OMBUDSMAN TASMANIA

DECISION

Right to Information Act Review **Case Reference:** R2305-015

Names of Parties: Robert Hogan and the University of Tasmania

Reasons for decision: s48(3)

Provisions considered: s35, s36, s37, and s39

Background

1 The University of Tasmania (University) announced in 2019 that it had made a decision to relocate its longstanding campus in Sandy Bay to central Hobart. In response to representations from the community and other stakeholders regarding this decision, the Legislative Council of the Tasmanian Parliament resolved, in May 2022, to convene a Select Committee to inquire into the provisions of the *University of Tasmania Act 1992*.

2 Particular reference was given to:

- the constitution, functions and powers of the University;
- the constitution, role, powers and obligations of the Council and Academic Senate;
- the appropriateness of the Act to ensure accountable executive, fiscal and academic decision-making; and
- the appropriateness of the Act to protect and promote academic freedom, independence and autonomy.

3 Submissions to the Select Committee closed on 29 August 2022 and 149 submissions, including submissions by the University, are listed on the Parliament of Tasmania website.[1]

4 Mr Robert Hogan has a strong interest in the fate of the University's Sandy Bay campus and is the author of a submission to the Select Committee, as well as hosting a website opposing the campus move.

5 On 26 January 2023, Mr Hogan made an application to the University for assessed disclosure under the *Right to Information Act 2009* (the Act), seeking a copy of research by Deloitte Access Economics mentioned in the University's submission to the Legislative Council Select Committee's Inquiry.

---

[1] Parliament of Tasmania, Legislative Council, Inquiry into the Provisions of the University of Tasmania Act 1992, www.parliament.tas.gov.au/committees/legislative-council/select-committees/lc20select20-20university20of20tasmania/submissions/submissions, accessed 14 September 2023.

6 Mr Hogan set out the details of the information he sought as follows:

> *Page 8 of Attachment 1 of Part 13 of UTAS' submission to the Legislative Council Select Committee's Inquiry into the Provisions of the University of Tasmania Act 1992 refers to research by Deloitte Access Economics (DAE).*
>
> *….*
>
> *I request a copy of the DAE research and all related documents (working papers etc).*
>
> *I anticipate that UTAS may argue that DAE's research is:*
>
> - *DAE's IP - Research reports to UTAS and the like will belong to UTAS; DAE should be consulted as a third party about any real IP invested in the project;*
> - *The research is commercially sensitive – truly sensitive material can be redacted;*
> - *My request would involve an unreasonable diversion of resources – given the public interest in this matter, the resources involved processing would be fully warranted.*
>
> *As DAE's research is being used as part of UTAS' main argument for relocation into the Hobart CBD (ie financial sustainability), UTAS should welcome the opportunity to provide that research for public scrutiny.*

7 On 23 February 2023, Mr Brendan Parnell of the University, a delegate under the Act, notified Mr Hogan that the information responsive to his application contained information relating to the business affairs of a third party (Deloitte), and it had been consulted pursuant to s37 of the Act.

8 On 17 March 2023, Mr Parnell released a decision to Mr Hogan. In his decision, Mr Parnell advised that the information located responsive to Mr Hogan's application had been found to be fully exempt from disclosure under ss35 (internal deliberative information), 37 (information relating to the business affairs of a third party), 38 (information relating to the business affairs of a public authority) and 39 (information obtained in confidence) of the Act. A Schedule of Documents was attached to the decision. Three heads of information were listed, as follows:

- Deloitte Financial Feasibility Assessment – Working Draft, March 2022
- Deloitte Financial Outputs – Preliminary Assessment, 30 November 2021
- Internal scenario and sensitivity modelling to the concept Sandy Bay masterplan

9 Mr Hogan applied for internal review of the decision on 17 April 2023.

10 On 15 May 2023, Ms Juanita O'Keefe, another University delegate under the Act, released her internal review decision. Ms O'Keefe upheld the decision in the first instance not to release the information and again relied upon exemptions in ss 35, 37 and 39 of the Act. She no longer relied on s38.

11 On 29 May 2023, Mr Hogan applied for external review. This office accepted his application under s44 of the Act on the basis Mr Hogan was in receipt of an internal review decision, the fee had been paid and his application for external review was submitted within 20 working days after receipt of that decision.

12 Mr Hogan applied to have his external review request expedited and I agreed to grant priority to this matter. I made this decision because of the high degree of public interest in the University's southern campus relocation, and the time critical nature of the matter due to the advanced stage of relocation of the University services to central Hobart.

13 Mr Hogan advised that he also sought external review on the basis that the initial search by the University for information responsive to his request was inadequate. Accordingly, this office liaised with the legal office of the University to ascertain whether any further information required assessment. On 10 July 2023, Mr Parnell contacted Mr Hogan and this office to advise of the active disclosure by the University of a substantial amount of information that may be of interest to Mr Hogan and responsive to his request. Mr Parnell also provided a further list of documents for Mr Hogan's perusal, which may require assessment by the University before considering whether it is appropriate that they be released.

14 Upon consultation with the University legal office and Mr Hogan, it was agreed that the determination of this external review would proceed in respect of the information which had already been assessed by the University, regardless of the result of the consultation between Mr Hogan and the University regarding the assessment of other information. This would form a separate external review, should such review be warranted.

Issues for Determination

15 I must determine whether the information is eligible for exemption under ss35, 37 or 39 or any other relevant section of the Act.

16 As these sections are contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33, including consideration of the matters in Schedule 1. This means that, should I determine that the information is prima facie exempt under this section, I must then determine whether it is contrary to the public interest to disclose it.

Relevant legislation

17 I attach copies of ss35, 36, 37 and 39 to this decision at Attachment 1.

18 Copies of s33 and Schedule 1 of the Act are also attached.

Submissions

University

19 The University did not make submissions in response to this external review, beyond the reasoning in its decisions, which is set out as follows.

20 In his original decision dated 17 March 2023, Mr Parnell said, in relation to s37:

> *My consultation with Deloitte raised concerns from Deloitte that information they provided as part of their engagement with the University includes business related confidential information of Deloitte. This information was divulged to the University on a confidential basis as it contains information that gives their business a competitive advantage in comparison to other similar professional services firms. If this information were disclosed to the public, it would also then be available to their competitors, and would be detrimental to Deloitte's market position and business affairs.*
>
> *They are also concerned that it would be contrary to the public interest as it would prejudice the effectiveness of Deloitte's information gathering process and ability to deliver accurate and comprehensive deliverables to their clients.*

21 In relation to s39, Mr Parnell said:

> *The Deloitte Working Draft and Deloitte Financial Modelling Outputs collected and utilised information from various sources both from the University and outside the University that was readily understood to have been divulged in confidence. The consultant authors* [sic] *engagement was for strict confidentiality. The report is marked on each and every page as confidential. The report is marked as containing information that has been provided as commercial in confidence not to be distributed to any third parties under any circumstances.*
>
> *If confidential information cannot be provided by and to the University for completion of commercially sensitive advice then it is highly likely to impair the University's ability to obtain similar and usable information in the future from its consultants. Third parties will be less likely to provide necessary information for a usable report if the information they provide is not kept in confidence.*

22 In relation to s35, Mr Parnell said:

> *I have determined that the material you have sought are working drafts and development feasibility assessments for modelling a range of development options. The information was sought from Deloitte and used for internal deliberations only.*
>
> *Feasibility modelling included high-level cost estimates of construction costs of a very early design of infrastructure and building works, financing costs, differing capital models and projected revenue streams and was*

highly sensitive to the input assumptions. The work was scenario and sensitivity modelling to the concept masterplan to understand the potential financial viability of development options and how it may be phased over a period of time. The work was for consideration of the various potential scenarios by the University and therefore its very nature was deliberative, opinion based, and consultative. It was not a final decision nor contain purely factual information and not in the public's interest for it to be released.

If the University is unable to deliberate, it will inhibit and harm the ability of the University to function effectively. It is therefore not in the public interest to release information used for internal deliberation as the University moved towards making a decision and/or embarking upon a course of action.

23 Mr Parnell also outlined a claim for exemption under s38 of the Act. However, as the decision upon internal review did not rely on s38, I will not restate this here.

24 Mr Parnell then addressed the matters in Schedule 1 in relation to the public interest test. These are also considered in the Analysis under the *Public Interest Test* below.

Mr Hogan

25 In his internal review request dated 17 April 2023, Mr Hogan made submissions contesting the claims for exemption made by Mr Parnell in his decision. Mr Hogan argued that the public interest test had not been applied correctly, and that the University has not discharged its onus to show that the information should not be disclosed. Mr Hogan also submitted that there has been an insufficiency of searching for the information by the University.

26 Specifically, Mr Hogan separated his submissions into three heads: documents identified, documents not identified and Mr Parnell's decision.

27 *Documents identified*

In response to the delegate's following statement:

I have determined that the material you have sought are working drafts and development feasibility assessments for modelling a range of development options. The information was sought from Deloitte and used for internal deliberations only.

Mr Hogan observed as follows:

- *The failure to date the third document is contrary to guidance provided on page 61 of the Ombudsman's Manual (section 8.5).*
- *The status of the third document should be made clear. Is it draft or final?*

- *Given their seeming importance, the documents are inadequately described in both the decision letter and the schedule.*
- *I have it on good advice that DAE were still working on this project in August 2022.*

As Utas has placed such emphasis on the financial case for its CBD move, and DAE's work is critical in the statement of UTAS' financial case to the LegCo Inquiry, it would be of major concern if UTAS had relied on draft or preliminary assessments by DAE.

28 *Documents not identified*

Mr Hogan submitted that the University ignored his request for *all related documents (working papers etc)* related to the DAE research which was specifically named in his original application under the Act. Mr Hogan further submitted that all such information should have been included in the schedule of documents and considered for release.

29 As mentioned above, Mr Hogan and the University are now in consultation regarding any other relevant information, which will be dealt with, if necessary, separately from this review.

30 *Mr Parnell's decision*

With regard to the delegate's decision to exempt the information from disclosure Mr Hogan submits as follows:

Mr Parnell's broad-brush approach of completely exempting information goes against the presumption of disclosure found in the RTI Act. Mr Parnell's decision to exempt this information also relies on a series of generic arguments. The documents he has identified are, for example, determined to be exempt under various sections of the RTI Act because; they are "business related confidential information of Deloitte" (RTI Act Section 37); Deloitte's "report is marked on each and every page as confidential" (RTI Act Section 39); they are "working drafts and development feasibility assessments for modelling a range of development options" (RTI Act Section 35); and "the information is likely to expose the University to competitive disadvantage."

The three identified documents all undoubtedly include factual material of a nature that is not sensitive and this should be able to be freely provided. Moreover description of material as "confidential" does not make it automatically exempt under the provisions of the RTI Act.

Over and above this, Mr Parnell's argument on the public interest in his decision letter is weak, especially as he seems to take no account of relevant Ombudsman and Supreme Court determinations. In particular he fails to apply a balancing test for and against the public interest, thereby excluding from consideration a number of elements in Schedule 1 of the Act that are heavily in favour of the public interest. Indeed, Mr

> *Parnell fails to provide any evidence of detailed consideration of the reasons for favouring release in the public interest.*

31 Mr Hogan submits that the proposed relocation of the University's campus to the Hobart CBD and redevelopment of the present site are matters of great public interest. Mr Hogan cites, for example, the Elector Poll that was taken during the Local Government elections in October/November 2022, and the large number of submissions to the Legislative Council Select Committee Inquiry into the *University of Tasmania Act 1992*.

32 Finally, Mr Hogan argues that:

> *UTAS has relied heavily on the "financial" sustainability argument to justify its relocation and in its presentation to the LegCo inquiry it has relied heavily on DAE to make this case. UTAS should release as much relevant material as possible, in line with the objectives of the Act.*

33 In his application for external review dated 29 May 2023, Mr Hogan set out the grounds for his application under s44(1) as follows:

> *I believe that the internal review decision is manifestly flawed, being a broad brush response in which UTAS seeks to find arguments for withholding all the material requested rather than releasing as much as it can.*
>
> *As this case goes to key areas of interpretation, and involves major public interest, I will provide a supplementary submission, prepared in conjunction with Prof Rick Snell, soon. I am also submitting a request for priority consideration.*

34 On 14 August 2023, Mr Hogan filed further submissions. He commenced by providing background to the case and the public interest in it. Mr Hogan's submissions specifically related to the public interest matters in Schedule 1 will be considered in the Analysis under the *Public Interest Test* below.

35 In respect of the University's reliance on s35, Mr Hogan argued that the University was being inconsistent.

> *On the one hand, [the University] claims – by fact of identifying them as responsive to my RTI application – that these are the documents on which UTAS based its major financial claims (its major argument for its relocation project) to the LegCo Inquiry (see Attachment A). On the other hand, it seeks to exempt the documents because they are draft, preliminary or internal documents.*

36 Mr Hogan noted that Ms O'Keefe referred to only one Report in her arguments for exemption under s37 of the Act in her internal review decision. However, the Schedule of Documents attached to the University's first decision indicates that s37 is relied upon for both Documents 1 and 2.

37 Not being privy to the information, Mr Hogan speculated that, based upon his professional experience in dealing with business cases, cost-benefit analysis and

financial modelling by consultants, the information would not be exempt under s37, but that any material that may be exempt under this section could easily be redacted. Mr Hogan further set out that:

> *the STEM Facility Business Case and the numerous consultants reports contained in UTAS' application for a Planning Scheme Amendment have now been released by UTAS in their entirety. I find it difficult to believe that the three documents that UTAS has exempted in this case contain material that is more commercially sensitive than that contained in every single one of those reports, let alone that they are fully comprised of such sensitive material, as the logic of UTAS' position would require.*

38 With regard to the claim for exemption under s39, Mr Hogan submits that the University's argument for relying on this section of the Act is spurious and lacks veracity. In particular, Mr Hogan submits that if the delegate's argument is:

> *… to be taken as having any validity, it would be a recipe for every potential contracting agency and consultant in Tasmania to be able to subvert the RTA Act if they wished. Distilled, the argument is:*
>
> - *We (client and consultant) do not have to worry about whether information is confidential to label it such.*
> - *It is enough for us to agree to treat the information as [sic] it was confidential.*
> - *If we, the client, do not then keep the information confidential [notwithstanding any legal obligations we may have] it may damage our ability to obtain similar information [does Ms O'Keefe mean confidential information or information that is not confidential but merely labelled such?].*
>
> *This is a thoroughly misconceived and/or deeply cynical argument.*

39 Mr Hogan has also made submissions regarding the application of s19 of the Act in anticipation of the University relying on that section to avoid releasing information on the grounds that it would unreasonably divert resources. I will not quote or address these submissions, as this external review does not require an assessment of the application of this section.

Analysis

40 The Schedule of Documents annexed to the University's initial decision on Mr Hogan's application lists the relevant information under three separate headings:

- Deloitte Financial Feasibility Assessment – Working Draft – March 2022 [Document 1]
- Deloitte Financial Outputs – Preliminary Assessment – 30 November 2021 [Document 2]

- Internal scenario and sensitivity modelling to the concept Sandy Bay masterplan

41 As the information consists of two separate, complete documents, clarification was sought as to how the three headings related to the two documents. The University's legal office clarified that the third heading related to certain specific items on page 76 of Document 1 and page 10 of Document 2. The University relies on ss35 and 39 to exempt information under the third heading. For all other information, the University relies on ss35, 37 and 39.

Section 35 - Internal deliberative information

42 For information to be exempt under s35(1), I must be satisfied that it consists of:

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

43 As the information was not created by a public officer of a public authority or Minister and does not consist of consultations between officers of public authorities or Ministers, it cannot be exempt under s35. This exemption cannot be used in relation to documents created by external consultants. The information will be considered under the alternative exemption proposed by the University, s39.

Section 37 – Business affairs of a Third Party

44 For information to be exempt under s37(1)(b), I must be satisfied that its release would disclose information related to business affairs of a third party acquired by the public authority from a person or organisation other than the applicant, and that the disclosure of the information under this Act would be likely to expose the third party to competitive disadvantage.

45 The concept of likely competitive disadvantage has been considered by the Supreme Court of Tasmania in relation to the equivalent provision under the now repealed *Freedom of Information Act 1991*. The Court held in *Forestry Tasmania v Ombudsman* that:

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

potential impact on the undertaking or agency acting as a competitor in the market…[2]

46 At paragraph 41 the Court interpreted 'likely' to mean that there must be a real or not remote chance or possibility, rather than more probable than not.

47 I note here, that in the New South Wales Supreme Court decision of *Kaldas v Barbour*[3] it was held that the Ombudsman is not subject to the supervisory jurisdiction of the courts of that State. I have since considered and taken legal advice on the position in Tasmania. As a result, I have formed the view that the same reasoning applied by the NSW Supreme Court applies in this jurisdiction due to s33 of the *Ombudsman Act 1978* and that I am also not subject to the supervisory jurisdiction of the Tasmanian Supreme Court.

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

49 In this instance, the University advises it consulted with the relevant third party (Deloitte) pursuant to s37(2), and Deloitte objected to the disclosure of the information. This was on the grounds that the information includes business related confidential information of Deloitte, and is information that gives Deloitte a competitive advantage in comparison to other firms that offer similar services.

50 The relevant information comprises two reports which were prepared for UTAS Properties Pty Ltd by Deloitte Real Estate Advisory. The University submits that if the information was disclosed, it would be available to the Deloitte's competitors and would be detrimental to Deloitte's market position and business affairs. Specifically, the University set out that Deloitte contended:

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

[2] *Forestry Tasmania v Ombudsman* [2010] TASSC 39 at [52]
[3] [2017] NSWCA 275 (24 October 2017)

> *and not a remote chance that it's disclosure may damage the reputation of the third party, hence being to it's* [sic] *disadvantage and to it's* [sic] *competitor's disadvantage.*

51 With regard to the above specific submissions, I make the following observations.

52 Deloitte is a commercial enterprise, and is very well known in the market. I do not see how the disclosure of the information would lessen Deloitte's ability to maintain competition between its suppliers.

53 Deloitte is a high profile firm and its type of work, including the nature of its reports, the industries that it operates in, its methods, approach, style and deliverables are all very well known. Deloitte provides a vast amount of information on its websites, in Australia and abroad, with regard to its services, products and expertise. I am not at all convinced that disclosure of the relevant information would have a negative impact on its market position. I would expect that a very large number of its reports have made their way into the public domain, indeed I recently ordered a Deloitte document be disclosed in my decision of *Alexandra Humphries and the Department of Health*.[4]

54 With regard to the case studies set out in Chapter 7 of Document 1 (pages 58-68), I note that the following disclaimer has been set out on page 60:

> *We note that the above information is provided as commercial in confidence and should not be distributed to any third parties under any circumstances.*

55 This is in connection with the case study of the Shell Cove Urban Release Project in NSW. I am aware that a very large amount of information regarding this project (dating back to at least 1995) is publicly available on the Australand (Frasers Pty) website, the Shellharbour City Council website, as well as NSW Government websites with regard to planning and major projects, and the Independent Planning Commission website.[5] I am not persuaded that there is any information here which is not already publicly available. I will refer to this information again during my analysis under s39.

56 With regard to the other case studies set out in pages 61-67, I note that the information contained in them is also in the public domain and can be found on various relevant websites[6]. I will refer to this information again under s39.

---

[4] (29 June 2023), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions

[5] For example, see: Shellharbour City Council: https://www.shellharbour.nsw.gov.au/things-to-do/waterfront-shell-cove; NSW Government.: https://www.planningportal.nsw.gov.au/major-projects/projects/shell-cove-boat-harbour-redevelopment; NSW Independent Planning Commission: https://www.ipcn.nsw.gov.au/cases/2018/11/shell-cove-boat-harbour-precinct-concept-approval-mp-07-0027-mod1; Frasers Property: https://www.frasersproperty.com.au/nsw/shell-cove.

[6] See La Trobe University: https://www.latrobe.edu.au/__data/assets/pdf_file/0003/600942/1.0-MMP-Introduction.pdf; Kelvin Grove: https://www.aurecongroup.com/projects/government/kelvin-grove-urban-development; https://www.researchgate.net/publication/259742693_Kelvin_Grove_Urban_Village_A_strategic_planning_case_study; Bingara Gorge: https://bingaragorge.com.au/masterplan; Simon Fraser University: https://www.sfu.ca/burnaby2065/campus-master-plan.html

57 With regard to the fourth dot point, Ms O'Keefe has cited my earlier decision of *Environment Tasmania and the Environment Protection Agency* (2017)[7] as authority for an argument that attempts to circumvent the first requirement of s37, that the information be related to business affairs of a person or organisation other than the person making the application under the Act. Regardless of the paragraph quoted by Ms O'Keefe, I have made it clear elsewhere in that decision[8] that the information did relate to business affairs of a third party organisation.

58 In this case however, the first element of s37 is not satisfied, as it is not clear how this report relates to the business affairs of Deloitte. I do not consider that the University has discharged its onus under s47(4) to show that the information is exempt under s37 and should not be disclosed. The information responsive to Mr Hogan's request under the Act was compiled by Deloitte upon engagement by the University to provide development feasibility financial modelling for the Sandy Bay Redevelopment Project. The information relates to the University's project and not to a third party's business affairs. And further, in any case, I am unable to see how the disclosure of the information under the Act would expose the third party to competitive disadvantage.

59 In view of the above, I agree with Mr Hogan that it is difficult to understand why this report would be commercially sensitive for Deloitte. I am not satisfied that any information responsive to Mr Hogan's request is exempt pursuant to s37.

Section 39 – Information obtained in confidence

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

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

(b) the disclosure of the information would be reasonably likely to impair the ability of the Department to obtain similar information in the future.

61 The University relies on s39(1)(b), as set out above. In the University's first decision dated 17 March 2023, the University's delegate under the Act addressed the application of s39 to the information:

> *The Deloitte Working Draft* [Document 1] *and Deloitte Financial Modelling Outputs* [Document 2] *collected and utilised information from various sources both from the University and outside the University that was readily understood to have been divulged in confidence. The consultant authors* [sic] *engagement was for strict confidentiality. The report is marked on each and every page as confidential. The report is*

[7] *Laura Kelly, on behalf of Environment Tasmania and Environmental Protection Agency* (12 June 2017) at [147-148] available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decision.
[8] See Note 10 at [138]

marked as containing information that has been provided as commercial in confidence not to be distributed to any third parties under any circumstances.

If confidential information cannot be provided by and to the University for completion of commercially sensitive advice then it is highly likely to impair the University's ability to obtain similar and usable information in the future from its consultants. Third parties will be less likely to provide necessary information for a usable report if the information they provide is not kept in confidence.

62 Upon internal review, the delegated right to information officer, Ms O'Keefe, expanded on the University's position and referenced my discussion of the elements of s39 in previous decisions.[9]

63 Legally, information is generally considered to have been *communicated in confidence* if it was communicated and received under a mutual understanding that the communication would be kept confidential.[10] The mutual understanding must have existed at the time of the communication not the time of the request for access.[11]

64 Ms O'Keefe advises that, in this case, the arrangement with Deloitte was for strict confidentiality. In addition, Ms O'Keefe points out that each page of both Document 1 and Document 2 is marked with the word 'confidential,' or with a disclaimer that it contains information that has been provided as commercial in confidence and not to be distributed to any third parties under any circumstances.

65 Subject to s39(2), a mutual understanding of confidence can exist even if a person is legally obliged to provide the information to the public authority,[12] which was not the case here. On the other hand, if a public authority has a statutory obligation to publish or release specified information, that obligation will outweigh any undertaking by the public authority to treat the information confidentially, and therefore any mutual understanding of confidence.[13]

66 While the marking of a document as confidential is not determinative, it is an indication of the intention of the parties. I am satisfied, in this instance, that there was a confidential communication of this information from Deloitte to the University. When a public authority seeks expert advice, it is standard for this to be provided in confidence and the consultant is not at liberty to share that advice more broadly. The public authority may then make the report or

---

[9] See *Elaine Anderson and Director for Inland Fisheries* (28 April 2021) and *Blue Derby Pods Ride Pty Ltd and Department of Natural Resources and Environment* (30 June 2022) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.

[10] *Re Maher and Attorney-General's Department* [1985] AATA 180. In *Luchanskiy and Secretary, Department of Immigration and Border Protection (Freedom of information)* [2016] AATA 184 at [32]

[11] *Secretary, Department of Foreign Affairs v Whittaker* (2005) 143 FCR 15.

[12] *National Australia Bank Ltd and Australian Competition and Consumer Commission* [2013] AICmr 84 [23]

[13] *Re Drabsch and Collector of Customs and Anor* [1990] AATA 265

advice public, or it may be released under this Act, but it will still have been communicated in confidence to the public authority.

67 It is necessary to consider next whether the information would be exempt if it were generated by the University or whether its disclosure would be reasonably likely to impair the ability of the University to obtain similar consultant reports in future.

68 The University has relied upon s39(1)(b), claiming that it is *highly likely to impair the University's ability to obtain similar and usable information in the future from its consultants who are engaged on a confidential basis*. However, I do not consider that the University has discharged its onus to show that s39(1)(b) would apply. Beyond the necessity to show that the information has been provided in confidence, it must be demonstrated that the disclosure must be reasonably likely to impair the ability of the University to obtain similar information in the future. I am not persuaded that this is the case.

69 As I said in my earlier decision of *Simon Cameron and Department of Natural Resources and Environment Tasmania*, someone who is in the business of providing services, such as a consultant, is highly unlikely to decline to provide services because the report they provide under contract with a public authority is released under the Act.[14] Professional consultants and contractors who regularly engage with public authorities will be well aware that their reports may be the property of the Government and end up, to some degree, in the public domain. This is unlikely to deter service providers from seeking new contracts with public authorities.

70 In view of the above, I am not satisfied that the information responsive to Mr Hogan's request is exempt pursuant to s39(1)(b).

71 However, I am prepared to consider whether the information is exempt information under s39(1)(a) of the Act. That is, whether disclosure of the information under the Act would divulge information in confidence by or on behalf of a person to a public authority where the information would be exempt if it were generated by a public authority.

72 In order to determine whether the information would be exempt information if it were generated by the Department rather than a third party, I must assess the information under s35 of the Act – internal deliberative information.

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

74 The University also relied on s35 as a basis for claiming exemption from disclosure of the information. As the information was not prepared by an

[14] (21 January 2022), available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions at [142].

officer of a public authority, the exemption is now being considered by virtue of s39.

75 Having satisfied the requirements of s35(1), I must then be further satisfied that the information was prepared or recorded in the course of, or for the purpose of, the deliberative processes related to the official business of the University.

76 The outlined exemption above does not apply to the following:

- purely factual information;[15]
- a final decision, order or ruling given in the exercise of an adjudicative function;[16] or
- information that is older than 10 years.[17]

77 The concept of 'purely factual information' in s35(2), was considered in *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1).*[18] The Commonwealth Administrative Appeals Tribunal (AAT) observed that the word 'purely' in this context has the sense of 'simply' or 'merely' and that the material must be 'factual' in fairly unambiguous terms, and not bound up with a decision-maker's deliberative process. In other words, the 'purely factual information' must be capable of standing alone.

78 The meaning of the phrase 'in the course of, or for the purpose of, the deliberative processes' has also been considered by the AAT. In *Re Waterford and Department of Treasury (No 2)* it adopted the view that these are an agency's 'thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.[19]

79 The University has relied on paragraphs (a) and (b) of s35(1). In the University's decision on internal review, Ms O'Keefe submitted that the relevant material, being *working drafts and feasibility modelling was for consideration of the various potential scenarios by the University and by its nature was deliberative, opinion based and consultative.* Ms O'Keefe further noted that the information is not purely factual or a final decision.

80 In particular, Ms O'Keefe submits:

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

---

[15] Section 35(2)
[16] Section 35(3)
[17] Section 35(4)
[18] *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at [14]
[19] *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588

81 The University has claimed exemption in respect of the entire documents and I agree with Mr Hogan that *such a broad brush approach of completely exempting information goes against the presumption of disclosure found in the RTI Act*.

82 Upon examination of the information, I find that the following pages are purely factual in character and are not exempt under s39(1)(a):

- Document 1: pp 1-4, 7 ("Community Objections" segment only), 11, 14-19, 21, 24-25, 30, 35, 38-39, 48, 58-59, 60-68 (apart from the sections titled "Relevance to Sandy Bay Project"), 74-82.
- Document 2: pp 1-5, 9-18, 22.

83 I am satisfied that the information contained in the remaining pages comprises information that could be exempt information if it were generated by a public authority. I am further satisfied that the information consists of opinion, advice or recommendation, or a record of consultations or deliberations. Accordingly, I consider that the information is prima facie exempt under s39(1)(a) of the Act.

Public interest test

84 Section 39 is subject to the public interest test contained in s33 of the Act. It is therefore necessary to assess whether it would be contrary to the public interest to release the information that I have found to be prima facie exempt. In making this assessment, I am required to have regard to, at least, the matters in Schedule 1 of the Act.

85 In the University's original decision, Mr Parnell considered the following matters in Schedule 1 to be applicable in the circumstances:

> (b) - whether the disclosure would contribute to or hinder debate on a matter of public interest;
>
> (c) - whether the disclosure would inform a person about the reasons for a decision;
>
> (d) - whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
>
> (k) - whether the disclosure would promote or harm the economic development of the State;
>
> (n) - whether the disclosure would prejudice the ability to obtain similar information in the future; and
>
> (s) - whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation.

86 I agree that matters (b), (c), and (d) all weigh in favour of disclosure. Disclosure of the information would contribute to debate on a matter of public interest. Conversely, withholding the information would stifle debate. Likewise,

disclosure would inform a person about the reasons for a decision, and provide contextual information.

87 In addition, the pro-disclosure object of the Act and matter (a) – the general public need for government information to be accessible – are always relevant and weigh in favour of release of information in any public interest assessment.

88 Mr Parnell made the following submissions in relation to matter (k):

> *While the University is an education charity and registered as such, it is also well established that it operates as a trading corporation and must be able to make commercial decisions based on internal deliberations. Threats to this ability to deliberate as part of its commercial operations jeopardises the Universities abilities to meet its core functions and risks harming the economic development of the State if highly commercially sensitive information used for internal deliberations is publicly released.*

89 While I accept that the University does undertake commercial activities and is the only tertiary educational institution in Tasmania, I do not agree that this factor weighs against disclosure in this instance. The University has already decided that it intends to move its Sandy Bay campus and it is difficult to understand the argument that the release of analysis being used to support this decision would harm the economic development of the State. The University is a public institution and, as such, is accountable to the public like other government agencies.

90 Taking this into account with regard to the University's submission around matter (k), it is my view that the risks of harm to the economic development of the State would be greater if major decisions were not subject to public and government scrutiny and accountability.

91 In relation to matter (n), I have already discussed whether disclosure would prejudice the University's ability to obtain similar information in the future in relation to the exemption under s39.

92 In terms of the public interest test, Mr Parnell argues that:

> *Releasing sensitive commercial information supplied by a third-party contractor under an understanding and agreement of commercial in confidence would prejudice the University from obtaining similar information in the future and would place the University in a precarious position if it were required to breach obligations of confidentiality.*

93 Ms O'Keefe reiterated this argument in her decision upon internal review and added the comment that she considered that the:

> *Intellectual property in the Deloitte reports rests with Deloitte. It was procured under confidentiality and was marked confidential.*

94 I am not persuaded by any argument the University has presented that disclosure of the information would prejudice the University's ability to obtain similar information in the future. The University should be aware that the

operation of the Act cannot be circumvented by contract. I find it highly unlikely that the third party would not be aware that entering into arrangements with public authorities in Tasmania may result in disclosure of the resulting reports and information. This is the nature of doing business with government, and such contractors and consultants who do business with government, particularly professional enterprises who are as experienced as Deloitte, will be well aware of this.

95 Likewise, I find that the argument regarding the intellectual property of the third party is ill conceived. It is usual practice that where a party commissions a report, the commissioning party retains copyright. If the parties contemplate other circumstances, that would need to be explicitly expressed in their agreement. On the material before me, I am not able to say whether this is the case. In any case, the Act may not be excluded by contract.

96 In addition, while Ms O'Keefe sets out that *intellectual property in the Deloitte reports rests with Deloitte*, disclosure of the information under the Act is not an infringement of any intellectual property retained by Deloitte. Copyright or intellectual property is not an applicable exemption, this is only relevant in relation to the provision of information under s18(4) where the information is not otherwise exempt. Information is often made available for inspection, instead of copies being provided, in such instances.

97 Finally, I am not persuaded that this situation with Deloitte is any different from the numerous third parties who have been engaged by the University to consult and produce reports which are already publicly available on the University's website. Use of consultants is widespread by public authorities and it would thoroughly undermine the public's right to information if publicly funded consultant reports were considered to belong to the consultants and disclosure were not permitted.

98 With regard to matter (s) the University argued that disclosure would harm the business or financial interests of Deloitte by eroding the competitive advantage of its business in comparison to other similar professional service firms. The University contends that this would be against the public interest because it would prejudice the effectiveness of Deloitte's information gathering process and ability to deliver accurate and comprehensive deliverables to its clients.

99 As with the argument in relation to matter (n), I am not persuaded that disclosure of the information would prejudice Deloitte's ability to gather information and deliver its services to clients. I am not persuaded that disclosure would harm the business or financial interests of Deloitte.

100 In terms of whether the disclosure would harm the business or financial interests of the University, Mr Parnell argued that:

> *As part of its core operations, it competes against universities around the world. If commercially sensitive information is publicly released, it may be*

used by the University's competitors in such a way that it would expose the University to a competitive disadvantage.

101 Ms O'Keefe expanded on the public interest aspect, finding that on balance weight was against disclosure:

> *The University competes in a local, national and international market for the attraction and retention of students. It also competes with 40 other Universities in the higher education sector for students broadly.*
>
> *All specific information relating to commercially valuable information such as commercial yields, details of financing arrangements, feasibility plans for strategic property management and confidential reports would likely result in market competitors having information that they would not ordinarily have access to and likely disadvantage the University from gaining access to this information in the future.*

102 I find this argument to be weak, in view of the number and range of masterplans of university development projects, both in Australia and abroad, that are freely available to the public. Indeed, some of these case studies have been referred to in the assessed documents and are easily accessible. Rather, it seems as if universities are well aware of what development projects and state of the art advancements are taking place within the sector.

103 I note Mr Parnell's argument that the material comprises "working drafts and development feasibility assessments for modelling a range of development options."

104 It appears that the material contains a range of hypothetical scenarios which have been subjected to forecasting computations, which in my view does not amount to revelation of the University's actual financial position or particularly valuable commercial information. But, rather, it presents a range of possibilities based on a number of assumptions which may or may not change over time.

105 Apart from universities which are privately owned, it appears that university development plans are fairly well known. It is therefore difficult to substantiate a claim that disclosure of the information would result in the possibility of competitive disadvantage for the University.

106 In addressing the public interest matters in his submissions, Mr Hogan referred to the public interest considerations which caused him to seek priority in the assessment of this review. These have been noted at the outset. Mr Hogan also submitted that the public interest has been strengthened by a number of developments.

107 First, Mr Hogan submits that, after analysing the material that is publicly available, he has determined that the information sought under this application (which he refers to as the DAE research) is the critical piece of information in the UTAS relocation decision.

108 Second, Mr Hogan submits that the value of the project, which he estimates is at least $4 billion, means that the project is of critical significance to Tasmania. Mr Hogan suggests that if the University's plans fail this could result in the State's finances being severely affected. Accordingly, Tasmanians should be entitled to access the crucial information about the University's plans. Mr Hogan contends that the crucial information is contained within the documents which were located responsive to his RTI request.

109 Thirdly, Mr Hogan submits that there has been a lack of proper government scrutiny of the University's dealings, at both State and Commonwealth level, around this project.

110 Fourth, Mr Hogan submits that the University's southern campus relocation project would be one of the largest infrastructure projects in the history of the State and there are significant financial risks involved with a project this size.

111 Finally, Mr Hogan argues that the University has used a broad brush approach for exempting information which goes against the presumption of disclosure under the Act. Mr Hogan submits that the University has not applied the public interest test correctly by failing to raise any maters under Schedule 1 which could be said to be in favour of disclosure.

112 I agree with Mr Hogan, in this instance, that the University has taken an overly broad approach to exemption and appears to have considered the information holistically rather than undertaking a line by line assessment genuinely considering whether the information could be released. While the redaction of entire documents is not necessarily inconsistent with the object of the Act if the information is legitimately exempt, as I discussed in a previous decision with these same parties,[20] it is unusual that internal deliberative information would contain zero purely factual information or detail that can be released.

113 This is clearly demonstrated in this instance, as there is factual information and publicly available information in the material responsive to Mr Hogan's request and it is disappointing that the University has claimed a blanket exemption over entire documents. While there may have been valid claims for exemption made over some information, the University has been perfunctory in its assessment and failed to acknowledge the substantial amount of purely factual information contained within the documents.

114 It is not clear to me whether the information holds the critical piece of information in the University relocation decision, as Mr Hogan anticipates. However, the information was relied upon in its submission to the Legislative Council Select Committee Inquiry, as mentioned above.[21] Therefore, in my view, if the University is so reliant upon the information as to cite it in its submission to the Tasmanian Government inquiry, it should be available for scrutiny by the public.

---

[20] See *Robert Hogan and the University of Tasmania* (2 June 2023) available at www.ombudsman.tas.gov.au/right-to-information/reasons-for-decisions.
[21] See Note 2.

115 In addition, this appears to debunk the University's other argument that the information consists of working drafts and is meant for internal use only. If the information has been cited to the Government inquiry, it could be presumed to be a substantially complete iteration. This is a use of the information that is clearly not internal. Finally, it appears that documents are in a sufficient state of finality that they have been delivered to the client (the University) by the consultant (Deloitte) presumably in completion of the terms of its engagement.

116 Thus, using the label "draft" is not sufficient to prevent disclosure under the Act. There must be some sort of evidence that shows that a document is in draft form and not yet a finalised piece of work. This is not the case here, where the evidence seems to show (in referring to the material in a submission to Parliament, and delivery of the report by the consultant to the client) that the work is past the point of being in draft and is a final product.

117 In my view, there is clearly a public interest in how the only higher education institution in Tasmania makes decisions in relation to its functions under its governing legislation, particularly where this involves the administration of public funds.

118 Taking into account all relevant maters, on balance I find that it would not be contrary to the public interest to release the information to the applicant.

119 I do not consider that the University has discharged its onus under s47(4) to show why the information should not be disclosed and it should be released in full to Mr Hogan.

Preliminary Conclusion

120 For the reasons set out above, I determine that exemptions claimed by the University under ss35, 37 and 39 are not made out.

Submissions to the Preliminary Conclusion

121 As the above preliminary decision was adverse to the public authority, it was made available to the University under s48(1)(a) of the Act, to seek its input before finalising the decision. On 12 October 2023, Mr Brendan Parnell of the University made further submissions to this office in response to the preliminary decision.

122 Mr Parnell made submissions with regard to the exemptions claimed under s39, in addition to raising new arguments for exemption of information under s36.

123 With regard to s39(1)(b), Mr Parnell disagrees with some of my assessment, in particular, with regard to the issue of whether the disclosure of information would be reasonably likely to impair a public authority from obtaining similar information in the future. Mr Parnell argues that my reasoning is overly generalised and does not make enough allowance for the possible negative

outcomes which could impact the University and third parties. Specifically, he sets out:

> *Consultants such as Deloitte are regularly engaged by government agencies and, as you note, are unlikely to stop seeking new engagements and providing services as a result of their work and reports being made public. It is highly likely that this type of work forms a significant part of their business and it would not be in their interest to wholesale refuse this work.*
>
> *Nevertheless, while they are likely to keep tendering and seeking government professional engagements, they are less likely to provide useful commercial insights and written reporting on that information where they are aware there is a heightened risk of its public release. In short, government agencies risk receiving a lower standard of third-party professional service if we cannot at the very least redact personal information of their employees (see below) and case studies where they have utilised a range of methods and insights to obtain commercial information – irrespective of whether the information may be located by competitors through a range of publicly available means. The very fact they have brought that information together from outside sources in such a way as to make it relevant to the engagement is part of their utility. While pieces of information may be publicly available, we still require people with the right skills to attain it, assess it, and apply it to the respective engagement scope.*
>
> *In my view, Deloitte's request for their case studies to remain commercial in confidence is an entirely reasonable request in the circumstances of their engagement with the University and it is appropriate to apply the exemption at s39(1)(b). As noted at paragraph 63, the information was communicated under a mutual understanding that it would remain confidential and their work in preparing those case studies should remain so.*
>
> *However, considering your points that much of the information appears to be public, I am also of the view that page 59 of the relevant Deloitte report is information that is useful to the RTI Applicant and provides them with the necessary detail as to what other projects were considered in preparing the report. The RTI Applicant is then provisioned with the information to undergo their own investigations into those projects if they choose and draw their own conclusions. Deloitte, on the other hand, retains confidentiality of the information they prepared in confidence from those case studies. I believe this is not only a fair and reasonably* [sic] *outcome, but a correct balance of ensuring we achieve meeting the public interest with the Deloitte reports while exempting commercial in confidence information relevant to s39(1)(b).*

124 Mr Parnell also submitted that the exemption of certain personal information under s36 should now be considered. The University had not previously claimed any exemption under s36, in view of the University's position that all

the information responsive to Mr Hogan's request was exempt under other sections of the Act. However, Mr Parnell submitted that it is now appropriate to consider the exemption of certain personal information under s36, detailed in his correspondence to this office dated 28 September 2023. Specifically, the personal information relates to employees of the University and of the third party on page 3 of Document 1, and pages 3 and 5 of Document 2.

Further analysis

125 In determining the issues before me, I have taken into account the submissions from Mr Parnell, and have continued to consider Mr Hogan's previous submissions.

Section 39(1)(b) – Information obtained in confidence

126 I understand the University's desire, and that of Deloitte, to keep certain information from disclosure, particularly the information around the aforementioned case studies. I also understand the concerns that the standard of advice and service from third parties may suffer if third party consultants thought that the information and product they deliver could not be controlled the way they would like. Insights that have been gleaned from other clients and projects which may be commercial-in-confidence might not be shared, if these were subject to disclosure under the Act. I accept that this is likely to be the case in relation to the Shell Cove Urban Release Project case study on page 60 of Document 1, which is marked as commercial-in-confidence, and will accept that this is prima facie exempt under s39(1)(b).

127 I have not altered my view regarding the remaining case studies, as this information is in the public domain and I am not convinced that Deloitte or any other consultant would fail to provide similar analysis of such material in future under a paid contract for services. It has expended effort to collate the publicly available material and discuss the parallels to the University's project, but it was compensated for this effort and I am not persuaded that such work would not occur or would not be done to the same standard if these case studies are released.

128 I turn to assessing the public interest test in relation to the case study regarding the Shell Cove Urban Release Project at page 60. The University's main argument is in relation to matter (n) in Schedule 1 (which is almost identical to the test in s39(1)(b)), in relation to *whether the disclosure would prejudice the ability to obtain similar information in future*. It appears, from the additional disclaimer on page 60, which sets out that *the above information is provided as commercial in confidence and should not be distributed to any third parties under any circumstance*, that the information provided in part of that case study is not publicly available and has been obtained by Deloitte through its relationship with a party connected to the Shell Cove Urban Release Project. While it is not clear exactly on what basis this information is shared, it may well be that Deloitte is sharing commercial-in-confidence material obtained from one client with another, on the proviso that this is kept secret. While the

situations are different and Deloitte may have full permission from its clients to share this information with the University, there are some parallels with the type of behaviour which led to the recent scandal regarding PwC using taxation information obtained in confidence from the Australia Taxation Office to advise other clients on how to minimise their taxation obligations.

129 I have accepted that there is a reasonable likelihood of prejudice to the ability to obtain such information again, and give this factor moderate weight as I agree that commercial insights may not be shared as readily if they were made available to the general public under the Act.

130 I also agree with the University that factor (s) is relevant – *whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation*. This information does not relate to Deloitte or the University but, if it is commercially sensitive, could negatively impact the Shell Cove Council or Australand by releasing confidential details of their contractual arrangements. If this information has been shared without their knowledge, this could be even more detrimental. Accordingly, this weighs significantly against release of the contractual terms set out in the case study.

131 I also consider that factors (a) and (b) are relevant as there is always a *need for government information to be accessible* and this does relate to *debate of a matter of public interest*. I do not weigh these factors as highly in relation to this case study as with other parts of the information, however, as it is provided only as a point of comparison with similar projects and does not provide significant insight into the actions of the University. It has similarly lower weight in relation to matters (c) and (d), as it does not provide particular insight into the decision of the University to move its campus or much contextual information to understand this decision.

132 This is a difficult balance to strike in the circumstances but, overall, I determine that there is some information on page 60 of Document 1 which is exempt under s39(1)(b) as it would be contrary to the public interest to release it. This is only the dot points following the words *The commercial terms of the DMA* [Development Management Agreement] *were as follows*. The remainder of the words and images on the page (including the dot points in the red text box) are not exempt and should be provided to Mr Hogan.

Section 36 – personal information

133 The University now considers that certain personal information that appears in the reports should be exempt under s36 of the Act. This information consists of names of persons involved in the production of the reports. They appear on page 3 of Document 1 (a list of four Deloitte staff members), and pages 3 (the same list of Deloitte staff) and 5 of Document 2 (the name of a University staff member instructing Deloitte).

134 I consider that the provision is relevant and I am prepared to consider it at this late stage. For information to be exempt under s36, I must be satisfied that its release would reveal the identity of a person other than the applicant, Mr

Hogan, or that the information would lead to a person's identity being reasonably ascertainable.

135 As the information in question is the names of various individuals, I am satisfied that it is personal information of those people and it is prima facie exempt under s36. I will now consider the public interest test.

136 When considering personal information, I have been consistent in my approach and my previously expressed view that the names of public officers or officers of public authorities, such as the University, performing their regular duties are not usually exempt under s36.[22] The personal information of public authority employees, including names, position, and work contact details, will only be exempt when there are specific and unusual circumstances identified which justify it.

137 With regard to the University Development Manager listed on page 5 of Document 2, I do not consider that the circumstances of this case provide an exception to the general rule that the names of public authority staff performing their regular duties are not exempt from disclosure. That this officer holds a role at the University is information already available online and the University provides no argument as to why it would be contrary to the public interest for details of this person performing their regular duties to be released. I, therefore, consider that the employee's name on page 5 is not exempt and may be disclosed.

138 With regard to the employees of the third party who are listed on page 3 of the Document 1 and page 3 of the Document 2, the University has similarly not advanced any argument as to why the release of this information would be contrary to the public interest. These are consultants performing their regular duties and all of the people named have online profiles setting out their roles at Deloitte. It is not apparent why the release of this information would have any professional or personal consequences for them or *harm to the interests of an individual* under factor (m) in Schedule 1.

139 I am not satisfied that the University has discharged its onus under s47(4) to show why this information would be exempt and I find it would not be contrary to the public interest to do so. It is to be released to Mr Hogan.

Conclusion

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

- that exemptions claimed by the University under ss35, 36 and 37 are not made out; and
- the exemption claimed by the University under s39 is varied.

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

Dated: 23 October 2023

Richard Connock
OMBUDSMAN

Attachment 1 - Relevant legislative provisions

Section 35 – Internal Deliberative Information

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

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

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

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

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

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

(3) Subsection (1) does not include –

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

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

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

Section 36 – Personal information of a person

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

(2) If –

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 37 – Information relating to business affairs of third party

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

(a) the information relates to trade secrets; or

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

(2) If –

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

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

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

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

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

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

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

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

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

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

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

(c) inform the third party of –

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

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

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

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

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

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

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

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

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

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

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

Section 39 – Information obtained in confidence

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

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

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

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

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

(b) relates to trade secrets or other matters of a business. Commercial or financial undertaking; and

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

33. Public interest test

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

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

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

SCHEDULE 1 - Matters Relevant to Assessment of Public Interest

Sections 30(3) and 33(2)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(t) whether the applicant is resident in Australia;

(u) whether the information is wrong or inaccurate;

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

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

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

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