

15 May 2023

Mr Robert Hogan
3 McLachlan Crescent
Weetangera ACT 2614

Via email: harveyr35@aol.com

Dear Mr Hogan,

Decision letter – Internal Review - Robert Hogan – Deloitte Access Economics

I refer to your request dated 17 April 2023 in which you sought internal review of the decision made by the University of Tasmania in relation to an application for assessed disclosure of information made by you under the *Right to Information Act 2009* (Tas) ("**RTI Act**") dated 26 January 2023 which sought information in the following terms:

- *Copy of research by Deloitte Access Economics mentioned in UTAS' submission to the Legislative Council Select Committee's Inquiry into the Provisions of the University of Tasmania Act 1992.*

On 2 February 2023 you responded to note your detailed request is:

"Page 8 of Attachment 1 of Page 13 of UTAS' submission to the Legislative Council Select Committee's Inquiry into the Provisions of the UTAS Act 1992 refers to research by Deloitte Access Economics (DAE).

See:

<https://www.parliament.tas.gov.au/ctee/council/Submissions/UTAS/113%20Part%2013%20-%20UTAS%20Campus%20Transformation.pdf?fbclid=IwAR04cvIhj99APVBvZ6Qtt4PDWFbEZa8SskmD7PZR3PfkBHOty9nlixoGj24>

I request a copy of the DAE research and all related documents (working papers etc). So my request is for the "DAE research and all related documents (working papers etc)."

An original decision was issued to you by Mr Parnell on 17 March 2023 which concluded that the DAE report and related documents were exempt on the basis of section 37,39,35 and 38 of the RTI Act and that after consideration of the factors in Schedule 1, the balance was in favour of not releasing because it would be contrary to the public interest to do so.

I am a delegated officer of University of Tasmania with power to make fresh decisions in relation to applications for internal review of decisions under the RTI Act.

Decision

I have considered the original decision, the nature of the information requested, the relevant material that may fall within the scope of the request, as well as taking into account the following information in making my decision:

- The nature of the content of the documents that may fall within the scope of your request;

- The RTI Act;
- The guidelines and manual issued by the Tasmanian Ombudsman under section 49 of the RTI Act; and
- Consultation with Deloitte under section 37 of the RTI Act.

This section outlines my decision and the reasons for my decision.

Section 37

Information is exempt information if its disclosure would disclose information related to business affairs acquired from a person or organisation and the information relates to trade secrets or disclosure would be likely to expose the third party to competitive disadvantage.

The purpose of this exemption has been described in the following terms:

The exemption in the Act protects the business interests of the third parties and serves the legitimate purpose of ensuring commercial engagement with government does not do damage to a business by the release of commercially sensitive information. On the other hand, there is also a strong case for allowing the public to have access to certain information that explains and justifies the expenditure of public funds. Clearly there is a fine balance between shedding light on the use of public money to avoid financial impropriety and obtaining value for money, and maintaining government's ability to engage in competitive pricing through the use of contractors without fear of prejudicing their commercial information: *Baird v Launceston City Council (November 2017)*

The assessment of competitive disadvantage must be made at the time of the decision or possible disclosure, not at the time the information or documents containing it were generated.

I consulted Deloitte and they maintained their objection to the release of the report and contended that the information they provided as part of their engagement with the University included business related confidential information of Deloitte and that position is unchanged today. This information was divulged to the University on a confidential basis as it contains information that gives their business a competitive advantage in comparison to other similar professional services firms. If this information were disclosed to the public, it would also then be available to their competitors, and would be detrimental to Deloitte's market position and business affairs. In my further consultation with Deloitte they confirmed that position is also unchanged. In relation to competitive disadvantage Deloitte confirmed:

- Disclosure would lesson Deloitte's ability to maintain competition between it's suppliers;
- Disclosure would have a potential impact on Deloitte's market position acting as a competitor in the market;
- Case studies were included in the report from other projects unrelated to the Sandy Bay Redevelopment that are not in the public domain;
- An example to support application of this exemption is *Environment Tasmania v Environmental Protection Agency (12 June 2017)* – where data about the health of a river did not reveal anything about the third party's operations, but had the potential to be reported wrongly, inaccurately or out of context, there was a real possibility and not a remote chance that it's disclosure may damage the reputation of the third party, hence being to it's disadvantage and to it's competitor's disadvantage.

Deloitte also contended that it would be contrary to the public interest as it would prejudice the effectiveness of Deloitte's information gathering process and ability to deliver accurate and comprehensive deliverables to their clients.

I have determined on internal review that reliance on the exemption in section 37 should be maintained.

Section 39

The legal test on the application of section 39 is whether information is communicated in confidence from its communicator to its receiver – it is not a matter of determining whether the information is of itself, confidential in nature. Information is communicated in confidence if it was communicated and received under a mutual understanding that the communication would be kept confidential. There must have been an understanding and acceptance of an obligation of confidence at the time of the communication (not at the time of the application for assessed disclosure) – *Anderson v Director of Inland Fisheries* (28 April 2021).

An example of a recent case of the application of this exemption is *Blue Derby Pods Pty Ltd v Department of Natural Resources and Environment* (30 June 2022). In that decision a design commissioned from a firm of architects and where intellectual property remains with the architects, when communicated to a government agency as part of a contracting process, was communicated in confidence and if disclosed, would be reasonably likely to impair the ability of the agency to obtain similar information in future.

In this case, Deloitte' engagement was for strict confidentiality. The report is marked on each and every page as confidential and marked as containing information that has been provided as commercial in confidence and not to be distributed to any third parties under any circumstances.

Disclosure in these circumstances is highly likely to impair the University's ability to obtain similar and usable information in the future from its consultants who are engaged on a confidential basis. An example (which is very similar to the Deloitte circumstance) of where disclosure is highly unlikely to have the necessary impairment was where a private business was paid to perform an assessment and make a report. It was considered unlikely that it would decline to provide services if their contract with the public authority or final report may be released under the Act – *O'Connor v Department of Natural Resources and Environment Tasmania* (14 April 2022), [35].

I have determined that the information is exempt and will consider the public interest factors below.

Section 35

This exemption is designed to protect the integrity and viability of the decision making process and to "encourage the free exchange of ideas during the process of deliberation and policy making". The information in question must consist of one of the 3 different types of communications referred to in section 35 a), b) or c). They are alternatives.

The working drafts and feasibility modelling was for consideration of the various potential scenarios by the University and by its nature was deliberative, opinion based and consultative. It was undertaken before a final decision was made and was not purely factual. Examples of information that have been held to fall within a) are estimates and forecasts, and information hypothesising on different options available.

I have determined that the deliberative material is pre decisional and records the University's thinking processes including the processes of reflection on the wisdom or expediency of a proposal or a course of action, which have been conducted prior to a final decision being made.

I have determined that the information is exempt and will consider the public interest factors below.

Schedule 1 – Public Interest

In making my determination I have considered all of the relevant matters which must be taken into account which are set out in Schedule 1 of the RTI Act. I have also considered Schedule 2.

I have afforded a very high weight to the following factors that are not in favour of disclosure:

- The University competes in a local, national and international market for the attraction and retention of students. It also competes with 40 other Universities in the higher education sector for students broadly.
- All specific information relating to commercially valuable information such as commercial yields, details of financing arrangements, feasibility plans for strategic property management and confidential reports would likely result in market competitors having information that they would not ordinarily have access to and likely disadvantage the University from gaining access to this information in the future.
- Intellectual property in the Deloitte report rests with Deloitte. It was procured under confidentiality and was marked confidential.
- Releasing sensitive commercial information supplied by a third party contractor under an understanding and agreement of commercial in confidence would prejudice the University's ability to gain similar reports in the future and would potentially expose the University to a claim of breach of confidence;
- Releasing confidential business information of Deloitte would be contrary to the public interest as it would prejudice the effectiveness of its information gathering process and ability to deliver accurate and comprehensive deliverables to their clients. Disclosure would on balance harm the business affairs of Deloitte by eroding their competitive advantage in comparison to other professional services firms.

On balance I have determined that it is not in the public interest to release the exempt information.

Review rights

If you are not satisfied with my decision you may within 20 working days of receiving this notice of decision seek external review by writing to the Ombudsman whose contact details are as follows:

Ombudsman Tasmania
GPO Box 960
HOBART TAS 7001

Email: ombudsman@ombudsman.tas.gov.au

Tel: 1800 001 170

Website: http://www.ombudsman.tas.gov.au/right_to_information

Yours sincerely,



Juanita O'Keefe
Delegated Right to Information Officer