s39 and there is no reason they could not be provided to Mr Cameron other than he would already have possession of it.

*Public interest test*

161 I now turn to the assessment of whether the documents I have identified above as being *prima facie* exempt under s39 should in fact be released, following the application of the public interest.

162 As the information is tentatively exempt under s39 on the basis that it would have been *prima facie* exempt under s35, had it been generated by a public officer as opposed to Mr Cumming, my analysis in relation to the public interest test in relation to s35 remains relevant. The Department and Mr Cameron have also not made specific submissions about the application of s39 outside the investigation report itself, as the Department originally only relied upon it in relation to that report.

163 The majority of the emails are preliminary consultations and discussions with Human Resources or Departmental staff being investigated for misconduct, which set up the interviews and analysis which comprises the investigation report. I am satisfied that the bulk of this information is validly exempt under s35, as it is the type of tentative and deliberative material which would be contrary to the public interest to release. There is limited advantage in relation to providing reasons for decision or contextual information, due to the preliminary nature of the information, and significant weight attaches to considerations regarding the advantages of maintaining confidentiality during misconduct investigations.

164 Different considerations apply in relation to Mr Cumming's invoice and running sheet at pages 13-15. I consider that the disclosure to the applicant of the investigator's account could have significant ramifications for his business, in that what would otherwise be confidential details of his charges might become public knowledge. The business interests of the investigator (or a similar consultant) might be harmed if a competitor learned of their fees (factors (s) and (w)), such

information not being generally available to such competitors (factor (x)). While there is public interest in knowledge and scrutiny around the expenditure of public funds and the outsourcing of government work to consultants (factors (a) and (g)), this does not outweigh the previously mentioned factors in relation to the release of such a detailed breakdown of a consultant's fees and methods of work.

165 Accordingly, pages 13-17, 95-96, 102-103, 106-107, 114-123 are validly exempt under s39 and not required to be released to Mr Cameron.

166 Pages 3-5, 12 and 99 are not exempt under s39 and should be released in full to Mr Cameron.

#### *Investigation report*

167 Pages 239-435 comprise the investigator's report and pages 437-766 comprise attachments to that report (marked A-P). Page 436 is blank. The Secretary claims that all of the information in the report (including the attachments), is exempt information under s39 (as well as under s30, but I have previously considered this above and not found that claim to exemption under s30(1)(d) to be made out).

168 Before dealing with this claim for exemption under s39, I will address a submission made by the applicant that by virtue of s39(2), the whole of the report is not exempt under s39(1).

169 In respect of s39(2)(a), I agree that the report was obtained by the Secretary from a business undertaking, being the investigator's business undertaking<sup>23</sup>, therefore that paragraph is made out.

170 In respect of s39(2)(c), consistent with my decision in *Clive Stott and Hydro Tasmania* (February 2021)<sup>24</sup>, I do not consider that the investigator's report was provided to the Secretary pursuant to a requirement of law. The applicant's submission that as the report was prepared for the purpose of the Secretary complying with statutory obligations related to a Commission inquiry, the information contained in it was provided to the Secretary pursuant to a requirement of law, is misconceived. The 'requirement of any law' to provide the information to the public authority must in my view be *directly* attached to the provision of that information. In the present circumstances the only legal requirement the investigator was acting under when he provided his report to the Secretary was one borne out of his contractual relationship with the Department (the government of Tasmania) to do so, and this is not sufficient to make its provision a requirement pursuant to specific law.

<sup>23</sup> In his initial letter of authorisation to investigate the Secretary wrote to 'James Cumming Investigation Services Pty Ltd' and the report is signed off under that name. Further, every email I have seen as sent by the investigator is signed off 'James Cumming Investigation Services'.

<sup>24</sup> See *Clive Stott and Hydro Tasmania* at paragraphs 170-171 at [https://www.ombudsman.tas.gov.au/\\_data/assets/pdf\\_file/0010/604198/O1702-115-Final-Decision-Stott.pdf](https://www.ombudsman.tas.gov.au/_data/assets/pdf_file/0010/604198/O1702-115-Final-Decision-Stott.pdf).

171 I am also unable to agree that s39(2)(b) is made out. In submitting that it is because the report ‘relates to other matters of business, being the business of the applicant’, the applicant has misread the provision. For paragraph (b) to be made out, the relevant information must relate to trade secrets or (relevantly) *other matters of a business, commercial or financial nature*. The words ‘business, commercial or financial’ qualify the word ‘nature’. It is not simply a question of demonstrating that the information relates to matters of (or pertaining to) the business of the applicant, which might include matters that are *not* of a business, commercial or financial nature.

172 The investigator’s inquiry was specifically directed to the alleged misconduct of a number of Departmental officers, the conduct supposedly occurring in the context of the investigation of certain events at the applicant’s business place, namely the alleged misuse (in a criminal sense) of permits issued under the *Wildlife (General) Regulations 2010* to cull feral deer at the applicant’s property. It might be said that these events thus related both to the applicant’s business and to its manager, the complainant, also charged in relation to the same events. In turn the events led to the complainant’s complaint to the Commission, the investigator’s investigation of that complaint and to his report. I note that in completing her complaint form as filed with the Commission, in the section headed *Desired outcome of complaint*, the complainant concluded by asking for a safe work and living environment and ‘to be able to manage the business without excessive financial expense and foremost without prejudice’.

173 In *Fountain v Alexander*<sup>25</sup> Justice Mason (as he then was) referred to the expression ‘in relation to’ as being ‘of wide and general import’, remarking that it should not be read down in the absence of some compelling reason for so doing. In *Toohes Ltd v Commissioner of Stamp Duties (NSW)*<sup>26</sup> Justice Taylor observed that:

*There can be no doubt that the expression “relating to” is extremely wide but it is also vague and indefinite. Clearly enough it predicates the existence of some kind of relationship but it leaves unspecified the plane upon which the relationship is to be sought and identified. That being so all that a court can do is to endeavour to seek some precision in the context in which the expression is used.*

174 As wide as the expression ‘relates to’ is, including as it appears in s39(2)(b), it must be read in context, that being that the matters to which the relevant information must relate are business, commercial or financial matters, trade secrets being a specific example.

175 While the report does investigate events that occurred in a business or workplace context, as described previously, it cannot be said that the information contained in the report, when regarded sensibly, relates to matters of a business, financial or commercial nature. What it essentially relates to is the investigation

<sup>25</sup> [\(1982\) 150 CLR 615](#) at paragraph 3.

<sup>26</sup> 1960-61 105 CLR 602 at 621.

of and report upon a series of allegations of misconduct by wildlife officers, none of the 33 allegations I note raising any issues of fraud or fiscal malfeasance of any kind. That is the true character of the information, despite there being business 'overtones' in the background.

176 It follows that s39(2) has no operation with respect to the report as a whole.

Pages 239-435 - Body of investigation report

177 I return to the Secretary's claim that the entire report, including attachments, is exempt under s39. It almost goes without saying that the labelling of the report 'Confidential' does not *automatically* attract the operation of s39. Further it does not *necessarily* follow that s39 will be engaged, none of the persons who made statements to the investigator having given permission for their statements to be released publicly. However, these facts are relevant to resolving what is essentially a question of fact; i.e., whether the information contained in the report was communicated in confidence by the investigator to the Secretary, being the head of the relevant public authority.

178 To my mind it is inconceivable that the report itself (as distinct from the attachments, which for reasons I will explain I will deal with separately), compiled after an extensive investigation into a number of serious allegations of misconduct by Departmental officers, which might have had significant consequences in terms of their employment, would be provided to the very person required to make findings about the relevant allegations (and if adverse to any officer, likely lead to employment consequences for that officer) other than in circumstances of complete confidentiality. In my view in labelling his report 'Confidential', the investigator was doing no more than stating the obvious.

179 Accordingly I am quite satisfied that, as a package of information, the report itself (197 pages long) was communicated in confidence by the investigator to the Secretary and that the information in this document would fall within s39(1)(a), as if the report had been generated by another officer of the Department (as it could well have been had the Secretary chosen to conduct an internal inquiry) it would be *prima facie* exempt under s35(1)(a). I note that the applicant specifically seeks the disclosure of the entire report.

180 It follows that, subject to the application of the s33 public interest test, all of the information in the report itself would be exempt under s39.

181 I consider that there are a number of factors in Schedule 1 that weigh in favour of the report itself being released, in particular (as agreed by the Secretary) factor (a) [the general public need for government information to be accessible], factor (b) [whether the disclosure would contribute to ...debate on a matter of public interest] and factor (c) [whether the disclosure would inform a person about the reasons for a decision]. Both the applicant and the complainant would no doubt be significantly informed as to the reasons for the decision of the Secretary not to find any of the relevant allegations made out, if the report were released to the applicant (and hence no doubt to the complainant). Factor (m)

[whether the disclosure would promote or harm the interests of an individual or a group of individuals] might also weigh in favour of disclosure, due to the promotion of Mr Cameron's interests and the relatively neutral impact on the investigated officers due to their exoneration which I have already discussed.

- 182 It is not clear to me in what way the Secretary relies on factor (j) [whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law] in finding it would be contrary to the public interest to disclose the report. I would have thought that the release of the report, which would demonstrate the seemingly fair and proper manner in which the investigation was carried out and provide a better understanding for the Secretary's findings, would do nothing but promote (to the extent that it is relevant to it) the administration of justice (in a broad sense). However, I accept that the Secretary is likely to be considering the usual practice of maintaining strict confidentiality in the handling of misconduct investigations. Confidentiality is not essential in relation to the administration of justice or procedural fairness, however, and justice is famously required to be 'seen to be done'.
- 183 Confidentiality is important, as the Secretary claims, for the effective investigation of allegations and factor (n) [whether the disclosure would prejudice the ability to obtain similar information in the future] weighs against disclosure of the information. I consider this 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 the future.

- 184 As I have mentioned previously, any reliance on factor (u) [whether the information is wrong or inaccurate] is misplaced. The fact that the Secretary has made findings contrary to the allegations that were made does not make those allegations 'wrong or inaccurate'. They were, and remain, just that; allegations. If anything the release of the complete report would paint a full picture, dealing with both the allegations and the investigator's investigation and conclusions and recommendations, if any, about each of them.

- 185 This issue, of the extent to which information about misconduct investigations should be provided, has been previously considered. The Queensland Information Commissioner decision in *8A3BPQ and Queensland Police Service*<sup>27</sup> is particularly relevant, though the applicant in that matter had been themselves investigated for misconduct rather than alleging it had occurred. In assessing the weight to be given to public interest factors relating to accountability, providing reasons for decision and contextual information informing the decision (highly analogous to factors (c), (d) and (f) in the Act), the Office of the Information Commissioner found that:

*The requirement for QPS to be accountable and transparent in the conduct of disciplinary investigations does not, in my view, oblige QPS to provide the*

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<sup>27</sup> [2014] QICmr 42 (30 October 2014)

*applicant with access to its entire investigation file nor reveal all of the information it gathered in dealing with the investigation. QPS conveyed the substance of the allegation to the applicant and notified him of the outcome of the ESU [Ethical Standards Unit] investigation.*

- 186 As discussed in relation to s36, I have given particular consideration to the apparent failure of the Department to provide Ms Poole and Mr Cameron with a summary or outcome of the investigation or details of its findings. However, while this significantly increases the weight of the factors relating to accountability and providing reasons and context for the decision, I do not consider that this justifies the release of the entire investigation report and annexures.
- 187 The Department did not raise factor (p), but I consider this to be of particular significance and to weigh against disclosure. The disclosure of investigation reports into staff misconduct prepared for the consideration of a final decision maker is likely to have a substantial adverse effect on the management by a public authority of that public authority's staff. Such disclosure is likely to hamper the ability of investigators to thoroughly canvass the evidence, assess the credit of complainants and respondents and make recommendations if full investigation reports were able to be obtained by complainants (or associated parties to the complainant, such as Mr Cameron in this instance). The investigation report's structure sets out the position of the complainant and Mr Cameron, then the respondent's position and then provides the findings of the investigator in a relatively brief form. In this instance, the report is particularly tentative in its conclusions and defers heavily to the Secretary as the final decision maker rather than making definitive findings. It is patently opinion and recommendations as part of a deliberative process and is far from a finalised decision. It also extensively quotes and refers to statements from respondents to the allegations, which I have already found to be exempt due to the potential cooling effect on cooperation from staff under investigation for misconduct.
- 188 Consequently, having weighed all the public interest considerations, I determine that it is contrary to the public interest to release the body of the investigation report. While there are parts of the report which are factual or known to the complainant and Mr Cameron (such as their complaints), these are quoted in context and are not severable from the report as a whole. These parts are also already known to Ms Poole and Mr Cameron. Accordingly, I determine that the body of the investigation report is exempt in full under s39.

Pages 437-766 - Annexures of the report

- 189 I turn to the annexures to the report, which comprise:

Annexure	Pages	Content
A-B	437-464	Investigation commencement documents – letter of instruction to Mr Cumming and Ms Poole's complaint to the Commission

C	465-522	Court file regarding the alleged commission of offences under the <i>Wildlife (General) Regulations 2010</i> by Shooter A
C	523-570	Court file regarding the alleged commission of offences under the <i>Wildlife (General) Regulations 2010</i> by Shooter B
D	571-670	Court file regarding the alleged commission of offences under the <i>Wildlife (General) Regulations 2010</i> by Ms Lyndel Poole
E-N	671-761	Statements from Department officers provided to Mr Cumming in response to Ms Poole's complaint to the Commission
O-P	762-766	Statements from two witnesses provided to Mr Cumming in response to Ms Poole's complaint to the Commission

190 I consider that this information, although for convenience attached to the investigator's report, should be treated separately in the context of s39, for the following reasons.

191 Annexures A-D are all documents which would have been obtained by the investigator from the Department. I am unable to see how these documents can be said to have been communicated in confidence to that public authority by the investigator. While it may have been convenient for the investigator to attach them to his report, these could not have been provided in confidence to the Department, because it already had them.

192 Annexure A comprises the investigator's instructing correspondence and authorisation from the Secretary to commence his investigation. These documents are not exempt under s39 and the Department has not discharged its onus under s47(4) to show that this information should be exempt under any other section of the Act.

193 Annexure B comprises the complainant's complaint to the Commission with supporting documentation, including that submitted to the Commission by the applicant. This is not exempt under s39 and there is no reason this could not be provided to Mr Cameron other than he would already be in possession of it.

194 Annexures C and D are labelled 'Prosecution documentation-the shooters' and 'Prosecution documentation-the complainant' respectively. The Department has not made specific submissions or provided reasons in relation to the exemption of these documents. Copies of the court files regarding the shooters contain evidence only and have address and date of birth information redacted. Given the conviction of both shooters and the likelihood of these documents having previously been provided to Ms Poole and Mr Cameron as part of the discontinued court process, I do not consider the Department has discharged its onus under s47(4) to show that this information should not be released to Mr Cameron.

- 195 Greater consideration is required in relation to the court file regarding the prosecution of Ms Poole, as this contains commentary and correspondence in addition to evidence and this is not likely to have been previously provided to Ms Poole or Mr Cameron. There is some documentation in the court file which Ms Poole and Mr Cameron would clearly already possess (such as correspondence between their legal representatives and the Department, evidence which would have been disclosed during the prosecution process). While I do not consider this information exempt, it is open to the Department to decline to release it on the basis that it is otherwise available under s12(3)(c)(i).
- 196 In relation to the correspondence between officers from Tasmania Police and the Department prosecuting Ms Poole, I consider that the Department's claim for exemption under s30 to be justified. Section 30(1)(a)(ii) provides that information is exempt if its disclosure would be reasonably likely to prejudice the enforcement or proper administration of the law in a particular instance. Pages 574, 588-590, 596-598, 600, 607-610, 617-618 and 631 comprise email and letter exchanges regarding the commencement, progress and abandonment of the prosecution of Ms Poole. If all prosecutor updates, assessments of the strength of evidence and development of legal strategies to run a case were able to be obtained under the Act by the person being prosecuted, it would significantly prejudice the ability to properly administer the law. I consider this to be the case even after the conclusion of a prosecution, as it could constrain prosecutors from being able to frankly assess matters and respond to an evolving legal situation. Usually s31 would be applicable for such legal assessments and reports, but these low level prosecutions are not undertaken by lawyers. I encourage the Department to consider the active release of this type of information to those being prosecuted, particularly when a prosecution is abandoned, but consider that it is exempt under s30(1)(a)(ii) and is not required to be provided to Mr Cameron. Exemptions under s30 are not subject to the public interest test.
- 197 Annexures E to N inclusive comprise either statutory declarations or statements made by Departmental officers for the purposes of the investigation. I consider that these are exempt under s39 for the same reasons that I have found the investigation report and correspondence with the respondents to be exempt. The balance of public interest factors does not favour the release of this information, due to the negative impact on the misconduct investigation process both in this instance and in general.
- 198 Annexures O and P comprise statements to the investigator made by two witnesses who are independent of the Department. These two statements fall s39(1)(b), as I am satisfied that the disclosure of the information in them would be reasonably likely to impair the ability of the Department to obtain similar information in the future. The information in these two statements is therefore provisionally exempt under s39.

199 Witnesses generally have no obligation to cooperate with a misconduct investigation.

There is a high potential for witnesses to decline to participate or be less frank if their statements may then be provided in full to the complainant. Accordingly, in applying the public interest test to these statements, having had regard to each of the factors in Schedule 1 (in particular factor (a)) and to nothing in Schedule 2, and to all relevant matters generally, I am of the view that it would be contrary to the public interest to disclose the information contained in the two statements. While it is somewhat unclear in this instance whether the witnesses (who are associates of Ms Poole) would specifically object to the release, the general considerations of the broader public interest do not favour release. Thus factor (n) [whether the disclosure would prejudice the ability to obtain similar information in the future] attracts significant weight, noting that the test is nearly the same as the test propounded by s39(1)(b)-‘would prejudice the ability...’ as opposed to ‘would be reasonably likely to impair the ability...’.

200 It follows that the information contained in annexures O and P is exempt information under s39 and is not required to be released to Mr Cameron.

### **Preliminary Conclusion**

201 For the reasons set out above, I determine the following:

- Exemptions claimed pursuant to s30 are varied;
- Exemptions claimed pursuant to s31 are upheld;
- Exemptions claimed pursuant to s35 are varied;
- Exemptions claimed pursuant to s36 are varied; and
- Exemptions claimed pursuant to s39 are varied.

### **Conclusion**

202 As the above preliminary decision was adverse to the Department, it was made available to the Department on 16 December 2021 under s48(1)(a) to seek its input before finalising the decision.

203 The Department advised on 21 January 2022 that it would not be making any submissions in response to the preliminary decision.

204 Accordingly, for the reasons given above, I determine the following:

- Exemptions claimed pursuant to s30 are varied;
- Exemptions claimed pursuant to s31 are upheld;
- Exemptions claimed pursuant to s35 are varied;
- Exemptions claimed pursuant to s36 are varied; and
- Exemptions claimed pursuant to s39 are varied.

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

**Dated:** 21 January 2022

**Richard Connock**  
**OMBUDSMAN**

## **Attachment I**

### **Section 30 – Information relating to enforcement of the law**

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

(a) prejudice –

- (i) the investigation of a breach or possible breach of the law; or
  - (ii) the enforcement or proper administration of the law in a particular instance; or
  - (iii) the fair trial of a person; or
  - (iv) the impartial adjudication of a particular case; or
- (b) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law; or
- (c) disclose methods or procedures for preventing, detecting or investigating, or dealing with matters arising out of, breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
- (d) endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person; or
- (e) disclose information gathered, collated or created for intelligence, including but not limited to databases of criminal intelligence, forensic testing or anonymous information from the public; or
- (f) hinder, delay or prejudice an investigation of a breach or possible breach of the law which is not yet complete.

(2) Subsection (1) includes information that –

- (a) reveals that the scope of a law enforcement investigation has exceeded a limit imposed by law; or
- (b) reveals the use of an illegal method or procedure for preventing, detecting or investigating, or dealing with a matter arising out of, a breach or evasion of the law; or
- (c) contains a general outline of the structure of a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or
- (d) is a report on the degree of success achieved in a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or
- (e) is a report prepared in the course of a routine law enforcement inspection or investigation by a public authority with the function of enforcing and regulating compliance with a particular law other than the criminal law if the inspection or investigation is complete; or

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

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

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

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

### **Section 31 – Legal professional privilege**

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

### **Section 35 – Internal Deliberative Information**

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

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

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

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

(3) Subsection (1) does not include –

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

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

### **Section 36 – Personal information of a person**

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

(2) If –

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

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

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

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

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 I - Matters Relevant to Assessment of Public Interest**

Sections 30(3) and 33(2)

- I. The following matters are the matters to be considered when assessing if disclosure of particular information would be contrary to the public interest:
  - (a) the general public need for government information to be accessible;
  - (b) whether the disclosure would contribute to or hinder debate on a matter of public interest;
  - (c) whether the disclosure would inform a person about the reasons for a decision;
  - (d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions;

- (e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public;
- (f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
- (g) whether the disclosure would enhance scrutiny of government administrative processes;
- (h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;
- (i) whether the disclosure would promote or harm public health or safety or both public health and safety;
- (j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;
- (k) whether the disclosure would promote or harm the economic development of the State;
- (l) whether the disclosure would promote or harm the environment and or ecology of the State;
- (m) whether the disclosure would promote or harm the interests of an individual or group of individuals;
- (n) whether the disclosure would prejudice the ability to obtain similar information in the future;
- (o) whether the disclosure would prejudice the objects of, or effectiveness of a method or procedure of, tests, examinations, assessments or audits conducted by or for a public authority;
- (p) whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of the public authority's staff;
- (q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
- (r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;
- (s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;
- (t) whether the applicant is resident in Australia;
- (u) whether the information is wrong or inaccurate;
- (v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;
- (w) whether the information is information related to the business affairs of a person which if released would cause harm to the competitive position of that person;

- (x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;
- (y) whether the information is information related to the business affairs of a person, other than a public authority, which if it were information of a public authority would be exempt information.

# OMBUDSMAN TASMANIA

## DECISION

### Right to Information

**Act Review**

**Case Reference:** R2202-

**040 Names of Parties:** Suzanne Pattinson and Department of Education

**Reasons for decision:** s48(3)

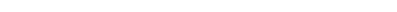
**Provisions considered:** ~~s35, s36, s45(1)(e)~~

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### Background

- 1 Rose Bay High School facilitated a European School Tour (the Tour) in July 2016. The Tour departed two days before a terrorist attack in Nice, France, resulting in concerns regarding the welfare of the students on the Tour. Ms Suzanne Pattinson is a history teacher and led the Tour, along with J and K who are other Rose Bay staff members. Following events during the Tour, the Department of Education (the Department) alleged Ms Pattinson and J breached the State Service Code of Conduct (the Code) and consequently initiated investigations under Employment Direction No. 5 (ED5).<sup>1</sup>
- 2 On 11 September 2020, Ms Pattinson made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the Department seeking *all information and documentation pertaining to the management of the Rose Bay High School 2016 European School Tour prior to and during the tour by senior DoE employees and relating to their involvement and input into the subsequent investigations and inquiries post tour.*
- 3 On 28 September 2020 the Department responded as saying that Ms Pattinson's application *appeared voluminous* and sought her agreement to reduce the scope of the information she sought. After negotiations between Ms Pattinson and the Department, the scope was refined on 16 October 2020 to:
  - *Risk Management Plan of the Rose Bay High School European Tour constructed by the DoE;*
  - *All information, correspondence and documentation between Jenny Gale, Maureen McKeown and former employees, Judy Travers, Bill Linton, Robyn Storey (and where applicable security/government experts) during and post Rose Bay High School 2016 European School Tour;*
  - *Evidence of DoE's (particularly Jenny Gale, Maureen McKeown) daily monitoring of the Rose Bay High School 2016 European*

<sup>1</sup> Employment Directions are issued by the Minister administering the *State Service Act 2000* (see s17 of the *State Service Act*). ED5 contains *Procedures for the investigation and determination of whether an employee has breached the State Service Code of Conduct* (see s9 of the *State Service Act*).



*School Tour for the duration of the tour, i.e., from the day of departure to return to Tasmania- July 2016;*

- *DoE's updates to parents of tour students post terrorist attack;*
  - *Communications to/from the Minister of Education and DPaC relevant to all facets of the Rose Bay High School 2016 European School Tour;*
  - *Reasons and evidence for initiating the Preliminary Investigation against [J] and Suzanne Pattinson.*
- 4 Following discussions with the Department on 19 October 2020, Ms Pattinson agreed to an extension of a further 20 working days to facilitate third party consultation under s36(2) regarding some personal information included in the application.
- 5 On 14 January 2021, Ms Justine Griffiths of the Department, a delegate under the Act, issued a decision to Ms Pattinson. The Department determined to release the information in part, with some information found to be exempt under ss35 and 36 of the Act. Human Resources and Ministerial Services correspondence was found to be exempt in part, also pursuant to ss35 and 36, and the Risk Management Plan was released in full to Ms Pattinson.
- 6 Ms Pattinson applied for internal review pursuant to s43(2) of the Act on 1 February 2021 and Ms Amy Robertson of the Department, a delegate under the Act, released a decision to Ms Pattinson on 4 March 2021.
- 7 The internal review decision stated the Department's reasons for decision *in exempting the information under the Act [were] similar to those provided by Ms Griffiths in her decision.* The Department relied upon the same provisions of the Act (ss35 and 36) but released slightly more information, which comprised:
- part of an email dated 21 June 2016 from the Department of Premier and Cabinet to the Department;
  - Rose Bay High School's Code of Conduct for Students;
  - 33 further pages of Human Resources correspondence (released in part); and
  - 15 further pages of Ministerial Services correspondence (also released in part).
- 8 On 23 March 2021, Ms Pattinson applied to my office for external review pursuant to section 44 of the Act. Ms Pattinson initially requested a review of the information she was not provided, and the reasons why it was not provided, as well as a review of the information she was provided both in the context of what she requested and what she indicated she did not require. This was then clarified with Ms Pattinson on 29 April 2022 and 1 May 2022, and it was confirmed that she was seeking a review of:

- a) the exemptions applied to/information redacted from the documents [she] did receive, including the reasons why this information was not provided; and
  - b) the sufficiency of searches conducted by the Department for information relevant to [her] request.
- 9 A request for priority consideration was made by Ms Pattinson on 30 March 2022 and I agreed to expedite the finalisation of this matter on 8 April 2022. This was on the grounds that Ms Pattinson was concerned a relevant time limitation relating to a potential legal claim would imminently expire.
- 10 On 3 May 2022, my office sought further details from the Department on the issue of whether it undertook a sufficient search for relevant information responsive to the applicant's request. The Department provided further information in response on 30 May 2022, which it said showed that it had undertaken appropriate searches for relevant information.

### **Issues for Determination**

- 11 I must determine whether the redacted information, in whole or in part, is eligible for exemption under ss35 and 36 or any other relevant section of the Act.
- 12 As ss35 and 36 are contained in Division 2 of Part 3 of the Act, my assessment is made subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under one or both of these sections, I must then determine whether it would be contrary to the public interest to disclose it. In doing so I must have regard to, at least, the matters in Schedule 1 of the Act.
- 13 I must also determine pursuant to s45(1)(e) whether the Department undertook a sufficient search for relevant information in responding to Ms Pattinson's request.

### **Relevant legislation**

- 14 The Department relied upon ss35 and 36 in its decision to exempt information. I attach a copy of those sections to this decision at Attachment 1.
- 15 Given Ms Pattinson has raised sufficiency of search as an issue, s45(1)(e) is also attached.
- 16 Copies of s33 and Schedule 1 of the Act are also included in Attachment 1.

### **Submissions**

#### *Ms Pattinson*

- 17 Ms Pattinson's submissions primarily related to information she believed was missing from that which was said to be responsive to her request and her

substantive concerns about the conduct of the Department which led her to lodge the request. She set out in an email to this office on 8 April 2022 that:

*If the DoE is unable to produce information about aspects of the management of the tour and failure to maintain communication with us (such as those below), the silences will point to DoE negligence and a failure to provide us with a duty of care.*

*In short, I want all evidence that while we were overseas the Department of Education was actively monitoring our situation and ensuring our safety. It is imperative to know both what the DoE senior staff members were and were not doing on our behalf.*

*I need to know why they did not maintain contact as they promised they would or provide alternative us with [sic] plans for the tour group...*

*Additionally, I require all information regarding the decision to investigate JJ and myself for misconduct (failing to follow directives – it was established there were no directives given). In the context of the investigation findings in our favour, I want to know why and what right Jenny Gale [then Secretary of the Department] had to put in writing, we were nevertheless unprofessional.*

- 18 In Ms Pattinson's original request for external review of 23 March 2021, she made the following submissions:

*While it is highly probable that no such information exists because it was not created or planned, the RTI was unable to furnish any documentation from the “many thousand [sic] of pages” it had access to, that showed:*

- *the DoE had its own risk management plan in place prior to the departure of the tour*
- *the DoE was monitoring and advising us between the 16<sup>th</sup> – 19<sup>th</sup> July, 2016*
- *the DoE had provided us with alternatives to the activities outlined in the tour agenda of [sic] which they were privy to*
- *the DoE had received updated security information that indicated a higher level of risk than before we departed.*

- 19 In Ms Pattinson's request for internal review on 1 February 2021, she submitted that:

*Despite initially being informed by the RTI that there were “many thousands of pages of documents and information”, I received 145 pages of information (+ 1 contents page). As my attached document indicates, of these 145 pages, 42½ pages comprised redacted information and 13 pages (approx.) contained information I do not recall seeing. The remainder of the pages comprised information that:*

- *I wrote myself*
  - *Was provided to me in emails, letters or investigative reports*
  - *Were documents that were readily available to the public and which I had already accessed myself.*
- 20 Ms Pattinson's submissions in relation to the issue of whether the Department conducted a sufficient search for information will be set out in the following Analysis.

*The Department*

- 21 The Department did not provide specific submissions in response to this external review, beyond the reasoning of its decisions, except as relates to the sufficiency of search issue. These are set out in that part of the following Analysis. The determinations in its decisions are set out below.
- 22 In the Department's internal review, Ms Robertson provided the following reasoning to support her decision to exempt information under s35:
- The information is exempt as officers of a public authority require the internal deliberative process, preparing their opinion, advice or recommendations, to carry out their duties. It is critical that officers, have some protected space to break down issues and find solutions.*

- 23 Ms Robertson maintained exemptions pursuant to s35 for similar reasons as those set out in the Department's original decision of 14 January 2021 by Ms Griffiths. In relation to s35, Ms Griffiths supported the exemption of *internal correspondence between Department officers and/or ministerial staff [and] minutes and briefing notes to the Minister*, saying:

*The exempt information contains opinions and advice between public officers to identify a potential course of action, and is part of the deliberating process. Deliberating process is another way of saying 'thinking process'. Examples of the thinking process of officers of a public authority can include internal correspondence, notes, etc. The Minutes, briefings and other correspondence were prepared by officers of the Department for the express purpose of briefing the Minister and/or Secretary regarding an investigation into the Rose Bay High Overseas Tour.*

*The thinking process is necessary for public officers to provide their free and frank advice in writing. Written advice can better cover complexities by allowing time for reflection and the working through of a problem in stages with possible better outcomes. For Department business units directly providing support to members of Executive and the Minister, internal deliberations are of particular importance and enable best possible outcomes for students, their families and the community.*

*I am satisfied that the information at issue meets all of the conditions to be exempt under this section of the Act.*

- 24 Ms Robertson provided the following reasoning to support her decision to exempt information under s36:

*I reiterate Ms Griffiths' reasons for exempting personal information of other individuals.*

*To disclose personal information of individuals to promote the interests of some individuals would not outweigh the harm to a larger group of individuals. It is essential for the Department to be trusted to responsibly handle the personal information of individuals. For personal information of individuals to be disclosed would cause a loss of trust and considerable harm to the Department's ability to perform its core function which is providing education service.*

- 25 Addressing the public interest test concerns contained in Schedule 1 of the Act, Ms Robertson said, *I concur with Ms Griffiths' assessment and agree that of particular relevance in this instance are matters (h), (m), (j), (n), (p) and (v). She then set out the following:*

*As outlined in Ms Griffith's decision that to release this information could harm 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.*

*In relation to documents relating to [J], while the Department sought [J's] approval to release information within the scope of this request, it is my decision that it is not in the interest of the public to release information related to a conduct investigation of another person, other than the applicant.*

*Therefore, I also find it contrary to the public interest to release this information.*

- 26 In the final part of her internal review decision, Ms Robertson addressed concerns raised by the applicant in relation to the scope of the information assessed, indicating:

- *In your correspondence you raised a concern that while there were thousands of pages, only a number of these were provided to you. The Department holds a range of information that it must assess against the scope of your request. The Department has undertaken to identify information within the scope of your request. Information that is held by the Department, but which sits outside the scope of your request, is not required to be provided under the Act.*
- *As this is a fresh decision as required by the Act, I am not privy to the information that Ms Griffiths has already provided to you under the original decision. Therefore, under this decision it is noted that you may receive duplicates of information and/or information that you have already received or that are within your possession.*

## **Analysis**

### **Section 35 – Internal deliberative information**

- 27 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;<sup>2</sup> or
  - a record of consultations or deliberations between officers of public authorities.<sup>3</sup>
- 28 Once the requirement of one of those subsections is met, I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative processes related to the official business of the Department.
- 29 The outlined exemption above does not apply to the following:
- purely factual information<sup>4</sup>;
  - a final decision, order or ruling given in the exercise of an adjudicative function<sup>5</sup>; or
  - information that is older than 10 years.<sup>6</sup>
- 30 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)*<sup>7</sup> 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.
- 31 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'.<sup>8</sup>
- 32 The Department has mainly relied upon paragraphs (a) and (b) of s35(1) given it notes *the exempt information contains opinions and advice between public officers to identify a potential course of action, and is part of the deliberating process*.
- 33 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

<sup>2</sup> Section 35(1)(a).

<sup>3</sup> Section 35(1)(b).

<sup>4</sup> Section 35(2).

<sup>5</sup> Section 35(3).

<sup>6</sup> Section 35(4).

<sup>7</sup> *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at 14.

<sup>8</sup> *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588.

exemption to apply, the Department must establish that the release of information would be contrary to the public interest.

- 34 The Department has claimed exemption pursuant to s35 (in part or in full) in relation to the information contained on pages: 56-57, 63, 64-66, 67-68, 70-71, 72-73, 74-76, 89, 94, 98-99, 110-112, 113, 117, 120-123, 133, 139-142, and 180-181. I will now consider these individually in my analysis below.

*Pages 56-57*

- 35 The redacted information in these pages is part of an email trail between the Department's Workplace Relations Manager, Industrial Relations Unit, the Deputy Secretary and what appears to be another senior Workplace Relations staff member dated 28 September 2016. The emails consist of opinion or records of consultations between officers of the Department regarding the deliberative process of determining the way to proceed with Ms Pattinson's ED5 investigation. Accordingly, I am satisfied that the redaction portions are *prima facie* exempt pursuant to s35(1)(a) and (b).

*Page 63*

- 36 The Department has sought to exempt part of an email from the Deputy Secretary to both the Department's Workplace Relations Manager, Industrial Relations Unit and the Senior Investigations Officer, Conduct and Investigations, with copies sent to the Secretary and other Departmental staff, dated 6 October 2016. The email includes a duplicate of an email from the Deputy Secretary to the Department's Workplace Relations Manager, Industrial Relations Unit, with copies sent to other Departmental staff members, dated 28 September 2016, which I have analysed in *Pages 56-57*. I note the email is partially redacted on *Pages 56-57* but fully redacted here.
- 37 The redacted part of the first email includes discussion about the two issues identified in the unredacted section, including seeking advice from the Department's Legal Services section, and requesting further related emails and a timeline of events. It clearly includes opinions, advice and recommendations in the course of a deliberative process. The redacted part of the second email includes a request for advice and is clearly a record of consultations and deliberations. Consequently, they are *prima facie* exempt under s35(1)(a) and (b). In relation to the duplicate email mentioned above, given the first line has already been released in *Pages 56-57*, that is not *prima facie* exempt under s35 and should be released in full to Ms Pattinson. The remainder is *prima facie* exempt under s35(1)(a) and (b).

*Pages 64-66*

- 38 These are two memos, which the Department has sought to exempt in full, one from the Senior Investigations Officer, Conduct and Investigations to the Deputy Secretary, Strategy and Performance, dated 28 September 2016, and the other from the Secretary to the Senior Investigations Officer, Conduct and

Investigations, dated 29 September 2016, both regarding an ED5 investigation in relation to J.

- 39 Given these documents are clearly records of consultations between officers of the Department regarding the deliberative process of determining the course of action relating to the ED5 for J, they are *prima facie* exempt under s35(1)(b).

Pages 67-68

- 40 This is a memo dated 28 September 2016 from the Senior Investigations Officer to the Deputy Secretary, Strategy and Performance, regarding Ms Pattinson and requesting consideration of the commencement of an ED5 investigation, which the Department has sought to exempt in full. I am satisfied that the memo is *prima facie* exempt pursuant to s35(1)(b), as consultations and deliberations between public officers in the course of the deliberative process.

Page 70-71

- 41 This is an email trail dated 28 September 2016 from the General Manager, Learning Services South Region to the Secretary and other Departmental staff members relating to the investigation involving Ms Pattinson. The email trail includes a duplicate of an email from the Deputy Secretary to the Department's Workplace Relations Manager, Industrial Relations Unit, with copies sent to other Departmental staff members, dated 28 September 2016, which I have analysed in *Pages 56-57* and *Page 63*. I note the email is partially redacted on *Pages 56-57* but fully redacted on *Page 63* and here.
- 42 I am satisfied that all emails except the duplicate email are *prima facie* exempt pursuant to s35(1)(b), as consultations and deliberations between public officers in the course of the deliberative process. Given the first line of the duplicate email has already been released in *Pages 56-57*, that part is not *prima facie* exempt under s35 and is to be released in full to Ms Pattinson. The remainder of the duplicate email is *prima facie* exempt under s35(1)(a) and (b).

Pages 72-73

- 43 This is a letter from the Secretary to J regarding an ED5 investigation, dated 5 October 2016. This is not internal deliberative information pursuant to s35 as, although J is an employee of the Department, the letter is a notification regarding the disciplinary process rather than a 'thinking process' document. It is, however, similar to other documents relating to J that the Department has sought to exempt under s36, so I will discuss it when I analyse those documents.

Pages 74-76

- 44 This is a communication from the Assistant General Manager of Learning Services South Region to the Secretary dated 27 September 2016 providing background information, allegations, findings, conclusions and options regarding

the investigation into Ms Pattinson and J. Given the information under the heading *Background* is purely factual, s35 does not apply to that section and it is to be released in full to Ms Pattinson. The preliminary information setting out explanatory administrative information such as the author, recipient, date and subject of the communication (communication header) can also be released to Ms Pattinson, as it similarly does not fall within s35. The remainder of the information in the communication is exempt under s35(1)(a) and (b) given it includes opinions, advice and constitutes a record of deliberations between Departmental staff members.

Page 89

- 45 This is an email from the Secretary to Departmental staff dated 15 July 2016 confirming the steps agreed to be undertaken that day. It also includes a request regarding follow-up action that day. Given the information in the email includes confirmation of agreed advice as well as consultations between Departmental staff, it is *prima facie* exempt under s35(1)(a) and (b).

Page 94

- 46 This is an email trail between the Deputy Secretary, Strategy and Performance, and another Department staff member, copying the Secretary, dated 16 July 2016. It includes a discussion regarding advice received from the Office of Security and Emergency Management, part of the Department of Premier and Cabinet, and is clearly a record of consultations and deliberations between public officers. It is therefore *prima facie* exempt under s35(1)(b).

Pages 98-99 and 180-181

- 47 These are both Briefing Notes to the Minister for Education and Training (one dated 18 July 2017, signed and noted by the Minister on 29 July 2017 and a duplicate undated and unsigned) regarding concerns raised by J in relation to the investigation. Given the Briefing Notes contain opinions and advice and a record of consultations undertaken in the course of the deliberative process related to assessing J's concerns, they are *prima facie* exempt under s35(1)(a) and (b).

Page 110-112

- 48 This is a memo from the Senior Investigations Officer to the Secretary regarding Ms Pattinson's investigation, dated 1 May 2017. It provides introductory information, a summary of evidence and matters for consideration.
- 49 I am of the view that the memo header and the first six paragraphs of the memo (the section before the heading *Summary of Evidence detailed in the Investigation Report*) are purely factual and consequently do not fall within s35. Much of that information is already well known to Ms Pattinson and is to be released in full. The remainder of the memo is clearly internal deliberative information pursuant to s35(1)(a) and (b) and is therefore *prima facie* exempt.

Page 113

- 50 This is an email trail dated 24 November 2016 between the Deputy Secretary, Strategy and Performance, the Workplace Relations Manager and other Departmental staff, with the Secretary copied into one of the emails, regarding advice received from the Office of Security and Emergency Management. I am satisfied that the emails are *prima facie* exempt pursuant to s35(1)(a) and (b) given they include the relaying of security advice received and they are a record of consultations between Departmental officers.

Page 117

- 51 This is an email trail between the Secretary and the Deputy Secretary, Strategy and Performance, dated 7 July 2016. Given the emails are a record of consultations between Departmental officers regarding the deliberative process of determining their advice to the Minister based upon security documents received before the commencement of the Tour, they are *prima facie* exempt under s35(1)(b).

Pages 120-123

- 52 This is a memo from the Acting Director Industrial Relations to the Secretary, dated 28 October 2016, regarding the preliminary investigation. It includes background information relating to the Tour, a list of attached documents, a timeline of events, background information relating to the preliminary investigation and a determination. It also includes the first three entries of a full timeline of events, which relate to Ministerial approval documents.
- 53 I am not satisfied that the following information is exempt under s35 given it is purely factual and consequently it is to be released to Ms Pattinson in full:
- memo header (excluding handwritten notes);
  - all information under the headings: *Background of Rose Bay High School Western Front Trip, Documents and Timeline of events*;
  - the first three entries in the attached *Timeline of Events*.
- 54 The remainder of the memo is *prima facie* exempt under s35(1)(a) and (b) as it includes advice and a record of consultations in the course of the deliberative process relating to the preliminary investigation.

Page 133

- 55 This is a memo from the Secretary to the Senior Investigations Officer, Conduct and Investigation Unit, dated 28 October 2016 and stamped *Draft*, regarding the appointment of an investigating officer in accordance with the ED5 relating to Ms Pattinson. The memo header and first sentence of the memo are purely factual and are to be released in full to Ms Pattinson.
- 56 The remainder of the memo is *prima facie* exempt under s35(1)(a) and (b) as it includes an opinion, recommendation and record of deliberations between

public officers in the course of the deliberative process relating to the ED5 investigation.

Pages 139-142

- 57 This is an overseas travel minute to the Minister dated 29 June 2016 relating to the Tour. The minute includes a recommendation, background information, financial considerations, Department of Foreign Affairs and Trade travel advice, risk implications, communication considerations, internal consultation, benefits to the Department and participant information as well as specified attachments.
- 58 I am not satisfied that the following information is exempt under s35 given it is purely factual and consequently it is to be released to Ms Pattinson in full:
  - Title and subject of the minute;
  - all information under the heading *Background*;
  - the first sentences of the first two bullet points under the heading *Department of Foreign Affairs and Trade Travel Advice*;
  - the first sentence under the heading *Risk Implications*; and
  - all information under the heading *Participants*.

- 59 The remainder of the information in the minute is exempt under s35(1)(a) and (b) as it includes advice and a record of consultations in the course of the deliberative process relating to the planning stage of the Tour.

#### Section 33 – Public interest test

- 60 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. I am required to have regard to, at least, the matters in Schedule 1 in making this assessment.
- 61 In its internal review decision, the Department indicated that it considered Schedule 1 matters (a), (b), (c), (d), (f), (m), (n) and (o) to be *of particular relevance*. It did not, however, provide specific reasoning for this, except in relation to matters (n) and (o), in which it set out:

*Many of the documents assessed in this request were not prepared by senior staff and therefore I find matters (n) and (o) can be applied when related to less senior staff. Release of internal deliberations by non-senior staff may inhibit the willingness of such staff as those involved with assisting senior staff with the investigation and therefore inhibit the ability of the Department to undertake such inquiries moving forward.*

- 62 The Department also referred to the original decision made by Ms Griffiths, who found matters (h), (m), (n) and (p) to be of *particular relevance*, noting:
- If internal deliberative information was to be released to the public this could harm individuals or a group of individuals by a reluctance to engage in and benefit from the possible better solutions of the thinking process. I have determined that it is reasonable to allow officers of the public authority to have some protected space to work on solutions and it is contrary to the public interest to release this information.*
- 63 I consider that the Department's assessment of the matters in Schedule 1 of the Act was quite limited and did not address all relevant considerations. I agree, however that matter (a) – the general public need for government information to be accessible – is of *particular relevance*, as this need is always relevant and will inevitably weigh in favour of release of information in any public interest assessment.
- 64 I agree that matter (b) – whether the disclosure would contribute to or hinder debate on a matter of public interest – has some relevance, as the welfare of children while in the care of the Department and the adequacy of public sector staff disciplinary processes are an ongoing subject of public commentary and debate. This is primarily a private dispute between Ms Pattinson and the Department, however, and does not specifically relate to a current topic of public debate. For this reason I find this factor to weigh only slightly in favour of disclosure.
- 65 I agree with the Department that (c) – whether the disclosure would inform a person about the reasons for a decision – and (d) – whether the disclosure would provide the contextual information to aid in the understanding of government decisions – are relevant, as any disclosure would inform Ms Pattinson and help her to understand the Department's decisions. This is particularly relevant given she has clear concerns about the Department's actions and inactions, which formed the basis of her initial application. I consider these factors weigh in favour of disclosure.
- 66 Similarly, I agree that factor (f) – whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation – is relevant, as well as factor (g) – whether the disclosure would enhance scrutiny of government administrative processes. Ms Pattinson is obviously concerned that the issues she has raised may not have been handled and addressed appropriately by the Department and the release of this information would enable her to scrutinise its process. I consider these factors also weigh in favour of disclosure.
- 67 Additionally, I consider factors (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 – to be relevant given Ms Pattinson has argued she has

been treated unfairly and she has questioned the justness of the Department's actions. I consider these factors also slightly weigh in favour of disclosure.

- 68 I also consider (i) – whether the disclosure would promote or harm public health or safety or both public health and safety – to be relevant, as the communications with and advice received from government bodies, such as the Office of Security and Emergency Management, were included in some of the *prima facie* exempt information under s35. I consider this weighs against disclosure given this is likely to be sensitive information and its release may lead to risks to public safety.
- 69 I disagree with the Department's reasoning in relation to matters (n) – whether the disclosure would prejudice the ability to obtain similar information in 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. I do not agree that (o) is relevant and consider that (n) should be given far less weight. The Department argued that much of the information claimed to be exempt related to junior staff and such staff may be reluctant to provide advice or assist senior staff with investigations in future if such information was released under the Act. I do not consider this a persuasive argument. As I noted in my previous decision of *Todd Dudley and Department of Natural Resources and Environment*:

*I do not disagree that there is genuine potential for public officers to become more cautious or inhibited in their written communication, or to seek approval from senior staff to reduce personal risk associated with expressing an opinion which may not end up being the position of the Department, for fear of disclosure of information under s35. However, I do not consider that this is a failing of s35 and would be a matter for a public authority to manage with its staff through a supportive culture and robust internal processes.*

*It has oft been said that public servants must be frank and fearless in their duties and s35 being subject to the public interest test accords with this adage. It is intended that public information should be accessible to the public and the Act sets 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.<sup>9</sup>*

- 70 Despite this, 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 accept

<sup>9</sup> See *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](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions).

that this is relevant in this case, given disciplinary processes such as ED5 investigations are highly sensitive and have far-reaching ramifications for the staff members involved. This is more relevant in relation to factor (p) rather than (n), however, and I do not consider that (n) weighs significantly against disclosure.

- 71 Although the Department mentions factor (p) – whether the disclosure would have a substantial adverse effect on the management or performance assessment by a public authority of its staff – it has not specifically addressed this factor. While the ED5 process in relation to Ms Pattinson and J has concluded, the routine disclosure of information regarding ED5 investigations might undermine the integrity of these processes more broadly.
- 72 Disciplinary processes are usually kept confidential and are often controversial. There are strong public interest considerations in ensuring inappropriate conduct by public officers is able to be effectively handled in accordance with relevant policies and legislation. Accordingly, I consider this factor weighs against disclosure in this instance.
- 73 Finally, I consider factor (m) – whether the disclosure would promote or harm the interests of an individual or group of individuals – to be particularly relevant here given Ms Pattinson is specifically motivated to obtain this information to advance her individual interests. Accordingly, I consider this factor weighs in favour of disclosure.
- 74 Overall, there is a difficult balance to strike and I consider that the Department has largely applied s35 in a reasonable and appropriate manner. Accordingly, I am satisfied that the information I have found to be *prima facie* exempt in pages 56-57, 64-68, 70-71, 72-73, 74-76, 94, 98-99, 110-112, 120-123, part of 133, and 180-181 is exempt under s35 and should not be released to Ms Pattinson. In relation to pages 63 and 113, the information found to be *prima facie* exempt which is not included in the following paragraph is exempt under s35.
- 75 I do not consider, however, that the Department has discharged its onus under s47(4) to show that it would be contrary to the public interest to disclose the following information and it should be released in full to Ms Pattinson:
  - Page 63 – paragraph four (except for the final dot point) until the end of the 6 October 2016 email;
  - Page 89;
  - Page 113 – the email dated 24 November 2016 sent at 1:03pm;
  - Page 117; and
  - Pages 139-142.

### **Section 36 – Personal information of a person**

- 76 For information to be exempt under this section, I must be satisfied that its release would reveal the identity of a person other than Ms Pattinson, or that the information would lead to that person's identity being reasonable ascertainable.
- 77 I will not address each individual application of s36 by the Department, as these fall into the following three categories of personal information relating to:
- J;
  - Departmental staff in their usual professional capacity; and
  - External professional parties.
- 78 I note in the Schedule of Documents relating to the Department's original decision, it included s36 in the *Human Resources* and *Ministerial Services* sections but it has been omitted in the Schedule of Documents relating to its internal review decision. In this regard I have assessed s36 according to the label provided by the Department in the full information that was attached to its internal review decision, rather than following the Schedule of Documents, given this appears to be the most logical course of action.

#### *Information relating to J*

- 79 Pages 72-73, 79-80, 85-86, 100-109 and 182 consist of correspondence between J and the Department or Minister for Education. As these documents all reveal the identity of a person other than Ms Pattinson, namely J, they are *prima facie* exempt under s36. In the course of this external review, J advised that he was *happy to give permission for this information to be released and shared with Ms Pattinson*. As a result, I do not accept the Department's reasoning that *it is not in the interest of the public to release information related to a conduct investigation of another person, other than the applicant*, as J has provided specific consent for this to occur.
- 80 I do not consider that the Department has discharged its onus under s47(4) of the Act to show why it would be contrary to the public interest to release this information in these circumstances. I do not consider that there are any public interest factors which weigh significantly against release and these are more than outweighed by those in favour of release. Accordingly, I determine that this information is not exempt under s36 and is to be released in full to Ms Pattinson.

#### *Departmental staff members in their usual professional capacity*

- 81 At internal review the Department claimed that the names, telephone numbers and email addresses of some Departmental staff members, as well as staff

members from other government bodies,<sup>10</sup> were exempt under s36. Ms Robertson argued that *to disclose personal information of individuals to promote the interests of some individuals would not outweigh the harm to a larger group of individuals and further that for personal information of individuals to be disclosed would cause a loss of trust and considerable harm to the Department's ability to perform its core function which is providing education service.*

- 82 In this regard I note my previously expressed view that the names of public officers performing their regular duties are not usually exempt under s36. This is consistent with previous decisions by this office<sup>11</sup> and the standard Australian practice<sup>12</sup>, the default position is that personal information of public servants which relates to the performance of their regular duties (i.e. name, position information, work contact details) is not exempt from release. Such information will only be considered exempt when there are specific and unusual circumstances identified which justify this, and the Department has not provided any reasons for not releasing the information or discharged its onus under s47(4) to show why this information should be exempt.
- 83 For these reasons, I determine that all personal information of public servants undertaking their regular duties is not exempt under s36 and is to be provided to Ms Pattinson. The exception to this is in relation to the mobile telephone numbers of the staff members, as I see no reason why this information should be released to Ms Pattinson. It does not aid understanding of the material and may divulge personal contact details of a person other than Ms Pattinson, especially as some Departmental staff mobile numbers in the documents were clearly provided for emergency purposes only. Accordingly, I consider all mobile telephone numbers contained in the information are exempt under s36 and should not be released to Ms Pattinson.

#### *External Parties*

- 84 The information contains the personal information of external parties, namely a staff member from Andrew Jones Travel, the travel agent the Department engaged for the Tour. While this does constitute personal information under s36, no reason has been advanced by the Department as to why it is necessary to exempt this information. The Andrew Jones Travel staff members are acting in their professional capacity as travel agents, and it is not apparent why any disclosure would be of concern to them or contrary to the public interest. I also note that the name of another Andrew Jones Travel staff member has already been released elsewhere in the information. I therefore determine that

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<sup>10</sup> Including the Department of Premier and Cabinet, the Department of Foreign Affairs and Trade, the Office of the Commissioner for Children and Young People, the Attorney-General's Department and the Office of the Deputy Premier.

<sup>11</sup> See *Simon Cameron and Department of Natural Resources and Environment Tasmania* (January 2022), *Camille Bianchi and the Department of Health* (November 2021), *Clive Stott and Hydro Tasmania* (February 2021), *C and Department of Primary Industries, Parks, Water and Environment* (December 2021) at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions).

<sup>12</sup> See *Hunt and Australian Federal Police* [2013] AICmr 66 (23 August 2013) at [72]-[74].

this personal information is not exempt under s36 and is to be released to Ms Pattinson in documents otherwise eligible for release.

*Has there been a sufficient search for information by the Department?*

85 Section 45(1)(e) of the Act provides that:

*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 –*

...

*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;*

- 86 My office has issued a Guideline, No. 4/2010<sup>13</sup>, 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.
- 87 Ms Pattinson made detailed submissions on 8, 9 and 18 April 2022 relating to further information which she believed was not accounted for in the information located by the Department as responsive to her RTI application. Specifically, she sought:
- a) Information that shows the DoE was monitoring and advising [the tour group] between the 16<sup>th</sup> – 19<sup>th</sup> July, 2016;
  - b) Information relating to why [the Department] did not maintain contact as they promised they would or provide alternative... plans for the tour group;
  - c) The Department's reasons for prohibiting [the tour group's] presence at Fromelles..., not informing [Ms Pattinson] of their final decision and at the last minute attempting to tell Ms Pattinson that she could go to the private but not public events at Fromelles when all events there were private;
  - d) Any correspondence where the DoE had contact with anyone to discuss [the tour group's] attendance at the rehearsal;
  - e) Any correspondence by the DoE to try and corroborate that overruled and outranked the information [Ms Pattinson] received that Defence on the day recommended that the safest place for [the tour group] was 'at the ceremony';
  - f) The Risk Management Plan the DoE created which shows how the DoE chain of command was expected to respond to the crisis [other than the Rose Bay High School Europe Battlefield's Tour July 2016 – Specific Risk Management Plan for Potential Terrorist Activity, which was already provided by

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<sup>13</sup> Revised 24 January 2013, available at [www.ombudsman.tas.gov.au/right-to-information/rti-publications](http://www.ombudsman.tas.gov.au/right-to-information/rti-publications).

the Department in the application and internal review process] and if the DoE plan was never created/does not exist... written confirmation of this; and

g) All investigation reports that were created post-tour.

- 88 On 3 May 2022 my office gave the Department the information contained in paragraph 87 and sought confirmation as to whether further information existed which was responsive to Ms Pattinson's request and a record of all searches conducted.
- 89 On 30 May 2022 the Department responded to points a) to f) in paragraph 87 by saying:
- All known correspondence (either between members of the Department, between Ms Pattinson and the Department, or generally) during that time has been assessed and is included in the information assessed;
  - We understand no further information exists within the scope of [Ms Pattinson's] application.
- 90 In relation to point g) in paragraph 87, the Department's response was:
- Any preliminary investigations have been included in the information assessed. The only "investigation report" created is by James Cummings [sic] and this was provided to Ms Pattinson at the time of the investigation. We understand no further information exists within the scope of her application.*
- 91 The Department further noted: it may appear that some of the questions [Ms Pattinson] seeks answers to may be addressed by the information that the Department's delegate/s considered appropriate to redact.
- 92 Given the Department confirmed the non-existence of further information responsive to Ms Pattinson's request, as I have noted in a previous decision,<sup>14</sup> it is not appropriate for me to determine whether the Department should have undertaken different administrative action or kept better records, given I have not investigated or reviewed its administrative action outside of the Act.
- 93 The Department also provided two search records in relation to Ms Pattinson's original application. The first is in a similar format to the template provided in my Search Guideline in that it has details such as the date, search undertaken, outcome and the name of the Departmental officer conducting the search. The second search record is less detailed and only includes the document number, title and date registered of information found responsive to the request. It does not include the nature of the action undertaken and the outcome of the action undertaken in the course of the search. It also does not include the identity and position of the person who conducted the search, only described as a Record of Search Ministerial Services in the document title. These

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<sup>14</sup> See Robert Vellacott and Devonport City Council (April 2022), available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions).

missing elements are required elements of a search record in my Search Guideline.

- 94 Despite this, though the Ministerial Services search record falls slightly short of the requirements in my Search Guideline, there is sufficient evidence overall that the Department adequately searched for relevant material responsive to Ms Pattinson's request. I do, however, urge the Department to follow my Search Guideline more diligently when conducting future searches.
- 95 Accordingly, I am satisfied that the Department appears to have undertaken an appropriate and sufficient search for the relevant information.

### **Preliminary Conclusion**

- 96 For the reasons given above, I determine that:

- Exemptions claimed pursuant to s35 are varied;
- Exemptions claimed pursuant to s36 are varied; and
- The Department's search for information was sufficient.

### **Conclusion**

- 97 As the above preliminary decision was adverse to the Department, it was made available to the Department on 1 July 2022 under s48(1)(a) to seek its input before finalising the decision.
- 98 The Department advised on 2 August 2022 that it would not be making any submissions in response to the preliminary decision.
- 99 Accordingly, for the reasons given above, I determine that:
  - Exemptions claimed pursuant to s35 are varied;
  - Exemptions claimed pursuant to s36 are varied; and
  - The Department's search for information was sufficient.

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

**Dated: 2 August 2022**

**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.

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.

#### **45. Other application for review**

- (1) A person who has applied for information in accordance with section 13 may also apply to the Ombudsman for a review of a decision if –
  - (e) following a decision being made by a Minister or public authority, the applicant believes, on reasonable grounds, that there is an insufficiency in the searching for the information by the Minister or public authority.

#### **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.

# OMBUDSMAN TASMANIA

## DECISION

**Right to Information Act Review**

**Case Reference:** R2208-035

**Names of Parties:** Tim Bullard and Department of Justice

**Reasons for decision:** s48(3)

**Provisions considered:** s30

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### **Background**

- 1 On 16 December 2021, an incident occurred at the Hillcrest Primary School in Northern Tasmania in which a jumping castle and inflatable ‘Zorb’ balls became airborne in high winds while in use by school children. Six children died and three were injured in the incident. The Hillcrest Primary School is operated by the Department for Education, Children and Young People, known at the time of the incident as the Department of Education (the Department).
- 2 Mr Tim Bullard is the Secretary of the Department and made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to the Department of Justice on 19 May 2022. Mr Bullard set out that the general topic of information he was applying for was:

*Information gathered up by WorkSafe (including by or through the regulator under the Work Health & Safety Act and any officer appointed under that Act) concerning the condition and attributes of the jumping castle which was used at the Hillcrest Primary School on the 16<sup>th</sup> December 2021, including any engineering reports or assessments; and any information concerning weather conditions on that day at the time and place the jumping castle was used, including any meteorological assessment(s) and opinion(s)*

Mr Bullard’s specific request for information was detailed as:

*All of the following:*

*Any assessments or reports about the condition of the jumping castle;*

*Any assessments or reports about whether the jumping castle was tethered to the ground;*

*Any assessments or reports about what gave rise to the jumping castle becoming airborne –*

*Including the force(s) required to make it airborne and the failure (if any) of any mechanism employed to prevent that;*

*Any assessments or reports about the weather conditions on the day the jumping castle was used;*

*Any assessments or reports about how the weather event, which caused the jumping castle to become airborne, arose*

- 3 On 28 July 2022, Ms Ginna Webster, Secretary of the Department of Justice and its principal officer under the Act, released a decision to Mr Bullard. Ms Webster set out that:

*I have decided that any information held by the Department relevant to your request is exempt under section 30(1) of the Act, save for a document titled Bureau of Meteorology Data Document CAS-23983-F9T0Q7-1.*

*Section 30(1) of the Act provides relevantly:*

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...

*Section 30 of the Act is not subject to the public interest test in section 33 of the Act.*

*I am advised that the WorkSafe investigation has yet to be completed.*

*In my opinion, the release of any material in WorkSafe's possession would be reasonably likely to prejudice the ongoing investigation and any associated compliance action under the Work Health and Safety Act 2012. My decision not to release information while the matter is still under investigation is consistent with the treatment of similar applications made by employees and employers (and their representatives) in respect of any other workplace accident.*

*I am releasing the Bureau of Meteorology information on the basis that the Bureau would provide that information to any person on request as it was already in existence and was not generated or collated solely for the purpose of the WorkSafe investigation.*

*Once the WorkSafe investigation and associated compliance action have been completed, the Department will generally release the bulk of the investigation file in line with its usual practice as section 30(1) of the Act will cease to be applicable.*

- 4 On 23 August 2022, Mr Bullard sought external review of Ms Webster's decision regarding the information not released. The application was accepted under s45(1)(a) on the basis that Mr Bullard had received a decision made by a principal officer and he had submitted it to this office for review within 20 working days of his receipt of it. The fee had been waived pursuant to s16(2)(c).

- 5 Mr Bullard applied to have his external review request expedited and I agreed to grant priority to this matter. This was due to the high degree of seriousness and public interest in this tragic incident, and the desirability of promptly resolving associated disputes regarding the release of related documents.

### **Issues for Determination**

- 6 I must determine whether the information responsive to Mr Bullard's request is eligible for exemption under s30 or any other relevant section of the Act.

### **Relevant legislation**

- 7 A copy of s30 is attached to this decision at Attachment 1.

### **Submissions**

#### *Applicant*

- 8 On 13 September 2022, in seeking an expedited decision on his application for external review, Mr Bullard set out the reason the information was sought:

*Specifically, the Department relies upon the need to prepare for the approaching Coronial Inquest, associated investigations and legal proceedings that are foreshadowed following the tragic events at Hillcrest Primary School. The documents requested are sought to assist in the Department's capacity to assist and also respond to these actions, and to assist in tribunals and investigations. In addition, the Department is cognisant of the expectation and indeed public interest in the community being informed in a timely manner about its actual or alleged actions or inactions.*

- 9 On 29 September 2022, Mr Bullard made the following submissions regarding why he considered the information sought should be provided to him:

*It is submitted that there is nothing in [Ms Webster's decision]...which shows why the Secretary concluded that the release of the material in the possession of WorkSafe '...would be reasonably likely to prejudice ongoing investigation and any associated compliance action...'. Given the provisions of s47(1)(k) and s47(4), absent a good explanation why the information that has been sought is, if provided, '...reasonably likely to prejudice...' then it should be provided.*

#### *Department of Justice*

- 10 On 1 September 2022, in responding to my office's request for information responsive to Mr Bullard's request to progress this external review, the Department of Justice provided submissions in the form of letters in support of its decision from Ms Robyn Pearce, Executive Director, WorkSafe Tasmania and Mr Daryl Coates SC, Director of Public Prosecutions.
- 11 Ms Pearce set out her position in her correspondence, as follows:

*I refer to the application for assessed disclosure made by the Secretary of the Department of Education under the Right to Information Act 2009 (RTI Act)...*

*...I am the regulator under the Work Health and Safety Act 2012 (WHS). For the following reasons, I am of the view that all of these records are exempt from disclosure under the RTI Act such that you should refuse the application in its entirety.*

*WorkSafe Tasmania is in the process of investigating the incident that occurred on 16 December 2021 at Hillcrest Primary School in Devonport. As regulator, I am responsible for this investigation. The investigation file is a work in progress.*

*The application for assessed disclosure is made by the Secretary of the Department of Education. I understand the Secretary to be an interested person in the inquest into the fatalities that resulted from the incident. More significantly, the Department of Education is a subject of WorkSafe Tasmania's investigation. One of the investigation's lines of inquiry is the Department's compliance with the WHS Act. That line of inquiry is being actively pursued, including through the exercise of powers under section 155 of the WHS Act. The compliance of other persons conducting a business or undertaking (PCBU) is also being actively pursued.*

*It is highly likely that, upon the completion of the investigation, I will:*

- *provide a copy of the investigation file to the Director of Public Prosecutions for consideration of whether any charges should be brought under the WHS Act against any of the PCBU's involved in the incident including the Department of Education; and*
- *upon being served with an authority under section 59 of the Coroners Act 1995, provide a copy of the investigation file to the coroner or a person authorised.*

*I am of the view that section 30 of the RTI Act applies to the information that is the subject of the application. Releasing the information would be reasonably likely to:*

- *prejudice WorkSafe Tasmania's investigation of possible breaches and enforcement of the WHS Act (s 30(1)(a)(i) and (ii));*
- *prejudice the fair trial of any prospective defendant to and impartial adjudication of proceedings under the WHS Act (s 30(1)(a)(iii) and (iv)), noting that the admissibility of some information maybe at issue in any proceedings; and*
- *hinder, delay or prejudice the investigation of possible breaches of the WHS Act (s 30(1)(f)), noting that the investigation is ongoing.*

*None of these exemptions is subject to the public interest test. Establishment of any of these exemptions would mean that the information cannot be*

*released. I contend that all of these exemptions apply. As noted above, WorkSafe Tasmania is still gathering information, including from witnesses in the Department of Education by way of coercive powers under the WHS Act, s 155.*

*I note that section 30(2)(e) and (f) contemplate the disclosure of information, or the substance of information, following the conclusion of an investigation other than criminal law. I make two observations:*

- *WorkSafe Tasmania is investigating compliance with criminal laws under the WHS Act; and*
- *that investigation has not concluded.*

*By section 232 of the WHS Act, there is a two year limitation period within which to commence a prosecution under that Act. Time expires on 16 December 2023, but proceedings may conclude before then. I make the point that the exemptions under section 30 do not necessarily exist in perpetuity.*

12 Mr Coates' letter set out the following:

*I refer to ... the Department of Education's request for numerous reports relating to the investigation into the deaths at Hillcrest Primary School pursuant to the Right to Information Act 2009.*

*As I understand, WorkSafe Tasmania is currently investigating the matter to determine whether there have been breaches of the Work Health & Safety Act 2012 by the operator of [the] jumping castle and/or officers of the Department of Education. I also understand there is a concurrent police investigation to determine whether any criminal charges ought to be laid.*

*In my view, release of the material is likely to impede the police investigation and, therefore, the material is exempt under s 30 of the Right to Information Act 2009. It is not appropriate that potential witnesses might see this evidence prior to any investigations being completed or proceedings being conducted.*

*Further, I do not see how such a delay will cause any long term detriment to the Department of Education, who is the applicant.*

## **Analysis**

### **Section 30 – Enforcement of the law**

13 For information to be exempt under s30(1)(a) or (f), I must be satisfied that if the information was released it 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.*

...

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

14 The word prejudice is not defined in the Act and is therefore to be given its ordinary meaning. The Macquarie Dictionary relevantly defines it as meaning *to affect disadvantageously or detrimentally*.<sup>1</sup>

15 The applicant has specifically sought information collected by WorkSafe in its current investigation into a major incident involving the deaths of multiple children and has advised that it seeks this to prepare for the upcoming coronial inquest into the deaths. There is no question that the information responsive to the application for assessed disclosure contains information which relates to the investigation of a breach or possible breach of the law.

16 I will not detail the contents of the information responsive to Mr Bullard's request, in order not to reveal potentially exempt information, but I have reviewed it and am satisfied that it contains statements, expert reports and other evidence specifically gathered for the purpose of investigating potential breaches of the *Work Health and Safety Act 2012* (WHS Act). Criminal charges could be laid as a result of that investigation. I am also satisfied that the investigation has not yet concluded and that a coronial inquest in accordance with the *Coroners Act 1995* is planned but is yet to be held into the deaths.

17 The key matter for consideration is whether the release of information regarding this open investigation would prejudice or hinder that investigation into a breach of the law. Ms Webster did not provide a detailed explanation in her decision of why she considered such prejudice or hindrance would occur and Mr Bullard has invited me to find that she did not discharge her onus under s47(4) to show why the information should not be disclosed.

18 I am not persuaded that this would be appropriate, as I am satisfied that Ms Webster's reasoning, regarding her reliance on s30, was sound. While she did not provide a lengthy explanation, this is not required in circumstances where the risk of prejudice is readily apparent. The rules and procedures regarding the investigation, prosecution and adjudication of breaches of the law are detailed and have a clear purpose of ensuring these processes are fair, just and effective. Section 30 exists to ensure that these processes are not subverted by premature disclosure of information, if disclosure is reasonably likely to prejudice the enforcement of the law.

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<sup>1</sup> Macquarie Dictionary Online, 2022, [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au).

- 19 I accept the accounts of Ms Webster and Ms Pearce that it is standard practice not to release information in relation to workplace accidents while the matter is still under investigation, in order to ensure the integrity of that investigation. That prejudice could occur through early disclosure of the detail of such an investigation is obvious and, consistent with my decisions in *Whitson*<sup>2</sup> and *Squires*<sup>3</sup>, I am satisfied that it is appropriate to exempt this information pursuant to s30(1)(a) due to the ongoing investigation and potential future criminal charges.
- 20 The deaths of multiple children, and injury to others, while attending a public school is arguably the most serious example of an incident which could be investigated under the WHS Act and I am surprised that the Secretary of the Department is not being more cautious regarding the risk of prejudice to that investigation being undertaken by another agency of the Crown. I note that the use of jumping castles and inflatable devices such as Zorb balls has been banned on Department premises and, accordingly, there is no indication that the tragic events at Hillcrest Primary School are at risk of recurring prior to the finalisation of the investigation and inquest.
- 21 Parliament made a conscious decision not to make s30 subject to the public interest test, in the knowledge that incidents subject to law enforcement investigation may involve the highest degree of justifiable public interest and demand for accountability and transparency. It made a decision that this public interest is outweighed by the vital importance of ensuring that investigations can occur in an unfettered way to detect and prosecute any breaches of the law.
- 22 The application of s30 exemptions is usually time limited and I note that the Department of Justice has indicated that it will release the majority of the information relating to the investigation, on request, after the conclusion of the investigation and any subsequent prosecution.

### **Preliminary Conclusion**

- 23 For the reasons given above, I determine that the Department of Justice's claim for exemption of the information responsive to Mr Bullard's request under s30 is upheld.

### **Submissions to the Preliminary Conclusion**

- 24 The above decision was made available on 2 November 2022 to Mr Bullard and the Department to enable them to provide input prior to the finalisation of the decision pursuant to s48(1)(b).
- 25 The Department advised on 3 November 2022 that it did not wish to make any further submissions regarding the external review. Mr Paul Turner SC,

<sup>2</sup> *Rhiana Whitson and the Department of Primary Industries, Parks, Water and Environment* (May 2021) available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions).

<sup>3</sup> *Mandy Squires and the Department of Primary Industries, Parks, Water and Environment* (March 2019) available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions).

Assistant Solicitor-General (Litigation), provided submissions on 29 November 2022 on behalf of Mr Bullard.

- 26 Mr Turner's submissions set out the following:

*In paragraph [10] of the Preliminary Decision reference is made to correspondence from Ms Robyn Pearce, Executive Director, WorkSafe Tasmania and Mr Daryl Coates SC, Director of Public Prosecutions...*

*What is contained in these extracts is little different to that which was set forth in the letter from Ms Ginna Webster, Secretary of the Department of Justice, as referred to in paragraph [3] of the Preliminary Decision. That is, the bare assertion is made that release of the materials sought would 'be reasonably likely to prejudice the ongoing investigation and any associated compliance action under the Work Health and Safety Act 2012' (Ms Webster); 'I am of the view that s 30 of the RTI Act applies to the information that is the subject of the application. Releasing the information would be reasonably likely to ... prejudice WorkSafe Tasmania's investigation of possible breaches and enforcement of the WHS Act ... prejudice the fair trial of any prospective defendant to and impartial adjudication of proceedings under the WHS Act ... and hinder, delay or prejudice the investigation of possible breaches of the WHS Act ... noting that the investigation is ongoing (Ms Pearce); 'In my view, release of the material is likely to impede the Police investigation and, therefore, the material is exempt under s 30 of the Right to Information Act 2009. It is not appropriate that potential witnesses might see this evidence prior to any investigations being completed or proceedings being conducted.' (Mr Coates SC).*

*There is nothing in what is set out in the Preliminary Decision, from the correspondence from Ms Webster, Ms Pearce and Mr Coates SC, nor is there anything else in the Preliminary Decision which explains **why** it is that the information which was sought (recalling that it is, essentially, reports/assessments as to various matters) is something which, if disclosed, 'would or would be reasonably likely to' fall within the provisions of s 30(1)(a).*

*That is, it is asserted that one or more of the provisions apply but there is no reasoned explanation showing that.*

*As noted, what has been sought are reports/assessments about various things. Consider one of those things – 'any assessments or reports about the condition of the jumping castle'. The jumping castle is in the possession of Tasmania Police. Disclosure of the assessment/report about its condition (assuming there is such a thing) could not sensibly attract any exemption under s 30(1). There might be argument as to the validity of any opinion expressed as to the condition of the jumping castle, but the observations of it and the opinions expressed about it are not something which might relevantly be interfered with; nor can the jumping castle be, likewise, interfered with. The same general observation can be made about the other things sought.*

*The request was not a request for witness statements in circumstances where it might be thought that the witness (or the exhibit) could be tampered with or influenced in some way. What has been sought is (if it exists) immutable.*

*With the greatest of respect, insufficient attention has been paid to this; and undue deference has apparently been given to assertions for which there is not, in the Preliminary Decision, any reasoning.*

*The Preliminary Decision concludes with an acceptance of ‘the accounts of Ms Webster and Ms Pearce that it is standard practice not to release information in relation to workplace accidents while the matter is still under investigation, in order to ensure the integrity of that investigation’ – paragraph [19].*

*That is irrelevant to the question to be addressed, which is whether the information sought (and recall, again, the limited nature of the information) attracts any of the exemptions in s 30(1).*

*Importantly, it is said at [19] following that which has just been quoted: ‘that prejudice could occur through early disclosure of the detail at such an investigation is obvious...’.*

*Again, with the greatest of respect, it is not obvious; nor is the reasoning by which the conclusion has been reached (‘that it is obvious’) revealed. The Preliminary Decision should explain why it is that the exemption applies – beyond simply accepting what has been asserted by Ms Webster, Ms Pearce and Mr Coates SC and acceptance of a practice. A proper analysis of the facts and circumstances needs to be undertaken in order to determine whether the exemption applies. This is a process of reasoning, which has as its starting point that information as sought should be provided unless it is exempt. The Preliminary Decision is devoid of any such reasoning.*

*Finally in paragraph [20] it is said: ‘I am surprised that the Secretary of the Department is not being more cautious regarding the risk of prejudice to that investigation being undertaken by another Agency of the Crown’.*

*Several things need to be said about that. The first is that it is a value laden judgment, which is inappropriate. It has nothing whatever to do with the task to be conducted by the Ombudsman, and its expression suggests a fundamental failure to understand that task. The reasons (viz the Preliminary Decision) should be confined to objective facts, proper analysis and sensible conclusion(s) made upon a reasoned basis.*

*Secondly, it appears to be based upon what is a conclusion – ‘the risk of prejudice to that investigation’, which is simply not explained. Again, it is to be observed that what has been sought is both limited and upon release could not prejudice anything. The information has been described as immutable – that is, it has been created. It exists. It might be the subject of agreement; or contention but, in any event, its existence and the content of*

*it is not something which, upon release, would or would likely cause one of the outcomes in s30(!).*

*Finally, it is not inapt to point out (as, indeed, is set out in the Preliminary Decision) the reason the information has been sought. The State (through the Department) is facing multiple civil claims arising out of the tragedy...Complex legal issues arise. The State has retained an engineering expert. The information is needed for the State to make proper assessments about its liability; and also to meaningfully participate in the inquest into the deaths of the six children.*

*In brief summary, the Preliminary Decision does not demonstrate how what has been sought, if provided, will result in one or more of the ills specified in s30(!) arising. Absent such demonstration, none of the exemptions apply. In saying this it is important to avoid confirmation bias – that is, the evaluation of materials with a view to showing how they fall within the exemption. The noted conclusion in paragraph [20] appears to be redolent of that.*

## **Further Analysis**

- 27 Mr Turner's primary argument and concern regards his perception that there has been a lack of explanation or reasoning for the preliminary conclusion I proposed. This was that the Department of Justice was entitled to rely on s30(1)(a) to exempt the information responsive to the request as to its disclosure would, or would be reasonably likely to, prejudice the investigation of a breach or possible breach of the law.
- 28 On review, I accept that I could have more specifically said that I was primarily relying upon s30(1)(a)(i), with some consideration of s30(1)(a)(ii), (iii) and (iv). While this can be summarised as s30(a), a more detailed analysis is appropriate and I will provide that as follows.
- 29 This does not alter my position that there is a reasonable likelihood of prejudice to the current WorkSafe investigation if this information were released. This is my own opinion and is not made in deference to the views of Ms Webster, Ms Pearce or Mr Coates. Mr Turner focuses on the condition of the jumping castle and the fact that the castle is in the possession of Tasmania Police, to surmise that no likelihood of prejudice could result from the release of information about this object. His assumption appears to be that the limited ability to tamper with this evidence would remove the application of the exemption in relation to prejudice to the investigation.
- 30 I consider this an overly narrow view which does not consider the overall investigation. The cause of this tragic incident and whether any party is culpable has not yet been determined. The condition of the jumping castle and the nature of how it was tethered prior to the incident, and why the jumping castle became airborne are crucial parts of the investigation and are not necessarily immutable facts, but subject to expert opinion and assessment of evidence such as witness statements. The release of this information prior to

the conclusion of the investigation gives rise to a genuine likelihood of prejudice to the investigation due to the details being provided to witnesses prior to the conclusion of the investigation and intense public scrutiny of information prior to final conclusions having been reached.

- 31 The point of an investigation as to whether a breach of the law has occurred is also to determine whether prosecution should occur if such a breach is apparent. That the investigation should be able to proceed in a confidential and unfettered manner prior to decisions being made as to whether charges will be brought against relevant parties, which include the Department, is also a major consideration regarding prejudice to the investigation. The potential prejudice to the fair trial of a person should charges eventuate or the impartial adjudication of a particular case is also a significant concern(ss30(1)(a)(iii) and (iv)), though not as persuasive at this stage due to the uncertainty that this will occur.
- 32 While I appreciate that Mr Turner disagrees, I still consider that the risk of such prejudice is obvious and remain surprised that Mr Bullard and Mr Turner have argued so strongly to obtain information about WorkSafe's ongoing investigation into such a significant incident. Mr Bullard is entitled to make requests for assessed disclosure and external review and I make no criticism of his choice to do so, but cannot but note the unusual nature of the request which is effectively a dispute between two parts of the same entity – the Crown. That I am considering diametrically opposing submissions from the Director of Public Prosecutions and the Assistant Solicitor-General is, to my knowledge, unprecedented and worthy of note. I do not consider that this observation has led to my decision not covering relevant facts, containing proper analysis or reaching sensible, reasoned conclusions.
- 33 Finally, while I note that Mr Turner has addressed the reason the information has been sought, this is not a matter I can consider in relation to s30. Parliament has chosen not to make this exemption subject to the public interest test, so even the most compelling reason to release the information would be irrelevant if it fell within the exemption. I accept that this information would have value to Mr Bullard in relation to various legal claims which have been made against the Department and the State of Tasmania but this is not a matter I am able to consider in relation to potential exemption under s30.
- 34 While I have carefully considered Mr Turner's submissions, I have not altered my determination that the relevant information is exempt pursuant to s30(1)(a).

## **Conclusion**

- 35 For the reasons given above, I determine that the Department of Justice's claim for exemption of the information responsive to Mr Bullard's request under s30 is upheld.

**Dated:** 1 December 2022

**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.

# OMBUDSMAN TASMANIA

## DECISION

**Right to Information  
Act Review**

**Case Reference:** O1904-160  
R2202-022

**Names of Parties:** Todd Dudley and Department of Natural Resources and Environment Tasmania

**Reasons for decision:** s48(3)

**Provisions considered:** s35, s36, s45(1)(e)

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### Background

- 1 In mid to late 2018, the Break O'Day Council (Council) submitted applications for Reserve Activity Assessments (RAAs) to the Department of Primary Industries, Parks, Water and Environment; now Department of Natural Resources and Environment Tasmania (the Department). RAAs appraise the environmental, social and economic impact of activities proposed to occur on land managed by the Parks and Wildlife Service at the Department.
- 2 Council's RAA application was for two bike tracks in the St Helens Area – Poimena to Swimcart Beach and St Helens Stacked Loop Mountain Track. Council was required to address concerns about the impact of the proposed development on the spread of *phytophthora cinnamomi* (plant root rot) and the disturbance of sea eagles.
- 3 Development and commercial activities in national parks and reserves are contentious in Tasmania, with particular concerns from environmental groups as to whether the approval processes for such activities are sufficiently robust and transparent.
- 4 Mr Todd Dudley, president of the North East Bioregional Network Inc., an incorporated entity that promotes increasing the amount of conservation areas in North East Tasmania, was concerned about the impact of the developments proposed by Council.
- 5 On 18 August 2018, Mr Dudley emailed the Department's Policy and Conservation Advice Branch (PCAB) seeking the following information under the *Right to Information Act 2009* (the Act):
  1. All correspondence (hard copy and email) and records (including notes, agendas and meeting minutes) between PCAB and the Break O'Day Council in relation to management of *Phytophthora cinnamomi* in the Doctors Peak Regional Reserve and Mount Pearson State Reserve (including the Mount Pearson *Phytophthora* Management Area) as part of the Council's development application (DA 128-18)

*for a Mountain Bike track from Poimena to Bay of Fires Mount Bike Trail.*

2. All correspondence (hard copy or email) and records (including notes, agendas and meeting minutes) in relation to the protection and management (including risk of significantly increased disturbance of breeding) of eagles' nests in and adjacent to the Boggy Creek Conservation Area between PCAB and the Break O'Day Council as part of the Council's development application (DA 143-18) St Helens Stacked Loop Mountain Bike Track.
- 2 On 3 December 2018, Ms Roxana Jones, delegated officer under the Act, released a decision to Mr Dudley under the Act, which included a *Decision Table* to explain why parts of the nine pages of information found to be responsive to his request were redacted as exempt or out of scope.
- 3 In the decision, Ms Jones determined that ss35 and 36 were applicable and that it would be contrary to the public interest to disclose significant amounts of information contained in the nine pages.
- 4 Ms Jones' decision as to how s35 and the public interest test applied included:

*I consider that to disclose the information would likely inhibit officers from freely communicating opinions, advice or recommendations in the course of everyday deliberations related to the official business of this Agency. In terms of matter (n), this would place undue restrictions on the decision-making process and would therefore be contrary to the public interest.*

*Therefore on balance, the public interest in exempting the documents from disclosure outweighs any public interest in disclosure.*
- 5 In relation to the s36 exemption, Ms Jones determined that it would be contrary to the public interest to release the names of public servants and a consultant and that she had 'followed what is in most cases the normal practice of this Department in dealing with personal information, which is to redact the information.'
- 6 On 20 December 2018, the applicant, now represented by Ms Claire Bookless from the Environmental Defenders Office Tasmania, sought an internal review.
- 7 Ms Bookless asked that Dr Whittington, then Secretary of the Department and its Principal Officer, review and overturn the RTI delegate's decision not to disclose information on the basis of section 35 of the Act. She submitted that s35 was not applicable, as the relevant information was not internal deliberative information.
- 8 On 29 March 2019, the Department's delegate under the Act, Ms Katrina Oakley, released her internal review decision to the applicant, specifically addressing s35 as per the applicant's request.
- 9 Ms Oakley provided further clarification of which information in the documents had been redacted pursuant to s35 and which was considered out of scope. She

provided additional reasoning for the application of s35 but affirmed Ms Jones' findings that all redacted information was exempt from release under the Act.

- 10 On 24 April 2019, the applicant, represented again by Ms Bookless, applied for an external review to this office and provided further submissions which are set out later in this decision.
- 11 On 29 April 2019, this office accepted Mr Dudley's application under s44 of the Act on the basis that Mr Dudley was in receipt of an internal review decision, it was submitted to this office within 20 working days and the fee was paid.
- 12 Ms Bookless also sought a review under s45(1)(e) of the Act, requesting that the Ombudsman determine whether the Department had undertaken a sufficient search of its records in response to Mr Dudley's RTI application. This request was made due to Ms Bookless noting that the information disclosed indicated meetings had occurred between Council and the Department, yet no notes or agendas regarding these meetings were identified. She considered the failure to provide this information gave rise to reasonable questions as to whether a proper search of the Department's records was conducted.

### **Issues for Determination**

- 13 I must determine whether there has been a sufficient search by the Department for information responsive to Mr Dudley's request
- 14 I must also determine whether the information identified is eligible for exemption under ss35 or 36.
- 15 As ss35 and 36 are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under these sections, I must then determine whether it is contrary to the public interest to disclose it.

### **Relevant legislation**

- 16 The Department has relied on ss35 and 36 in its decisions to exempt information. I attach copies of these sections.
- 17 Copies of s33 and Schedule 1 of the Act are also attached.

### **Submissions**

#### *Mr Dudley*

- 18 On 20 December 2018, Ms Bookless, representing Mr Dudley, wrote to Dr Whittington and the Department seeking a review of the RTI delegate's decision to exempt information on the basis of s35 of the Act. She provided four reasons as to why this review was necessary and these are summarised below
- 19 The first reason provided is that s35 only applies to (her emphasis):

*documents containing opinion, advice, recommendations etc. relating to the **internal process of deliberation** that are potentially*

*shielded from disclosure – documents that might, perhaps, have been more aptly described in the headnote as ‘Internal Thinking Documents’.*<sup>1</sup>

- 20 Ms Bookless submitted that Council, a separate entity from the Department, contacted it as a RAA proponent, so the information does not consist of *internal thinking documents*. Additionally, it was said that no sound public policy reason exists in shielding the information from public scrutiny as other developers would not have equivalent protection.
- 21 Secondly, she submitted that the Department gave insufficient reasons regarding what “deliberative process related to the official business of a public authority” were being undertaken, so much so that it did not fall within the s35 exemption.
- 22 Ms Bookless also submitted that even if it could be shown that the provision of that advice was “internal”, the information provided by the Department to Council regarding phytophthora cinnamomi and eagle management cannot be categorised as being part of a “deliberative process”. Additionally, she believed that the Department relied on only one matter in its assessment of the public interest test (Schedule 1, matter (n)) to exempt *opinions, advice or recommendations* but did not adequately explain why the release of this information would prejudice its ability to obtain similar information in the future.
- 23 Ms Bookless’ third reason was that disclosure would not be contrary to the public interest. She referred to 14 relevant public interest test matters; (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m) and (n), and submitted that all favoured the release of the information. Ms Bookless also commented on delays by the Department, saying it had shown “flagrant disregard for statutory timeframes, in the context of a relatively small and uncomplicated RTI application”.
- 24 In addressing the reasons provided by the Department regarding the scope of the requested information, Ms Bookless submitted in her external review application that Ms Oakley’s approach to scope was *unnecessarily narrow and infected by error*. She detailed that the Department had failed to have due regard to s13(7) and (8) of the Act and that it relied upon an incorrect summarisation of the information sought in Mr Dudley’s RTI application.
- 25 Ms Bookless stated that it was clear that any discussion about the management of eagles’ nests and plant root rot between the Department and Council would fall within the scope of the RTI application, *not just discussion specifically concerning the Doctor’s Peak Regional Reserve, Mount Pearson State Reserve or the Boggy Creek Conservation Area*. She sought a direction from me to order the Department to disclose information it had deemed out of scope of the request.
- 26 Ms Bookless also requested a review of whether the Department had undertaken a sufficient search pursuant to s45(1)(e) and restated concerns raised in her internal review request, which are detailed above.

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<sup>1</sup> Quoting from *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67, [at 60]

- 27 Finally, Ms Bookless provided detailed submissions regarding the proper assessment of the public interest test, which are analysed in relation to s35 below.

*The Department*

- 28 The Department did not provide separate submissions regarding the external review, but set out its reasoning in the internal review decision of Ms Oakley released on 29 March 2019. This decision focused on the objections raised by Ms Bookless in relation to the Department's application of section 35, and assessment of the public interest test, in its original decision. Section 36 was only addressed in the original decision of Ms Jones, as set out in the background above.
- 29 In relation to concerns raised by Ms Bookless regarding information deemed out of scope of the request, Ms Oakley said:

*However, first I will address an important point. I consider that the Decision Table, which explained Mrs Jones' reasoning for her decision, requires clarification. The Decision Table states "part out of scope" for pages 3 to 9. Consequently, out of the 9 pages of information only 2 pages did not have out of scope information. Reading the redacted information it is clear that a large proportion of it is out of scope information because:*

- (1) *it has nothing to do with the management of eagles nests around the Boggy Creek Conservation Area or*
- (2) *plant root rot around the Doctors Peak Regional Reserve and Mount Pearson State Reserve.*

*For certain redacted blocks of information no exemption is relevant as it is out of scope. If information is not applicable to the request, then it is redacted as being out of scope, and this is what occurred in this matter in the initial decision. For example, in the emails exchanged between DPIPWE and Council there is out of scope information that cites other areas in Tasmania where root rot occurs. There is also email correspondence concerning setting up meetings and the relevant dates to be agreed – which is, once again, out of scope information. To assist the appellant to understand what information is out of scope and what is subject to the exemption of section 35, I have marked up the documentation so that it is clear.*

- 30 Ms Oakley stated that Council had provided detailed information about the proposed development.<sup>2</sup> However, she stressed that:

*Council has not published the ecological assessments and responses to objections to the developments concerning the spread of PC [phytophthora cinnamomi] and the disturbance of sea eagles by Mark*

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<sup>2</sup> See the minutes and agenda of a Special Meeting of the Break O'Day Council to discuss this issue on 3 September 2018, available at [www.bodc.tas.gov.au/council/agendas-minutes](http://www.bodc.tas.gov.au/council/agendas-minutes).

*Wapstra from EcoTAS<sup>3</sup> referred to in the Agenda and Minutes of a Special Council Meeting.*

- 31 Ms Oakley asserted that the redactions made concerning Mr Wapstra's opinions, advice and recommendations in the nine pages of information pursuant to section 35 was correct. All factual information has been disclosed properly in accordance with the Act.
- 32 Ms Oakley then expanded the Department's assessment of the public interest test, considering additional matters in Schedule 1 of the Act. She asserted that matters (a), (b), (f), (h), (m), (n), (s), (v), (w) and (x) were most relevant, determining that (a) to (h) weighed in favour of disclosure and (m) to (x) weighed against. Overall, her assessment was that:

*The main public interest [sic] in favour of disclosure of the information relates to the general public need for government information to be accessible. Release of the exempt information would promote the object of the RTI Act, which is to disclose information where possible. Moreover, it is the public's expectation that government decision-making processes are open, transparent and accessible and that the government is to be held accountable for its decisions.*

*While acknowledging that disclosure of the information would contribute to government information being accessible, I consider that to disclose the information would be likely to inhibit officers from freely communicating opinions, advice or recommendations in the course of everyday deliberations relating to the official business of this Agency. In terms of matter (n), this would place undue restrictions on the decision making process and would therefore be contrary to the public interest. In this instance, the discussions with the Council and DPIPWE about the proposal are preliminary and it is essential that advice is provided and debated to ensure sound, evidence based decision-making. The threat of disclosure of information risks officers not providing forthright advice or not expose [sic] risk; and this would undermine deliberative processes.*

*I consider that the arguments against disclosure are stronger than the arguments for, therefore it would be contrary to the public interest to disclose the information.*

## **Analysis**

*Has there been an insufficient search for information by the Department?*

- 33 Section 45(1)(e) of the Act provides that:

*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 –*

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<sup>3</sup> An external consultant engaged by the Break O'Day Council to assess the environmental impact of the proposed bike track developments.

*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;*

- 34 My office has issued a Guideline, No. 4/2010<sup>4</sup>, under s49(1)(c) of the Act, 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.*
- 35 On 24 April 2019 Ms Bookless, in her application for an external review to this office, requested that the Ombudsman determine, pursuant to s45(1)(e) of the Act, whether or not the Department has undertaken a sufficient search. Her belief that there has been an insufficient search is indicated by her statements as follows:

*When one reads the original RTI application..., it is clear that any discussion about the management of eagles nests and plant root rot between PCAB and the Break O'Day Council (not just discussion specifically concerning the Doctors Peak Regional Reserve, Mount Pearson State Reserve or the Boggy Creek Conservation Area) in the context of the Council's development applications, or arrangements for meetings to discuss the same, would fall within the scope of the RTI application.*

...

*We also note that the Decision indicates that meetings were arranged between Council and PCAB staff, yet no file notes or copies of agendas were located and/or disclosed about whether DPIPWE has undertaken a proper search of its records.*

- 36 The Department supplied nine pages of information to the applicant along with its original decision. The last line on page 7 is from Council to the Department and it reads: *We look forward to hearing from you in relation to a meeting in Hobart.*
- 37 In my assessment, this seems to be reasonable grounds for the applicant to hold concerns around the sufficiency of searching, as it is reasonable to believe that there may be other records associated with interactions between these particular public authorities.
- 38 On 8 July this office emailed this submission to the Department and later that day, Ms Oakley replied by email that: *A proper search of records was conducted by DPIPWE which took 3 hours by five (5) independent and separate DPIPWE officers, and I attach the Search record for completeness.*
- 39 The Department's search record is based on a template included in the Ombudsman's Guideline 4/2010. It records searches by five different people and includes the outcome of these searches. One officer found one record in

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<sup>4</sup> Revised 24 January 2013, available at [www.ombudsman.tas.gov.au/right-to-information/rti-publications](http://www.ombudsman.tas.gov.au/right-to-information/rti-publications)

addition to the nine pages. Three officers saved *relevant emails in a shared drive RTI folder* and one officer found no relevant information.

- 40 Ms Oakley for the Department submitted that there was much duplication in the search and the end result was that the same nine pages of records were found to be relevant to the request. The one extra record found was assessed to be out of scope. I am satisfied that the Department's search record contains sufficient information about the searches undertaken, indicating that the search took five hours over two days in August 2018 and providing details of the search officers.
- 41 Further information which was redacted from the nine pages found to be responsive to Mr Dudley's request casts doubt on whether the proposed meeting between the Council and PCAB ever occurred. It is also possible that poor record keeping practices could have meant that a meeting occurred but was not documented, which could potentially be raised as a concern under the *Ombudsman Act 1978* but is not a matter I could externally review under the Act.
- 42 Overall, therefore, I am satisfied that the Department appears to have undertaken an appropriate and sufficient search for the relevant information.

### Section 35

- 43 For information to be exempt under s35(1), it must consist 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.
- 44 Section 35 is not applicable to purely factual information or information that is older than 10 years.<sup>5</sup>
- 45 As to the meaning of 'purely factual information' in s35(2), I refer to my previous analysis in *White and Barnett*<sup>6</sup> and that in *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)*<sup>7</sup>, 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.

<sup>5</sup> Section 35(2) and 35(4) respectively.

<sup>6</sup> Hon Rebecca White MP and the Minister for Resources, Minister for Building and Construction, Hon Guy Barnett MP (January 2021), available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions)

<sup>7</sup> *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at 14.

- 46 Associate Professor Moira Paterson, in her text, *Freedom of Information and Privacy in Australia: Information Access 2.0*<sup>8</sup>, refers to the decision in *Re Waterford* in her analysis. She 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.*

- 47 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.<sup>9</sup>
- 48 As s35 is subject to the public interest test contained in s33 and by extension, the relevant matters at 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.

*Could this be internal deliberative information?*

- 49 Ms Bookless submitted that the information provided by the Department to Council is not internal information and because of this, exemption under s35 cannot be claimed. She asserts that information contained in the nine pages is not part of a *recognised category of “deliberative process”* because Council was not acting as a planning authority in the emails and was, instead, acting as a proponent of the RAA being assessed by the Department.
- 50 While I accept that Council’s role in this situation is somewhat unusual, I am not persuaded that it prevents s35 from operation or that it creates a scenario where additional protection is provided to Council over that which would be afforded to other developers. If appropriate in the circumstances, s39 could be used to exempt information communicated in confidence by an RAA proponent which is not a public authority.
- 51 There is no definition of *internal* in the Act. It is also silent as to the parameters of *deliberative processes related to the official business of a public authority*. There is no exception to the s35 exemption which appears to be envisaged in this situation.
- 52 Ultimately, the Department and Council are public authorities under the Act and the assessment of a RAA is an internal deliberative process. Opinion, advice or recommendations from Council or Departmental officers, or consultations between Council and Departmental officers remain able to be captured by this exemption in this context. I will proceed to review the Department’s application of s35 in relation to specific parts of this information.

*Is this particular information exempt under s35?*

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<sup>8</sup> LexisNexis Butterworths Australia, 2<sup>nd</sup> edition 2015 at 7.30

<sup>9</sup> *Re Waterford and Department of Treasury (No2)* (1985) 5 ALD 588

Page 1

- 53 This is an email dated 12 April 2018 from the Department in response to one from Council and references the decision making process for the RAA. Information has been claimed to be exempt under s35 in the first and second paragraphs. The first paragraph details consultations between Council and the Department regarding the utility of arranging a meeting. The second paragraph contains advice or a recommendation by an officer of the Department to an officer at Council.
- 54 I am satisfied that this information was conveyed in the course of, or for the purpose of, the deliberative process related to the official business of the Department. I consider that the first paragraph is *prima facie* exempt under s35(1)(b) and the second under s35(1)(a), subject to consideration of the public interest test.

Pages 3-7

- 55 This is an email dated 19 March 2018 from Council to the Department which provides information and a response to concerns raised by PCAB about the proposed development. It includes sections written by an external consultant engaged by Council to provide expert advice on the proposed development, Mark Wapstra from ECOTAs.
- 56 The private consultant's opinion has been exempted by the Department pursuant to s35(1)(a). It is unclear why this has occurred, however, as Mr Wapstra is clearly not a public officer. Accordingly, I am not satisfied that the Department has discharged its onus under s47(4) to show that this information is exempt and Mr Wapstra's opinions on pages 3-5 should be released in full to Mr Dudley.
- 57 Other information in this email was claimed to be exempt under s35 by the Department, but it consists of the restatement of an email from a PCAB officer to the Council which makes up pages 8-9 of the information and I will analyse it in the next section.

Pages 8-9

- 58 This is an email from Dr Annika Everaardt from PCAB to Chris Hughes, Council's Manager, Community Services, dated 16 March 2018.
- 59 The Department has sought to exempt three sentences on page 8 under s35. The first redaction includes the words *comments and recommendations* but does not contain any detail of these comments or recommendations. I am not satisfied that this is exempt under s35 and it is to be disclosed to Mr Dudley.
- 60 The second sentence sought to be exempted provides slightly more information about the detail of the recommendation made by an officer of the Department. Accordingly, I am satisfied that it is *prima facie* exempt under s35(1)(a), subject to consideration of the public interest test.

- 61 The third redaction on this page continues into the next two paragraphs on the following page. This also contains opinion, advice or recommendation prepared by an officer of the Department and is *prima facie* exempt under s35(1)(a).
- 62 A final redaction on page 9 is of part of a sentence regarding mitigation options for *phytophthora cinnamomi*, which is also *prima facie* exempt under s35(1)(a).

*Out of scope*

- 63 The Department maintained that parts of the information redacted on pages 5-6 were out of scope and part was exempt under s35 but did not detail the exact division of information into each category. Ms Oakley provided some indication that some information on page 5 was out of scope as *it relates to different locations around Tasmania*.
- 64 Ms Bookless complained that the Department had taken an overly narrow approach to scope and I am inclined to agree with her. Mr Wapstra refers to other parts of Tasmania as part of his explanation as to the impact of *phytophthora cinnamomi* but it remains a discussion of matters relevant to Mr Dudley's request. The object of the Act in s3 sets out that discretions should be exercised to facilitate the release of the maximum amount of official information and the approach to assessing what is within scope does not appear to comply with this intention.
- 65 While I do not have the power on external review to direct the Department to assess this information as within scope, I strongly encourage it to do so given the clear link to Mr Dudley's request. If this occurs, I would make the same determination as with the remainder of Mr Wapstra's views, that this information is not exempt under s35 and should be released to Mr Dudley.

*Public interest test*

- 66 As s35 is in Division 2 of Part 3 of the Act, the public interest test must be considered before making a determination on any of the information I have found to be *prima facie* exempt above.
- 67 Ms Oakley, in her internal review decision considered Schedule 1 matters (a), (b), (m) and (n) to be relevant.
- 68 In deciding to exempt the documents from disclosure, she concluded that:

*I consider that to disclose the information would likely inhibit officers from freely communicating opinions, advice or recommendations in the course of everyday deliberations related to the official business of this Agency. In terms of matter (n), this would place undue restrictions on the decision-making process and would therefore be contrary to the public interest.*

- 69 Ms Bookless in reply considered matters (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m) and (n) in Schedule 1 were in favour of disclosure. She provided specific submissions in relation to these matters, stating it would not be contrary to the public interest to disclose the information as:

- (a) the general public need government information [sic], such as that which was requested to be disclosed in order to fully understand the government's approach to the management of PC and the impacts of development on eagle nests;
  - (c) the disclosure would inform the public about the reasons behind DPIPWE's support for the proposed mountain bike trail developments;
  - (d) the disclosure would provide contextual information to aid in the understanding of government decisions relating to the management of PC and the impacts of development on eagle nests;
  - (e) the disclosure would inform the public about the practices of the government in dealing with the proponents for developments with impacts on threatened species and management of PC;
  - (i) the disclosure would promote the environment and ecology of the State by allowing the public to understand how the government is preventing the spread of PC and the impacts of developments on eagle nests;
  - (j) the disclosure would promote the interests of environmental NGOs in ensuring they have access to all relevant information about proposals with likely adverse environmental impacts;
  - (l) The disclosure would not prejudice the ability of the government to obtain similar information in the future as proponents for developments in Crown reserves and land must consult with PCAB/DPIPWE staff in order to obtain consents and all the relevant permits for their activities;
  - (m) The disclosure would not prejudice the objects of, or effectiveness of any assessments or audits conducted by or for DPIPWE; and
  - (n) the disclosure would not harm the business or financial interests of a public authority or any other person or organisation, because the Break O'Day Council is not proposing the developments for the generation of profit.
- 70 I generally agree with Ms Bookless' submission that there is significant public interest in understanding the way in which the Department manages the RAA process and in ensuring the natural environment is protected in reserve areas.
- 71 The primary consideration to counter this, as identified by the Department, is the potential that disclosing the information may inhibit officers from freely communicating opinions, advice or recommendations in the course of every day deliberations related to the official business of the Department.
- 72 The information contained within the nine pages is indicative of a consultative process involving differing opinions between the proponent public authority, its consultant and the Department. The Department argues that the disclosure of these conflicting views would be contrary to the public interest, as to do so would inhibit free flowing discussion and internal thinking processes prior to the reaching of a final position on a matter. In this case, the objections of PCAB were

either overruled or adequately addressed and the RAA was ultimately approved and the mountain bike tracks built on the originally proposed route, with the inclusion of a ‘wash down’ station to try to prevent the spread of phytophthora cinnamomi by riders.

- 73 The Department raises valid concerns, however I do not consider that this information is of the type in which its internal deliberative quality overrides the public interest considerations favouring disclosure. These are not tentative internal opinions of the Department but considered views of PCAB which it has put to the Parks and Wildlife Service and Council in response to the RAA. I trust that such views would not be swayed or changed by disclosure under the Act and that public officers in PCAB would continue to give professional and evidence-based advice in future if this occurs.
- 74 Accordingly, on balance, I consider that it would not be contrary to the public interest to disclose the information I have found to be tentatively exempt under s35 and I determine that it should be released in full to Mr Dudley.

### *Section 36*

- 75 The Department’s original decision-maker found that the names, telephone number and email address of a Council officer and Mr Wapstra were exempt under s36. Ms Jones stated that this was the ‘normal practice’ of the Department.
- 76 While these exemptions have not been further referred to by Ms Bookless or the Department, I will note again my repeatedly expressed view that the names of public officers performing their regular duties are not usually exempt under s36. This is consistent with previous decisions from this office<sup>10</sup> and the standard Australian practice<sup>11</sup> that the default position is that personal information of public servants which relates to the performance of their regular duties (i.e. name, position information, work contact details) is not exempt from release. Such information will only be considered exempt when there are specific and unusual circumstances identified which justify this, and the Department has not provided any such reasons or discharged its onus under s47(4) to show why this information should be exempt. I am not satisfied it is exempt and it should be released to Mr Dudley.
- 77 In relation to the external consultant, Mr Wapstra is named in Ms Oakley’s internal review decision and is repeatedly referenced in the Minutes and Agenda of Council’s Special Meeting discussing these developments. His response to objections raised by community members to the proposal is also appended to these documents. I can see no justification for the Department’s redaction of his name in this information. I am again not satisfied that it has discharged its onus

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<sup>10</sup> See Simon Cameron and Department of Natural Resources and Environment Tasmania (January 2022), Camille Bianchi and the Department of Health (November 2021), Clive Stott and Hydro Tasmania (February 2021), C and Department of Primary Industries, Parks, Water and Environment (December 2021) at <https://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions>.

<sup>11</sup> See Hunt and Australian Federal Police [2013] AICmr 66 (23 August 2013) at [72]-[74].

under s47(4) to show why this information should be exempt and it should be released to Mr Dudley.

*Out of scope*

- 78 The Department, in its original decision, also identified parts of pages 1, 3, 4 and 8 as being out of scope of Mr Dudley's request. The Department confirmed this in its internal review decision, stating it had done so for the following reasons:
- (1) *it has nothing to do with the management of eagles nests around the Boggy Creek Conservation Area or*
  - (2) *plant root rot around the Doctors Peak Regional Reserve and Mount Pearson State Reserve*
- 79 I have discussed this above in relation to pages 5 and 6 and make the same comments regarding the remainder of out of scope redactions. The Department appears to have taken a particularly narrow approach to scope, despite the Act being beneficial legislation and the stated intention of Parliament being to exercise discretions so as to facilitate the release of the maximum amount of information.
- 80 While I do not have the power to determine that information should actually be deemed within scope as part of this external review, I invite the Department to consider actively disclosing it to Mr Dudley in accordance with s12 of the Act.

**Preliminary Conclusion**

- 81 For the reasons given above, I determine that:
- the Department's search for information was sufficient; and
  - exemptions claimed by the Department pursuant to ss35 and s36 are not made out.

**Submissions to the Preliminary Conclusion**

- 82 The above preliminary decision was made available to the Department on 5 April 2022 under s48(1)(a) of the Act, to seek its input before finalising the decision.
- 83 On 5 May 2022, submissions were received from Mr Jason Jacobi, Acting Secretary of the Department and its principal officer under the Act.
- 84 Mr Jacobi did not have any comment to make in relation to the release of information pertaining to Mr Wapstra's assessment and recommendations, or the use of s36. He indicated that he wished to provide comment on my preliminary decision regarding the application of s35 with respect to communications from the Department's staff.
- 85 Specifically, he submitted:

*I am, however, concerned of the chilling effect that disclosure may have on NRET staff's ability to freely communicate their opinions during the internal thinking process. If officer-level staff are wary that their deliberative thoughts,*

*whether held resolutely or not, may be publicly disclosed, and taken to be the official position of the Department, they may be less likely to communicate these opinions or recommendations as needed for consultative processes to run efficiently.*

*If staff need be worried that their written communications during the deliberative stage of a project will be released, they may instead choose to communicate verbally. This will increase the chance for confusion or misunderstanding and may negatively impact decisions being made.*

*Alternatively, officer-level staff may instead seek to reduce personal risk by having all their deliberative opinions and recommendations vetted and cleared by Senior Executive staff before they are willing to put them in writing to ensure that any information being disclosed accurately reflects the position of the Department. This would significantly increase the workloads of Senior Executive staff, and slow down all governmental processes to the detriment of the Tasmanian community.*

*It is my opinion, and the opinion of this Department more broadly, that officer-level staff should feel that they can securely communicate their early opinions and recommendations during a deliberative process without fear that their opinions will be taken as the full and final decision of the Department. I do not believe that this can be achieved if you decide that information, such as the kind applied for by Mr Dudley, should be disclosed without exemption under s 35.*

*I would appreciate the opportunity to discuss my concerns with you further as I believe the impacts of your decision are far-reaching.*

### **Further analysis**

- 86 It is clear that not all internally deliberative information is appropriate for release and that there are valid reasons why it may be contrary to the public interest to disclose some such information. Section 35 would not exist otherwise and I have certainly found information to be exempt under this section in past decisions.
- 87 It is always a balancing exercise between shielding free communication between public officers during a public authority's thinking processes, and ensuring public sector accountability and that the general public has access to government information. Each factual circumstance has different considerations which may tip the balance towards disclosure or exemption of information under s35.
- 88 I do not disagree that there is genuine potential for public officers to become more cautious or inhibited in their written communication, or to seek approval from senior staff to reduce personal risk associated with expressing an opinion which may not end up being the position of the Department, for fear of disclosure of information under s35. However, I do not consider that this is a failing of s35 and would be a matter for a public authority to manage with its staff through a supportive culture and robust internal processes.

- 89 It has oft been said that public servants must be frank and fearless in their duties and s35 being subject to the public interest test accords with this adage. It is intended that public information should be accessible to the public and the Act sets 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.
- 90 Accordingly, I cannot agree with Mr Jacobi's apparent view that all officer-level staff communication of early opinions or recommendations should be exempt under s35 to prevent fears that these will be taken as the final view of a public authority. Such an application of s35 would not be in accordance with the Act and its intention, which requires the public interest test to be assessed in each instance and that discretions conferred be exercised so as to facilitate the release of the maximum amount of official information.
- 91 Mr Jacobi did not make any specific submissions regarding the actual information responsive to Mr Dudley's request, which I did not consider was contrary to the public interest to release in my preliminary decision. Consequently, I have not changed my view that this information is not exempt under s35 and should be disclosed to Mr Dudley.

## **Conclusion**

- 92 For the reasons given above, I determine that:
- the Department's search for information was sufficient; and
  - exemptions claimed by the Department pursuant to ss35 and 36 are not made out.
- 93 I apologise to the parties for the inordinate delay in finalising this matter.

**Dated:** 12 May 2022

**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.

**36. Personal information of person**

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

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

### **33. Public interest test**

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

### **SCHEDULE I - Matters Relevant to Assessment of Public Interest**

Sections 30(3) and 33(2)

- (4) 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:** OI904-118  
R2202-029

**Names of Parties:** Trevor Burdon and Sustainable Timber Tasmania

**Reasons for decision:** s48(3)

**Provisions considered:** s31, s38

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### Background

- 1 Sustainable Timber Tasmania (STT), formerly Forestry Tasmania, is a Tasmanian Government Business Enterprise which manages public production forests and produces and sells forest products from these forests. Part of the land managed by STT was previously leased to Gunns Plantations Limited (Gunns) and shareholders were able to invest in plantations grown by Gunns on this land through Managed Investment Schemes (MIS).
- 2 Gunns became insolvent in 2013 and liquidators were appointed to manage the winding up of its operations, including the MIS. Legal disputes arose in relation to the losses incurred by MIS participants, the potential ‘windfall’ gain to STT of valuable MIS plantations, Gunns’ default on lease payments to STT and associated issues. Many MIS participants, including Mr Trevor Burdon, were adversely impacted by the Gunns collapse and received significantly less than the actual value of their investments in the settlement reached between STT and Gunns’ liquidators.
- 3 On 7 December 2018, Mr Burdon made an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to STT, seeking: *Proper and considered justification for the gross underpayment of MIS investors in Tasmania, whose trees were established and grown on Crown lands.* Mr Burdon specifically sought:

*STT Board Minutes sufficient to determine whether:*

- *the Board and Ministers were aware of the STT-GPL Settlement;*
- *the Board and Ministers understood the issue;*
- *the Board and Ministers were able to justify the settlement and poor outcome for the original investors in their sustainable assets.*

*(Being as it was no better than \$1 in \$20, and amounting to a \$30.3M shortfall.)*

*The claimant would appreciate an explanation as to the behaviour of the named parties.*

- 4 On 12 February 2019, Ms Suzette Weeding, a delegate under the Act for STT, released a decision to Mr Burdon. Mr Burdon sought internal review of this decision and Mr Steve Whitely, Chief Executive Officer of STT and its principal officer under the Act, affirmed this decision on internal review. Mr Burdon then sought external review to my office.
- 5 Following concerns raised by my Senior Investigation and Review Officer regarding the incorrect fee being charged to Mr Burdon, STT reissued its decision on 17 April 2019. The new decision was released by Mr Whitely and was identical to Ms Weeding's original decision.
- 6 Mr Whitely identified 86 pages of information responsive to Mr Burdon's request, all of which were STT Board Minutes and associated papers. Extracts of information from some of the minutes were released to Mr Burdon and the rest was claimed to be fully or partially exempt. The exemptions claimed were pursuant to:
  - s31 of the Act - legal professional privilege;
  - s35 of the Act - internally deliberative information;
  - s37 of the Act - business affairs of a third party;
  - s38 of the Act - business affairs of a public authority; and
  - s40 of the Act - procedures and criteria used in certain negotiations of a public authority.
- 7 Later on 17 April 2019, Mr Burdon applied for external review and his application was accepted under s45(1)(a). This was on the basis that a decision was made by a principal officer and an external review request had been made within 20 working days of Mr Burdon receiving that decision. The applicable fee had been paid.

### **Issues for Determination**

- 8 I must determine whether the information is eligible for exemption under ss31, 35, 37, 38, 40 or any other relevant section of the Act.
- 9 As ss35, 37, 38, and 40 are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine that the information is *prima facie* exempt under this section, I must then determine whether it is contrary to the public interest to disclose it. In doing so, I must have regard to, at least, the matters listed in Schedule 1 of the Act.

### **Relevant legislation**

- 10 The Department has relied on ss31, 35, 37, 38, and 40 in its decision and I have attached copies of these sections to this decision at Annexure I.

11 Copies of s33 and Schedule 1 of the Act are also attached.

## **Submissions**

### *Mr Burdon*

- 12 On 24 February and 8 April 2019, Mr Burdon made submissions in support of his internal review application and his original request for external review.
- 13 He indicated that since February 2017, he had been in contact with the relevant Minister, and the Executive and the Board of STT, as well as its staff, but had not been successful in obtaining the information he required. His key concern was that *it remains unclear that the Board members understood the issue of very poor returns to growers, who owed nothing to Forestry Tasmania, and that they discussed and were able to justify that settlement... I contend that the extracts and RTI Officers commentary do not answer [his questions on these issues]*.
- 14 Mr Burdon elaborated:

*Sustainable Timber Tasmania (FT) negotiated a secret settlement with the Liquidators PPB (now PwC) at great cost to investors in Tasmania. Stakeholder interests have not been respected. Despite growers not owing STT anything they received ~\$100/ha for established lots valued by the Auditor-General at ~\$5,000/ha. The STT opening offer was \$0/ha! In Court STT relied on questionable claims that it had not benefited materially, while it (including a Board member) was actively involved in selling these MIS lots as part of the \$60M sale to Reliance for 20x that amount/ha. Pruned thinned lots retained for future sale are likely to be worth more than \$50k/ha. Contrived confidentiality is being relied upon as an excuse with the Liquidators, especially when the majority commercial interest in these lots was that of MIS investor-growers. The matter requires thorough investigation, without reliance on technicality to avoid it. The grower return and agency behaviour alone are *prima facie* evidence of a culture and standards not aligned with the governance expected of senior Tasmanian public servants and GBE agencies.*

### *STT*

- 15 STT did not make submissions beyond the reasoning in its decision of 17 April 2019. Following a request from my office, a schedule providing greater detail of the reasons for exemption of particular information in the material responsive to Mr Burdon's request was provided by STT in May 2019. Both are discussed in the following Analysis.

## **Analysis**

- 16 The information responsive to Mr Burdon's request is comprised of thirteen documents, which are the minutes of Forestry Tasmania Board meetings dating from 25 November to 30 November 2016 and attached reports and out of session papers. Extracts of some of the relevant information were disclosed to Mr Burdon in STT's decision of 17 April 2019, the remainder was claimed to be

exempt from disclosure. Section 38 was primarily relied upon, with some reliance also on ss 31, 35, 37 and 40.

### **Section 31 – Legal professional privilege**

17 As I have discussed in previous external review decisions<sup>1</sup>, it is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and their lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings<sup>2</sup>.

18 Section 31 of the Act reflects this rule, and 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.*

19 STT have sought to exempt some information under s31, though the wording in its 17 April 2019 decision and schedule is somewhat ambiguous as to exactly which information is claimed to be so exempt.

20 As a result, except where information is clearly exempt under s31, I have assessed the majority of the information responsive to Mr Burdon's request under s38. This accords with the reasoning of STT's decision, which relies primarily on this section.

21 The information I have assessed under s31 re-states legal advice provided to STT, sets out legal advice to be requested by the Board or has been prepared by STT's legal representative. It is located in the following documents:

- Minutes of Forestry Tasmania Board Meetings on 25 and 26 November 2014 – Item 13, paragraph two, sentence two;
- Minutes of Forestry Tasmania Board Meetings on 16 and 17 December 2014 – Item 9, paragraph two, after 'trees' and Legal Representation section of attached *Ex Gunns Plantations Ltd MIS Plantations Update*;
- Minutes of Forestry Tasmania Board Meeting on 26 February 2016 – attached *Gunns' Mediation report*;
- Minutes of Forestry Tasmania Board Meeting on 25 May 2016 – Item 6, *Gunns*, paragraph three, sentence two;
- Minutes of Forestry Tasmania Board Meeting on 11 August 2016 – Gunns Mediation section of attached *Chief Executive Officer Overview*;

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<sup>1</sup> See *Simon Cameron and Department of Natural Resources and Environment* (January 2022) and *Clive Stott and Hydro Tasmania* (February 2021) available at [www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision](http://www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision).

<sup>2</sup> See *Daniels Corporation International Pty Ltd v ACCC* 213 CLR 543 at paragraph 9-majority of the High Court, re-affirming the 'dominant purpose test' as established in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* 201 CLR 49.

- Minutes of Forestry Tasmania Board Meeting on 31 August 2016 – second sentence of Gunns Mediation section of attached *Chief Executive Officer Overview*; and
  - Minutes of Forestry Tasmania Board Meeting on 30 November 2016 – first paragraph, second sentence and seventh paragraph of Plantation Sale section of attached *Chief Executive Officer Overview*.
- 22 I am satisfied that the information listed above is exempt under s31 and is not required to be released to Mr Burdon. Section 31 is not subject to the public interest test.

**Section 38 – Information related to the business affairs of a public authority**

- 23 Section 38(a) provides that information is exempt 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;
- 24 STT relied upon s38 to exempt the majority of information it determined should not be released to Mr Burdon. While it did not specify the limb of s38 it sought to rely upon, it appears clear from the nature of the information responsive that it was s38(a)(ii) - information of a business, commercial or financial nature which would be likely to expose STT to competitive disadvantage if disclosed. Section 38 is subject to the public interest test.
- 25 STT is a Government Business Enterprise and is clearly engaged in trade and commerce. Mr Burdon's request for assessed disclosure seeks information relating to STT's financial settlement with the liquidators for Gunns, following its collapse and inability to meet its obligations under commercial agreements. I am satisfied that all information responsive to his request is therefore of a business, commercial or financial nature.
- 26 The next consideration is whether the information responsive to the request would, if released, be likely to expose the public authority to competitive disadvantage.
- 27 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...*

28 The Court further held that:

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

- 29 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*.
- 30 I note here, that in the New South Wales Supreme Court decision of *Kaldas v Barbour*<sup>3</sup> 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.
- 31 Accordingly, the value of the *Forestry Tasmania v Ombudsman* case as a precedent is confined to the holdings of the learned judge in relation to the narrow nature of exemptions and the meaning of the phrases ‘competitive disadvantage’ and ‘likely to expose’, all of which are instructive and with which I agree.
- 32 There is some factual or innocuous information contained in the documents (in addition to that already released by STT, not listed below) which is not likely to expose STT to competitive disadvantage. This information is:
- Minutes of Forestry Tasmania Board Meetings on 25 and 26 November 2014 – First page until Item 2, Item 13, paragraph two, sentence one and cover page of attached *Ex Gunns Plantations Ltd MIS Plantations Update*;
  - Minutes of Forestry Tasmania Board Meetings on 16 and 17 December 2014 – First page until Item 2, Item 9, until ‘trees’ and cover page of attached *Ex Gunns Plantations Ltd MIS Plantations Update*;
  - Minutes of Forestry Tasmania Board Meeting on 26 February 2016 – First page until Item 2, attached *Gunns’ Mediation report*;
  - Minutes of Forestry Tasmania Board Meeting on 23 March 2016 – First page until Item 2 and first sentence on page 3;
  - Minutes of Forestry Tasmania Board Meeting on 27 April 2016 – First page until Item 2;
  - Minutes of Forestry Tasmania Board Meeting on 25 May 2016 – First page until Item 2;

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<sup>3</sup> [2017] NSWCA 275 (24 October 2017)

- Minutes of Forestry Tasmania Board Meeting on 29 June 2016 – First page until Item 2 and cover page of attached *Chief Executive Officer Overview*;
  - Minutes of Forestry Tasmania Board Meeting on 11 August 2016 – First page until Item 2 and cover page of attached *Chief Executive Officer Overview*;
  - Minutes of Forestry Tasmania Board Meeting on 31 August 2016 – First page until Item 2, and cover page and first sentence of Gunns Mediation section of attached *Chief Executive Officer Overview*; and
  - Minutes of Forestry Tasmania Board Meeting on 26 September 2016 – First page until Item 2;
  - Minutes of Forestry Tasmania Board Meeting on 5 October 2016 – First page until Item 2 and Item 8, sentence one;
  - Minutes of Forestry Tasmania Board Meeting on 2 November 2016 – First page until Item 2; and
  - Minutes of Forestry Tasmania Board Meeting on 31 August 2016 – First page until Item 2.
- 33 The above information is not exempt under s38, or any other section of the Act, and is to be released to Mr Burdon.
- 34 I am satisfied that the remainder of the information is *prima facie* exempt under s38, as there is a genuine likelihood of competitive disadvantage were it to be released. Though STT has a monopoly on forestry operations on Crown land, it operates within a broader market and the release of details regarding its negotiation strategy and business operations in the context of a commercial dispute could cause detriment to its competitive position.
- Public Interest Test*
- 35 When considering whether the disclosure of the information I have found to be *prima facie* exempt would be contrary to the public interest, I must have regard to, at least, the 25 matters contained in Schedule 1 of the Act.
- 36 STT's decision of 17 April 2019 outlined the following public interest considerations under Schedule 1 of the Act as relevant – matters (a), (b), (c), (d), (f), (h) and (s). No further explanation was given for its conclusion that the disclosure of the information would be contrary to the public interest, beyond the listing of these factors.
- 37 Applying the public interest test involves balancing the factors that favour release against those that do not. It is also important to note that whether or not information should be released is to be decided in the context of what is in the public interest as opposed to what might be interesting to the public.
- 38 I agree with STT that matters (a), (b), (c), (d) and (f) in Schedule 1 favour release of the information, as to do so would support the general public need for

information to be accessible, contribute to debate on this matter, provide greater information about the reasons for, and context of, STT's decisions and enhance scrutiny of government decision-making processes. Government business enterprises are subject to higher standards in their operation than private commercial ventures and there is a clear public interest in scrutiny being applied to the commercial use of public resources. Forestry operations in Tasmania are often controversial and STT's dealings with Gunns have been a matter of significant public debate, with concerns raised by investors such as Mr Burdon and environmental groups about whether these have been appropriate.

- 39 STT also raised matter (h), whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government, and I agree that this favours disclosure. I also consider matter (m) to be highly relevant. Mr Burdon has raised concerns about his personal losses as a MIS investor and that *the grower return and agency behaviour alone are prima facie evidence of a culture and standards not aligned with the governance expected of senior Tasmanian public servants and GBE agencies*.
- 40 His concerns about whether STT Board members understood and properly considered the poor returns to growers in discussing the settlement are the reason for his application and a valid issue. Though why he seeks this information is not strictly relevant in this assessment, I note that, while represented by the Gunns liquidator, Mr Burdon considers that MIS growers were not treated equitably and fairly by STT in its settlement which he believes left STT with a 'windfall' gain at their expense. His interests, and that of other MIS investors, would clearly be promoted by the release of further information.
- 41 Despite this, it must also be considered that the information in question does not include any discussion of the returns to MIS growers or any justification of the terms of the settlement, as sought by Mr Burdon. Other than to perhaps note the absence of such considerations by the Board, the lack of utility to Mr Burdon of the information in addressing these concerns reduces the weight of these factors which otherwise favour release.
- 42 This is particularly relevant, as there are significant factors which weigh against release, most notably matter (s) – that the disclosure would harm the business or financial interests of a public authority or any other person or organisation.
- 43 The information I have found to be *prima facie* exempt records the considerations of the Board in responding to a commercial dispute and legal claims arising from that dispute. These were sensitive and evolving matters, and the disclosure of high-level internal discussion of strategy and valuations of assets could clearly cause harm to STT's business and financial interests. Even after the finalisation of the dispute, this remains sensitive information which would usually be kept strictly confidential by a business. There is significant public interest in not harming the financial interests of GBEs, as this can limit their effectiveness in achieving public objectives and maximising the returns on public money.

- 44 This is a difficult balance to strike, with significant public interest factors both for and against release. Overall, however, due to the lack of relevance of the information to Mr Burdon's concerns and its high degree of commercial sensitivity, I do not consider the balance of factors favours release.
- 45 It would be contrary to the public interest to release this information and I determine that it is exempt pursuant to s38.

#### **Other exemptions**

- 46 STT also sought to rely on ss35, 37 and 40 to exempt the information I have already assessed. While there may also be valid claims to exemption under these sections, it is not necessary for me to further analyse them as I have already found the information to be exempt pursuant to s38.

#### **Preliminary Conclusion**

- 47 For the reasons given above, I determine that:
  - Exemptions claimed pursuant to s31 are varied;
  - Exemptions claimed pursuant to s38 are varied;
  - Exemptions claimed pursuant to ss35, 37 and 40 are not required to be assessed, as the relevant information is otherwise exempt.

#### **Submissions to the Preliminary Conclusion**

- 48 The above preliminary decision was made available to STT on 13 May 2022 under s48(1)(a) of the Act, to seek its input before finalising the decision.
- 49 On 6 June 2022, submissions were received from Ms Suzette Weeding of STT, a delegated officer under the Act.
- 50 Ms Weeding did not make submissions about the substance of my preliminary decision, but raised concerns that certain information could not be released to the applicant as STT now considers it is not within the scope of his request. The documents considered out of scope were update documents regarding the Ex Gunns Plantations Ltd MIS Plantations and from the Chief Executive Officer of STT. These updates were attached to STT Board Minutes dated 25 and 26 November 2014, 16 and 17 December 2014, 26 February 2016, 29 June 2016, 11 August 2016 and 31 August 2016.

#### **Further Analysis**

- 51 I consider it highly unusual and disappointing that STT is now claiming that information is out of scope of Mr Burdon's request at this late stage, after providing it to me for external review as part of the information responsive to his request. STT also specifically discussed this information in a table provided with the full information and assessed whether it was exempt under the Act. No explanation was provided as to why STT has changed its position, other than saying the documents were Board papers not Board Minutes.

- 52 The Act explicitly sets out that it is the intention of Parliament that discretions conferred be exercised so as to facilitate and promote the provision of the maximum amount of official information. I cannot see how this late reduction of the scope of information assessed as responsive to Mr Burdon's request is in line with this clear intention.
- 53 I do not, however, have the ability to review decisions in relation to the scope of assessed disclosure requests on external review. Despite this, I strongly encourage STT to act in accordance with the object of the Act and to release the information in these updates which I had determined was not exempt as an active disclosure to Mr Burdon.
- 54 STT is not bound to do so, however, and the information which I determined was to be released in paragraph 32 above should now be substituted with the following list:
- Minutes of Forestry Tasmania Board Meetings on 25 and 26 November 2014 – First page until Item 2, and Item 13, paragraph two, sentence one;
  - Minutes of Forestry Tasmania Board Meetings on 16 and 17 December 2014 – First page until Item 2, and Item 9, until ‘trees’;
  - Minutes of Forestry Tasmania Board Meeting on 26 February 2016 – First page until Item 2;
  - Minutes of Forestry Tasmania Board Meeting on 23 March 2016 – First page until Item 2 and first sentence on page 3;
  - Minutes of Forestry Tasmania Board Meeting on 27 April 2016 – First page until Item 2;
  - Minutes of Forestry Tasmania Board Meeting on 25 May 2016 – First page until Item 2;
  - Minutes of Forestry Tasmania Board Meeting on 29 June 2016 – First page until Item 2;
  - Minutes of Forestry Tasmania Board Meeting on 11 August 2016 – First page until Item 2;
  - Minutes of Forestry Tasmania Board Meeting on 31 August 2016 – First page until Item 2;
  - Minutes of Forestry Tasmania Board Meeting on 26 September 2016 – First page until Item 2;
  - Minutes of Forestry Tasmania Board Meeting on 5 October 2016 – First page until Item 2 and Item 8, sentence one;
  - Minutes of Forestry Tasmania Board Meeting on 2 November 2016 – First page until Item 2; and
  - Minutes of Forestry Tasmania Board Meeting on 31 August 2016 – First page until Item 2.

55 The remainder of my decision remains unchanged.

### **Conclusion**

56 For the reasons given above, I determine that:

- Exemptions claimed pursuant to s31 are varied;
- Exemptions claimed pursuant to s38 are varied;
- Exemptions claimed pursuant to ss35, 37 and 40 are not required to be assessed, as the relevant information is otherwise exempt.

57 I apologise to the parties for the inordinate delay in finalising this matter.

**Dated:** 10 June 2022

**Richard Connock  
OMBUDSMAN**

## **ANNEXURE I – Relevant legislative provisions**

### **Section 31 – Legal professional privilege**

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

### **Section 35 – Internal Deliberative Information**

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

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

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

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

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

### **Section 37 – Information relating to business affairs of third party**

- (1) Information is exempt information if its disclosure under this Act would disclose information related to business affairs acquired by a public authority or Minister from a person or organisation other than the person making an application under section 13 (the "third party" ) and –
  - (a) the information relates to trade secrets; or
  - (b) the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.
- (2) If –
  - (a) an application is made for information under this Act; and
  - (b) the information was provided to a public authority or Minister by a third party; and

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

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

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

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

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

- (a) state the nature of the information to be provided; and
- (b) if the decision was made on behalf of a public authority, state the name and designation of the person who made the decision; and
- (c) inform the third party of –
  - (i) its right to apply for a review of the decision; and
  - (ii) the authority to which the application for review can be made; and
  - (iii) the time within which the application must be made.

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

–

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

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

### **Section 38 – Information relating to business affairs of public authority**

Information is exempt information –

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

### **Section 40 – Information on procedures and criteria used in certain negotiations of public authority**

Information is exempt information if it consists of instructions for the guidance of officers of a public authority on the processes to be followed or the criteria to be applied –

- (a) in negotiations, including financial, commercial and labour negotiations; or
- (b) in the execution of contracts; or
- (c) in the defence, prosecution and settlement of cases; or
- (d) in similar activities –

relating to the financial, property or personnel management and assessment interests of the Crown or of a public authority.

### **33. Public interest test**

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

### **SCHEDULE 1 - Matters Relevant to Assessment of Public Interest**

Sections 30(3) and 33(2)

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

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

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

# **OMBUDSMAN TASMANIA**

## **DECISION**

**Right to Information Act Review**

**Case Reference:** O1901-107

**Names of Parties:** X, Y and Tasmania Police

**Reasons for decision:** s48(3)

**Provisions considered:** s36

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### **Background**

- 1 The applicant, X, alleges that an older man, Y, sexually abused him when he was a child. Y was investigated by Tasmania Police and interviewed in 1993 in relation to allegations made by X and several other complainants. Y was charged with indecent assault and indecent practices between males in 1994. The indecent assault related to an incident on or about 1 May 1979, when X was 15 years old. The indecent assault charge was discontinued but Y pleaded guilty and was convicted of four counts of indecent practices between males. At least one of these counts related to X.
- 2 X submitted an application for assessed disclosure under the *Right to Information Act 2009* (the Act) to Tasmania Police on 23 October 2018 to seek Y's statement in relation to what he called 'the child abuse case heard in 1994', as he is seeking to make a civil claim against Y.
- 3 Sergeant Lee Taylor of Tasmania Police, a delegated officer under the Act, assessed X's application and wrote to Y on 5 November 2018 to seek his view under s36(2) of the Act as to whether a record of interview and associated notes relating to the indecent practices between males charge should be provided following a request for information.
- 4 Y made submissions through his lawyer opposing the release of the information on 9 November 2018 on two bases. These were that:
  - the indecent assault charge was not proceeded with and it would be inappropriate to release details of unproven criminal allegations; and
  - indecent practices between males is no longer a crime as a result the decriminalisation of homosexuality and that Y has applied for an expungement of the convictions under the *Expungement of Historical Convictions Act 2017*.

He submitted that the information should either not be released or any decision on the release of the information should be delayed until the determination of the expungement application.

- 5 Sergeant Taylor wrote again on 9 November 2018 to apologise and clarified that the matter actually related to the indecent assault (of a child) charge heard in the Supreme Court of Tasmania in 1994. He asked if this changed Y's submissions in response to the request for consultation under s36(2) of the Act.
- 6 Y's lawyer reaffirmed his submissions despite this change on 13 November 2018.
- 7 Sergeant Taylor made a decision on 13 November 2018 to release the record of interview and associated notes. He indicated to Y's lawyer that 'to balance appropriate disclosure of information with protection of personal information, I will not be releasing any part of the Record of Interview which identifies your clients [sic] home address (or that of any third party), your clients [sic] personal phone number/s (or that of any third party) or your clients [sic] date of birth (or that of any third party)'. He considered that the expungement application was not relevant, as the request related to the indecent assault court file, which could not be the subject of expungement due to the type of offence and that it had been discontinued. His decision included the following:

*I have considered the following in making my decision:*

- *A person's legally enforceable right to be provided, in accordance with the Act, with information in the possession of Tasmania Police;*
- *The applicant [sic] need for information to assist in preparing for civil court proceedings;*
- *The personal information exemption at Part 3 of the Act; and*
- *The public interest test at Schedule 1 of the Act, particularly sub-sections (h) and (j) which respectively state:*
  - *"whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government"*
  - *"whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and enforcement of the law"*
- *Your preference for the information of an historical offence not to be released; and*
- *Provisions of the Expungement of Historical Offences Act 2017.*

- 8 Y sought internal review of Sergeant Taylor's decision on 19 November 2018.

9 Detective Inspector Mark Wright, another delegated officer under the Act, conducted the internal review of Sergeant Taylor's decision and wrote to Y on 20 December 2018 to provide his decision. He determined that Sergeant Taylor had appropriately applied the provisions of the Act and had afforded Y the opportunity to oppose the release of the personal information. Having considered the provisions of the Act, particularly s7, Division 2 of Part 3, s36(1), s5 regarding personal information, and Schedule 1 particularly (a), (j), (m) and (n), he made a fresh decision, which is set out as follows:

*I have decided that the record of interview and associates [sic] notes can be disclosed to the applicant. Please note that:*

- *The record of interview and associated notes will be redacted so as to only reflect the content pertaining to the allegations made by the RTI applicant;*
- *Identifiers will be redacted including your client's name, employment details, place of residence, date of birth, and phone number/s; and*
- *A copy of the information to be disclosed to the applicant is attached for your information.*

10 Y sought external review on 16 January 2019 of the decision to release his personal information by Tasmania Police.

### **Issues for Determination**

11 I must determine whether Y's information is eligible for exemption under s36.

12 As s36 is contained in Division 2 of Part 3, it is subject to the public interest test in s33. This means that, should I determine that the information is prima facie exempt under that section, I am then required to determine whether it would be contrary to the public interest to release it having regard to, at least, the matters contained in Schedule 1.

### **Relevant legislation**

13 Section 36 is relied upon by Y to object to the release of the information. A copy of this section is attached.

14 Copies of s33 and Schedule 1 are also attached.

### **Submissions**

15 Y made the following submissions through his lawyer setting out his opposition to the release of his personal information:

- I. *These are historical convictions which are no longer law and he is entitled to make application for their expungement and has done so.*

2. *The offences were between consenting males. It is a moot point as to whether what my client pleaded to would be an offence today as it is open that the person making the application for the release of the material may have been seventeen at the time and as such, subject to expungement, no crime ever would have been committed. It would be proposed by the Applicant for information that he would utilise those materials to commence civil proceedings taking into account that there is no longer a limitation for young persons subject to sexual crime commencing proceedings.*
- 16 No submissions were made by Tasmania Police beyond the reasoning of its original and internal review decisions.
- 17 X made submissions about the importance of obtaining this information to enable him to pursue a civil claim for damages and compensation, stating that he has suffered severe and ongoing psychological impacts from Y's abuse.

### **Analysis**

- 18 I am satisfied that the unredacted record of interview and associated notes contain Y's personal information, as his identity is clearly ascertainable. It also contains the personal information of a number of other complainants alleging Y had committed sexual offences against them. Due to the highly sensitive nature of the information and clear identification of Y and the other complainants, I do not consider that this is personal information which it would be likely to be in the public interest to release.
- 19 Tasmania Police did not propose to provide the unredacted record of interview and associated notes, however, but a version which attempted to remove all personal information except for that of X. The personal information of the applicant is not exempt under s36 of the Act. Whether the information in the form proposed to be released by Tasmania Police, with all details regarding other complainants and Y's name, employment details, place of residence, date of birth and phone number removed, contains exempt personal information is the matter I must determine.
- 20 It would be difficult to identify Y from the redacted record of interview and associated notes but it may be possible for persons familiar with the allegations to do so. Given the passage of time since the interview took place in 1993 and the limited reporting which appears to have occurred in relation to Y's convictions, the likelihood of this is significantly reduced. I could not be completely satisfied that Y's identity could not be ascertained from the redacted information, however, especially as the allegations relate to conduct which occurred in a small community in which Y remains a resident.
- 21 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. While not explicitly saying that he considered it not in the public

interest to release the information, Y submitted that it would be inappropriate to do so as his convictions related to matters which would not be a crime if they occurred today, and the other conduct was unproven. He was particularly focussed on the application he has made for expungement of his indecent practices between males convictions under the *Expungement of Historical Convictions Act 2017*.

- 22 I agree with Tasmania Police, when it says that any expungement application relating to the indecent practices between males convictions is not relevant to this application, which concerns the release of the court file for a separate matter, the discontinued indecent assault charge. It is also disputed by X and Tasmania Police that the conduct investigated related to consensual homosexual activity between adults, which has since been decriminalised and convictions for which can now be expunged.
- 23 Y did not make any further submissions as to why the information should not be released, but I have considered the factors in Schedule I in making my own assessment of whether release would be contrary to the public interest. Of particular relevance in this matter are (c) whether the disclosure would inform a person about the reasons for a decision, and (d) whether the disclosure would provide contextual information to aid in the understanding of government decisions. Providing information to a victim of crime regarding the investigation of their complaint and the decision to discontinue prosecution of a charge is in the public interest as it gives reasons for, and context to, government decisions.
- 24 The primary Schedule I factor warranting consideration in this matter, however, is (m) whether the disclosure would promote or harm the interests of an individual or group of individuals. The applicant has asserted that this information is of critical importance to him and that it will enable him to make a civil claim against the man who he alleges sexually abused him as a child and caused him lifelong harm. That the information would so significantly promote the interests of an individual is a consideration strongly in favour of the release of the information.
- 25 I accept that there is potential for harm to Y's interests in releasing the information, but the public interest in protecting the interests of alleged perpetrators of child sexual abuse is lower than that of the victims of such abuse. Due to the redaction of his personal information, the previous exposure in court proceedings of these matters, Y's conviction in those court proceedings and his ability to defend any civil action brought against him, I do not consider that the potential for harm to Y's interests makes the disclosure contrary to the public interest.
- 26 I also considered the fact that Y had the right to silence when he gave the interview and was cautioned that any statement that he made could be used against him in evidence. That he provided the information contained in the Record of Interview and associated notes in the knowledge that it may be made public at a later date, I consider a relevant factor supporting the

conclusion that it would not be contrary to the public interest to release this information.

### **Conclusion**

- 27 For the reasons given above, I determine that the record of interview and associated notes should be released to the applicant in the redacted form provided to Y in the Tasmania Police internal review decision dated 20 December 2018.
- 28 I apologise to the parties for the inordinate amount of time taken to finalise this decision.

**Dated:** 4 March 2021

**Richard Connock**  
**OMBUDSMAN**

## **Attachment I**

### **Relevant Legislation**

#### **36. Personal information of person**

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

(2) If –

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

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

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

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

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

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

### **33. Public interest test**

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

### **SCHEDULE 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.

**Names of Parties:** Z, C and Department of Primary Industries, Parks, Water, and the Environment

**Reasons for decision:** s48(3)

**Provisions considered:** s36

### **Background**

- 1 The Arthur-Pieman Conservation Area in Tasmania is a large and highly acclaimed natural site popular with environmental and nature enthusiasts. Commercial filming in the area is restricted and requires permission from the Department of Primary Industries, Park, Water and the Environment (the Department) in the form of an approved filming agreement.
- 2 On 21 May 2018, C made an application to the Department for assessed disclosure under the *Right to Information Act 2009* (the Act), which included a request for copies of commercial filming agreements approved between 1 January 2013 and 21 May 2018. An application Z had made through his media company was found to be responsive to the request and he was consulted under s36(2) and 37(2) by the Department. Initially, the information being considered for release did not include an email from Z which was attached to the filming agreement and provided further information, but only the agreement itself. Z did not object to the release of the agreement.
- 3 Following concerns raised by C, the Department located the four page email attached to Z's application. It again consulted Z under s36(2) and 37(2) to seek his views about its release. On 26 October 2018, Z informed the Department that he did not want anything in the email to be released.
- 4 On 22 November 2018, Ms Roxana Jones, a delegated officer under the Act, notified Z that she had made a decision that some information would be released under the Act and that some would be redacted. She did not provide any reasons or refer to any section of the Act to explain why that information had been redacted.
- 5 Ms Jones did provide the following additional reasoning in her decision to C regarding the same information:

*Names along with addresses, email addresses, mobile phone numbers and signatures are captured by the definition of personal information and therefore meet the elements of s36(1) of the Act therefore making it exempt information subject to the public interest test.*

*Section 36 of the Act are [sic] conditional upon the ‘public interest test’ specified in section 33 of the Act. For information to be exempt under sections [sic] 36 it must satisfy the requirements of this section 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 this case I consider the following Schedule 1 matters to be relevant:*

- (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;

*Matter (a) is the main public interest argument in favour of disclosure and (m) is the main public interest argument against disclosure.*

*There could be no significant benefit to the public interest in disclosing this personal information. Conversely, disclosure would reveal the personal details of private citizens, thereby affecting the privacy of the individuals concerned.*

*On balance I find that it would be contrary to the public interest to release the information and consequently that it qualifies as exempt information under s.36 of the Act.*

- 6 On 23 November 2018, Z wrote to the Department and sought an internal review of the decision to release his information and maintained his objection to the release of the entire email.
- 7 On 19 December 2018, Ms Katrina Oakley, a delegated officer, released an internal review decision to Z. The internal review had reached the same conclusion as the original decision; some information should be released and some redacted. Ms Oakley provided reasons to Z for the exemption of some information under s36 and redacted an additional sentence, which she considered related to a future intention rather than factual matters regarding the filming. Her reasons were as follows:

*In accordance with section 43(4)(b) of the Act, I have reviewed the earlier decision by Mrs Jones in the matter and now make a fresh decision.*

*I have reviewed only the email dated 27 November 2013 and the redactions proposed by Mrs Jones and rejected by the appellant.*

*I have decided that the redactions are valid. Mrs Jones has properly redacted all personal information, pursuant to section 36, in the email with one minor exception, which will be discussed below. Factual information has been unredacted, which is in accordance with the Act.*

*...[s36 of the Act was reproduced here]*

*I do not consider that the disclosure of the email would promote or harm the appellant's fair treatment by DPIPWE (g), nor would it promote or harm the appellant's interests as an individual (m). The email states where and why the appellant was intending to film, and this is factual information.*

*All information that mentions the appellant's personal journey, and other confidential and private information, has been properly redacted, with one minor exception. I have redacted one sentence on page 1 ...[redacted sentence was reproduced here] I consider this to be the appellant's statement of intention, not fact, and therefore should be redacted. However, the remaining unredacted information, on balance, would not be contrary to the public interest to release and that information should be disclosed.*

*I confirm that I have not considered any matters, which are irrelevant in deciding if disclosure is contrary to the public interest pursuant to Schedule 2 of the Act.*

- 8 On 18 January 2019, Z applied to my office for external review of this decision. His application was accepted under s44 on the basis that he had received an internal review decision and had sought external review within 20 working days of that receipt.

### **Issues for Determination**

- 9 I must determine whether Z's information is eligible for exemption under s36.
- 10 As s36 is contained in Division 2 of Part 3, it is subject to the public interest test in s33. This means that, should I determine that the information is prima facie exempt under that section, I am then required to determine whether it would be contrary to the public interest to release it having regard to, at least, the matters contained in Schedule 1.

### **Relevant legislation**

- 11 Section 36 is relied upon by Z to object to the release of the information. A copy is attached. Copies of s33 and Schedule 1 are also attached.

### **Submissions**

- 12 Z maintained that his information should not be released because, as far as he could determine, there was nothing in it that could be considered to be in the public interest. Specifically, he submitted:

*The email to PWS [Parks and Wildlife Service] detailed what I had in mind for a bushwalk, but the entire events and places and dates didn't come off as the project was ultimately too ambitious as I tried to do a one person documentary which I was also the subject of.*

*The extent of the question at hand apparently is specifically in relation to filming within the Arthur Pieman Conservation Area. This was done on*

*one day in mid December 2013, observing all permissions given by PWS TAS.*

*I fail to understand how the release of this email, even with the redactions is in the public interest. This email was sent over five years ago and I can't comprehend how a request for filming permission email from me can suddenly be released, even with omissions, to a member of the public.*

- 13 The Department maintained that exempt personal information had been redacted and that there was no valid basis under the Act for exempting the remaining information sought to be redacted by Z and it should be released.

## **Analysis**

- 14 For information to be exempt under s36 it must be information that, if released, would disclose the personal information of a person other than the person making an application under s13.
- 15 Personal information is defined in s3 as *any information or opinion in any recorded format about an individual whose identity is apparent or is reasonably ascertainable from the information or opinion and who is alive, or has not been dead for more than 25 years.*
- 16 Section 36 appears to have been applied to the email having regard to the two discrete classes of personal information contemplated by that definition: information from which Z's identity is apparent, and what the Department has determined is information from which Z's identity is reasonably ascertainable.
- 17 The apparent personal information consists of Z's name, either included generally in the email or in his email address. I would also consider that his mobile phone number and postal address fall into this category. This information is clearly personal information and I find it prime facie exempt under s36 pending consideration of the public interest test.
- 18 The bulk of the information claimed to be exempt is information from which, the Department contends, Z's identity is reasonably ascertainable.
- 19 As Z's Australian Business Number and company details have already been released in the commercial filming agreement to which the email relates, and due to the apparently very small size of the company, it is likely that Z's identity may be ascertainable in every part of the email. Accordingly, it is prime facie exempt under s36 subject to a consideration of the public interest test.
- 20 The Department has further divided the information in the email into two categories: purely factual information regarding travel and filming details; and other information regarding Z's intentions and his personal details. It has redacted the second category as personal information and proposes to release the first because of its factual nature. As noted, Ms Oakely said that 'factual information has been unredacted, which is in accordance with the Act'.

- 21 I do not agree with any purported general proposition that purely factual information, even if it is personal information, should be released, or that the provisions in the Act, such as s35, which distinguish purely factual from exempt information are relevant, or can somehow be transposed on to s36. Personal information is frequently, indeed nearly always, factual information (for example names, addresses, criminal convictions and employment details are all factual personal information) and this has no relevance to the application of s36.
- 22 I accept, however, that the Department may well have intended to make this distinction due to the different public interest considerations which apply to the two categories of information Z provided to support his commercial filming application.

*Public interest test*

- 23 I now turn to the consideration of whether the release of Z's personal information would be contrary to the public interest.
- 24 In relation to the apparent personal information - Z's name, email address, mobile phone number, and postal address - I am satisfied that the release of this information would be contrary to the public interest and it is exempt under s36. It would harm the interests of an individual (factor (m) in Schedule 1) without providing any additional benefit in relation to government accountability or providing context to decisions.
- 25 Assessment of the remainder of the information is more complex, but I consider that dividing it into the two categories, as the Department did, is a reasonable approach to assessing whether it is contrary to the public interest to release it.
- 26 I agree with the Department that it is appropriate to release some level of factual detail concerning the reason Z applied for a commercial filming application, and the areas in which he was approved to film. While it is possible that Z's identity may be ascertainable from this information, it is unlikely, and the details are not sensitive. There is also significant public interest in providing basic information about the reasons why, and the locations where, commercial filming was approved (factors (a), (d) and (g) in Schedule 1 are relevant). I consider that these matters outweigh any detriment to Z's interests (factor (m)) in it potentially becoming known that he undertook filming in these areas as part of his company's commercial activities.
- 27 I accept Z's concerns that this 'factual' information does not reflect the actual locations he visited, but I do not consider that this is material as the information at issue relevantly reveals the basis upon which permission to film was granted.
- 28 I determine that the unredacted factual information in the Department's internal review decision is not exempt under s36 and may be provided to C.

- 29 I also agree with the Department that the additional details Z provided regarding his motivation for the filming, his employment history, his personal circumstances and his future intentions are subject to different public interest considerations. Z provided this information to support his application, in greater detail than was required, and it would be contrary to the public interest to release it given the potential harm this would do to his interests as an individual. Z strongly objects to the release of this information and his submissions in this regard are comprehensive and provide appropriate detail to support the Department's decision to approve the agreement with this information redacted.
- 30 I determine that the additional information provided by Z which was redacted in the Department's internal review decision is exempt under s36 and is not to be released to C.

### **Conclusion**

- 31 For the reasons given above, I determine that the email should be released to the applicant in the redacted form provided to Z in the Department's internal review decision dated 19 December 2018.
- 32 I apologise to the parties for the inordinate amount of time taken to finalise this decision.

**Dated:** 25 March 2021

**Richard Connock  
OMBUDSMAN**

## **Attachment I**

### **Relevant Legislation**

#### **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 –
    - (d) notify that person that the public authority or Minister has received an application for the information; and
    - (e) state the nature of the information that has been applied for; and
    - (f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.
- (3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f), decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.
- (4) A notice under subsection (3) is to –
  - (a) state the nature of the information to be provided; and
  - (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
  - (c) inform the person to whom the notice is addressed of –
    - (i) that person's right to apply for a review of the decision; and
    - (ii) the authority to which the application for review can be made; and

- (iii) the time within which the application must be made.
- (5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) –
- (a) until 10 working days have elapsed after the date of notification of that person; or
  - (b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or
  - (c) until 20 working days after notification of an adverse decision under section 43 ; or
  - (d) if during those 20 workings days the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or
  - (e) if the information is information to which a decision referred to in section 45(1A) relates –
    - (i) during 20 working days after the notification of the decision; or
    - (ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

### **33. Public interest test**

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

### **SCHEDULE 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:
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- (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.