

TASMANIAN OMBUDSMAN



Freedom of Information Review under s.48 of the *Freedom of Information Act 1991*

SIMON CULLEN AND THE DEPARTMENT OF PREMIER AND CABINET
Case Reference: 700-0808048

REASONS FOR DECISION

1. Background

Simon Cullen, a journalist with the Australian Broadcasting Corporation, wrote to me on 28 August 2008 applying under s 48 of the *Freedom of Information Act 1991* (the Act) for the review of a decision by a freedom of information (FOI) officer in the Department of Premier and Cabinet (DPAC) that he was not entitled to certain information that he had requested.

Mr Cullen's original FOI request was made on 28 April 2008, and was in these terms -

"I am writing to seek access to any documents that mention or refer to Nigel Burch (a former ministerial advisor to Steve Kons). This includes - but is not limited to - documents (including emails, briefing notes, etc) originating from Mr Burch or to Mr Burch.

However, I would only like access to those documents created since the start of 2008."

Mr Burch was a Ministerial advisor to Steve Kons MP when Mr Kons was Deputy Premier, Attorney-General and Minister for Infrastructure, Resources, Planning and Workplace Relations. Revelations by Mr Burch led indirectly to Mr Kons' resignation as a Minister in April 2008. This was after Mr Burch's employment as an advisor had been terminated, resulting in an unfair dismissal claim.

It was agreed between Mr Cullen and the FOI officer who dealt with the request that it could be limited to documents pertaining to Mr Burch's tenure as a Ministerial officer, and should not be treated as extending to all documents that Mr Burch may have generated or received in the course of carrying out his duties.

The FOI officer made her decision on the request on 16 June 2008. A total of 23 documents was identified as falling within the request, but all but one of them was said to be exempt from release. Reliance was variously placed upon three sections of the Act as providing exemption - ss 27 (the internal working documents exemption), 29 (the legal professional privilege exemption) and 30 (the personal affairs exemption).

Attached to these Reasons for Decision is a copy of the Table of Documents which issued with the decision, summarising the reasons given for the decision taken. This table ascribes a number to each of the relevant documents.

Prior to making her decision, the FOI officer consulted with Mr Burch under s 30 of the Act in relation to 9 documents which she regarded as containing information covered by that section. Mr

Burch notified her by letter dated 6 June 2008 that he had no objection to the information being released to Mr Cullen.

Following receipt of the FOI officer's decision, Mr Cullen applied for internal review under s 47 of the Act. The internal review decision, by the Secretary of DPAC, was sent to Mr Cullen by letter dated 6 August 2008. It varied the original decision to a limited degree, in that the Secretary determined to release document 3 in full, and part of documents 4, 5, 8, 11, 15 and 21. No Schedule of Documents was attached to the Secretary's decision.

The decision before me is whether any of the information identified by DPAC as responsive to Mr Cullen's request but not released to him is exempt information under the Act.

I note that Mr Burch was not consulted with respect to all of the documents which might be said to contain information which is exempt under s 30. I personally provided him with copies of 6 particular documents, and received written confirmation from him that he did not object to the release under the Act of any of the information which was identified by DPAC as being responsive to Mr Cullen's request.

2. This review

2.1 Preliminary comments

I am satisfied that the only exemption provisions in the Act which require my consideration are those identified by the DPAC in making its decision.

Attached to these Reasons is a Schedule of Documents in which I briefly explain my decision with respect to each of the documents at issue. The numbering of this Schedule corresponds to that in the Table of Documents which accompanied the original decision.

I elaborate below on the reasoning set out in the Schedule. Before I do so, however, I make two preliminary observations.

The first of these observations is that the process of making a decision on a request for information under the Act requires intellectual rigour. When faced with a request, an agency might legitimately look at the political or policy consequences of release as a first step, but only for the purpose of deciding whether or not to release information irrespective of whether or not an exemption might be claimed under the Act - see s 12. Beyond that, the correct process is to look at the information which is identified as being responsive to the request and determine with objectivity whether or not any exemption applies to it. Some sections of the Act, such as ss 27 and 30, bring public interest issues into play in this process, but political or policy consequences of release are only relevant in that context.

The second observation is that the application of exemption provisions frequently requires evidence. If an agency fulfills its obligations under s 22 of the Act in making both the original decision and any internal review decision, I should have the necessary evidence to make my decision on an application for review under s 48. If evidence necessary to make out a claim for exemption is not provided, there is no prospect of me upholding that claim.

2.2 Section 27

This is the section which provides exemption for internal working information.

The Schedule sufficiently explains how I have applied this section to the information at issue to which the section is either relevant or claimed to be relevant. By way of explanation, I note that there are a number of basic elements which must be established for the section to apply -

- that the relevant information consists of an opinion, advice or recommendation prepared by an officer or a Minister;
- alternatively, that the information consists of a record of consultations or deliberations between officers and Ministers;
- that the opinion etc. was prepared, or that the consultations or deliberations occurred, in the course of, or for the purpose of, deliberative processes included in the functions of the agency or Minister, or the Government;
- that the disclosure of the information would be contrary to the public interest; and
- that the information is not purely factual information.

It is well-established that "deliberative processes" of the kind mentioned in the section represent pre-decisional thinking processes within the agency as it moves towards the making of a decision or towards embarking upon a course of action - see *Re Waterford and Department of Treasury (No. 2)* (1985) 5 ALD 588.

2.3 Section 29

This section declares information to be exempt information if it is contained in a record of such a nature that the record would be privileged from production in legal proceedings on the ground of legal professional privilege. Section 29(2) pointedly states that the exemption stated in s 29(1) does not apply "in respect of a record solely because it was created or received by a lawyer".

The Schedule sufficiently explains how I have applied this section to the information at issue to which the section is either relevant or claimed to be relevant.

I note that s 118 of the *Evidence Act* 2001 contains a definitive description of legal professional privilege in so far as it applies to legal advice. Relevantly, that section states -

"Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of –

(a) a confidential communication made between the client and a lawyer;

...

for the dominant purpose of the lawyer ... providing legal advice to the client."

2.4 Section 30

This section declares information to be exempt information under the Act "if its disclosure under the Act would involve the unreasonable disclosure of information relating to the personal affairs of a person".

The term "*personal affairs*" is not defined in the FOI Act and the cases make it clear that it cannot be precisely or exhaustively defined. In several cases it has been given its ordinary dictionary meaning, that is, "*matters of private concern to an individual*" (see *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 per Beaumont J at 221-222; *Young v Wicks* (1986) 13 FCR 85 per Beaumont J at 89.) In *Commissioner of Police v District Court of New South Wales (Perrin's Case)* (1993) 31 NSWLR 606 a decision of the Court of Appeal Kirby P noted at 625 that it has been suggested that the ordinary dictionary meaning might be too narrow. He there held that, "*In its context, the words 'personal affairs' mean the composite collection of activities personal to the individual concerned.*" I adopt this definition in considering the meaning of the phrase in this case.

In applying s 30(1), one must ask two questions. First, would disclosure of the information at issue disclose information that can be properly characterised as information concerning the personal affairs of a person? Secondly, if the information does relate to the personal affairs of a person, would disclosure of the information be unreasonable?

As can be seen from the Schedule, my answer to the first of these questions is in the negative in the case of two documents. This is where I have characterised information as relating to the employment affairs of an individual, not to their personal affairs - see documents 4 and 8. For cases where a similar distinction has been drawn, see *Perrin's Case (supra)*, and *University of Melbourne v Robinson* [1993] 2 VR 177.

My answer to the second of the questions which arises under s 30(1) is in the negative in numerous other instances where s 30 has been raised or might be thought to be relevant - see documents 2, 11, 12, 14, 16 and 19.

As I have noted above, Mr Burch has informed me that he has no objection to the release of any of the relevant information to Mr Cullen. This very clear issue is thus raised - can one under these circumstances say that it would be unreasonable for the information to be released?

In his internal review decision, the Secretary detailed various matters that the FOI officer had taken into account when determining that the release of the information would be unreasonable -

- "- *Mr Burch's personal view about release of the information*
- *Current public scrutiny of Mr Burch's termination*
- *Community interest in the procedures and work practices of the Government*
- *The information already in the public arena*
- *The nature of information not already in the public arena*
- *The terms of a deed of release*

- *The impact of information that may also prejudice Mr Burch's possible future employment"*

He continued -

- *"Although Mr Burch's employment has been and continues to be the subject of media and Parliamentary scrutiny, [the original decision-maker] did not consider there was any paramount public interest reason to release these documents as it would not inform the public about any aspect of the transparency or accountability of government practices or decision making in relation to these issues that is not already in the public domain.*

...

- *In making this determination I also note the following -*
 - *The release of material relating to an individual's termination is highly confidential and private. Given the potential of information to prejudice an individual's future employment prospects, the release of this type of information needs very careful consideration and a persuasive argument for disclosure.*
 - *The deliberative or reflective nature of some of the information that could be considered personal, and considerations of s 27 are also relevant to this information and any final decision about disclosure.*
 - *The applicant's comment about the confidentiality provisions in the Deed of Release and agree that it doesn't override the FOI Act. Although the deed is an indication of the views of the parties about the terms of the determination, this decision is based on the provisions of the FOI Act and not the Deed.*
 - *That the factual information in the relevant documents is already in the public arena and there would be no additional benefit to the public in releasing this information.*
- *I agree that some employment information such as a person's position, duties and salary is released in certain cases, but this is because the public interest is about the performance of government and the responsible expenditure of public funds. It is quite proper in those circumstances to release that sort of information because it promotes transparency and accountability."*

It was recently held by the Court of Appeal in Victoria in the case of *Victoria Police v Marke* [2008] VSCA 218, and also held long ago in the case of *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437, that the decision as to whether the release of personal affairs information would be unreasonable must be made in light of all the circumstances of the case. However, this decision must also be made in light of the purpose behind the provision. This, manifestly, is to protect personal privacy. As was said in *Re Chandra*, at para 51 : "Plainly enough what s.41 [the Commonwealth provision equivalent to s 30 of the Act] seeks to do is to provide a ground for preventing unreasonable invasion of the privacy of third parties." In so doing, provisions such as s 30 seek to protect the public interest in ensuring that the personal affairs of persons are not

unnecessarily disclosed in response to FOI applications : Lockhart J in *Colakovski v Australian Telecommunications Corporation* (1991) 100 ALR 111, at para 34.

The test of unreasonableness in s 30(1) thus imports public interest considerations, but this is not to say that it invites consideration of anything which might be said to bear upon the public interest in general. Since the purpose of the provision is to prevent the unreasonable invasion of the privacy of third parties, the issue of unreasonableness must be viewed from the perspective of what is unreasonable when considering the interests of the individual whose personal affairs are at issue, in the context of the overall responsibilities of government.

The application of the unreasonableness requirement in s 30 is much more straightforward where the individual affected is resisting release. In that setting, it is entirely obvious that the information should only be released where there are powerful public interest considerations which outweigh the public interest in protecting privacy which is inherent in the section, and which make it reasonable to release the information notwithstanding the consequences of so doing for the privacy of the individual. An example might be where it is more important to protect the public from some danger than to protect the privacy of the individual.

This case involves consideration of the unreasonableness requirement from the opposite side, where the individual is content for the relevant information to be released, and government asserts that it would be unreasonable for this to happen. In this setting, government is seeking the protection of the section, not the individual. Moreover, in this particular case government seeks that protection on the basis of taking into account a multiplicity of factors, most of which which bear on the public interest in general, not on the privacy interests of the individual.

This is an illegitimate approach, for it negates the purpose of the section and gives primacy to public interest considerations other than those which the section seeks to protect. In so doing, it risks frustrating the objects of the Act as stated in s 3, which are to improve democratic government in Tasmania in the ways stated in ss 3(1)(a) and (b) "by giving members of the public the right to obtain information contained in the records of agencies and Ministers *limited only by necessary exceptions and exemptions*" [emphasis added].

This is not to say that the views of the individual whose personal affairs information is at issue should be determinative of the question of whether or not the release of the information would be unreasonable. This is clearly not expected to be the case where the individual does not want the information released (s 30(4)), and nor should it be the case where the individual is content for the information to be released. Even though the individual is content, it may nonetheless be unreasonable, treating the individual's privacy interests as a prime consideration, to release their personal affairs information. An example might be where government determines that the individual does not have adequate capacity to understand the consequences which are likely to flow for them if the information is released.

The capacity of Mr Burch to appreciate the potential consequences of agreeing to disclosure is not in issue. That being so, I do not believe that the decision makers in DPAC could properly decline to release the information on the basis that this might prejudice his future employment prospects. That, it seems to me, is the only consideration which the decision makers took into account which gave primacy to his privacy interests. The other considerations were general public interest considerations which were irrelevant to the purpose of the section.

Under all the circumstances, applying the section purposively in the way that I have described, and taking account of Mr Burch's expressed views, I see no reason for saying that it would be

unreasonable to disclose the relevant information in documents 2, 11, 12, 14, 16 and 19. I accordingly determine that this information is not exempt under s 30.

3. Conclusion

I determine that DPAC should release all of the information to Mr Cullen that has been identified by the Department as responsive to his request, other than the information identified in the Schedule attached to this decision as being exempt. In this respect, I remind the Department of its obligation under s 48(7) of the Act to take all such action as may be necessary to implement the decision.

DATED: 18 DECEMBER 2008

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SIMON ALLSTON
OMBUDSMAN

Freedom of Information Act 1991

Applicant: Simon Cullen, ABC Journalist

Request: Made to Department of Premier & Cabinet (DPAC), 28/04/08

Table of Documents

No	Date	Document	Previously released?	Release on Review?	Reasons
1	02/03/08	Letter to Premier from Nigel Burch, and email cover sheet	No	Yes	<p>The release of this document was refused in the original request on the basis that the document was in the public domain. That is not a ground upon which release can be refused. If this was intended as a reference to s 9 of the Act, the requirements of that section are much more specific.</p> <p>In any event, the email cover sheet is not in the public domain. It carries some handwritten notes. I have no evidence which might enable me to apply any of the exemptions in the FOI Act to this document.</p> <p>There are no exemptions under the Act which apply to the letter to the Premier.</p>
2	14/03/08	Leave application	No	Yes	<p>This document contains information relating to Mr Burch's personal affairs. For reasons given in the attached Reasons for Decision, it is not unreasonable for the document to be disclosed. Hence it is not exempt under s 30.</p>
3	17/03/08	File note prepared by Manager Ministerial Services	Yes	No - already released	
4	17/03/08	Letter to Nigel Burch from Chief of	In part only	Yes	<p>This document was partially released on internal review.</p>

		Staff (Office of the Premier)			Mr Burch has no objection to release of the document, and it is not therefore unreasonable to release his address. The fact that the named person holds the position of Manager - Human Resources is not information relating to his personal affairs, but information relating to his employment affairs.
5	17/03/08	Memorandum to Premier from Chief of Staff (Office of the Premier)	In part only	Yes, but for the second paragraph deleted when the document was released - being the 4th paragraph on p 2 of the memo.	<p>This document was partially released on internal review.</p> <p>The first paragraph deleted is a record of consultations or deliberations between an officer and a Minister (Daniel Leesong and Steve Kons) in the course of deliberative processes included in the Minister's functions. It is therefore covered by s 27(1)(ii) of the Act. However, the information in it does not go beyond that in Document 4 which has already been released. The disclosure of this paragraph would not therefore be contrary to the public interest. The paragraph is not therefore exempt.</p> <p>The second paragraph deleted is exempt under s 29, on the ground of legal professional privilege. The paragraph records the essence of communications between officers of government and a lawyer or lawyers, presumably within government, made for the dominant purpose of obtaining legal advice.</p> <p>The third paragraph deleted</p>

					is not exempt. S 27 is the applicable provision. There is no evidence that the memo to the Premier was for the purposes of deliberative processes. It is expressed to be for information. If that is wrong, the paragraph contains no information which it would be contrary to the public interest to disclose. It merely expresses what might be regarded, from Mr Leesong's perspective, as a reasonable assumption.
6	28/03/08	Letter for Chief of Staff (Office of the Premier) from Crisp Hudson and Mann (Solicitors acting for Mr Burch)	No	Yes	This document does not contain any exempt information.
7	31/03/08	Question Time Brief	Yes	No - already released	
8	01/04/08	Email from Secretary Justice to Manager Ministerial Service regarding Mr Burch's personal email	Yes, in part	Yes	The names of the government officers deleted from this email do not in this context represent information relating to their personal affairs. These references relate to their employment affairs.
9	03/04/08	Email from Manager Industrial Relations (DPAC) to Manager Ministerial Service	No	No	The whole of this document is exempt under s 27. It is in the nature of advice by an officer, given as part of the deliberative processes of the agency in determining how to address Mr Burch's claim of unfair dismissal. The disclosure of the information in the document would be contrary to the public interest, in that disclosure of such

					information might impair the ability of Government to obtain full and frank written advice from its officers on how best to handle such claims.
10	03/04/08	Email exchange between Mr Burch's solicitor and the Manager - Industrial Relations in DPAC	No	Yes	These documents do not contain any exempt information.
11	11/04/08	File note signed by Electoral Officer Minister for Education and Skills	Yes, in part	Yes	This document contains information relating to Mr Burch's personal affairs. For reasons given in the attached Reasons for Decision, it is not unreasonable for the document to be disclosed. Hence it is not exempt under s 30.
12	07/04/08	Letter from Crisp Hudson and Mann to DPAC	No	Yes	This document contains information relating to Mr Burch's personal affairs. For reasons given in the attached Reasons for Decision, it is not unreasonable for the document to be disclosed. Hence it is not exempt under s 30.
13	08/04/08	Briefing note prepared by Public Sector Management Officer to Secretary DPAC re Nigel Burch employment and legal action	No	Yes, but omitting first two dot points under "Background"	The only exemption that needs consideration in relation to this document is s 27. There is no evidence that the document itself arose in the course of or for the purposes of any deliberative process. On its face, its purpose was to provide information only, on the course and apparent outcome of Mr Burch's claim. The first two dot points under "Background" are

					<p>however exempt, as a record of consultations between officers (PSMO, Hayley Phillips and Daniel Leesong) in the course of deliberations over how to respond to Mr Burch's claim. It would be contrary to the public interest for this record to be disclosed, for it is essential that officers be able to communicate in confidence in the course of determining how the State should properly respond to such claims.</p> <p>The balance of the document is not exempt.</p>
14	09/04/08	Letter from Crisp Hudson and Mann to DPAC	No	Yes	<p>This document contains information relating to Mr Burch's personal affairs. For reasons given in the attached Reasons for Decision, it is not unreasonable for the document to be disclosed. Hence it is not exempt under s 30.</p>
15	09/04/08	Email from Solicitor General to Chief of Staff (Premier's Office) attaching email from him to Crisp Hudson and Mann	Yes, in part	Yes	<p>This document was sent for information only. There is no evidence to show that it arose for the purpose of giving legal advice. Hence there is no legal professional privilege and the document is not exempt under s 29. The attached email to Crisp Hudson and Mann is not covered by legal professional privilege in its own right.</p>
16	15/04/08	Letter from Solicitor General to Chief of Staff (Premier's Office) enclosing letters from Crisp Hudson and Mann	No	The Solicitor-General's letter should not be released. The attachments	<p>The letter from the Solicitor-General is exempt under s 29. It is a record which is covered by legal professional privilege, in that it was prepared in the</p>

				should be released.	context of a solicitor-client relationship for the dominant purpose of giving legal advice. The letter from Crisp, Hudson and Mann dated 15 April 2008 contains some information relating to Mr Burch's personal affairs. However, since he has no objection to the disclosure of that information, it is not unreasonable for it to be disclosed. The remaining attachments do not contain any exempt information. Hence, the attachments as a whole should be released.
17	16/04/08	Email from Head of Media Unit to Chief of Staff (Premier's Office) etc attaching Greens Media Release	No	Yes	<p>It was said in the original decision that this email was "in the public domain". This is not correct (and nor is the fact that a document is in the public domain a ground for refusing disclosure - see the very specific requirements of s 9, which was presumably in contemplation). The email is an internal email, which incorporates another internal email and an email from the Tasmanian Greens sending out a media release. Only the latter email is in the public domain.</p> <p>The internal emails contain no information of any note. The only exemption capable of applying to them is that in s 27, but I have no evidence enabling me to apply that section. Since the emails are uninformative, it could not be argued that their disclosure would be contrary to the public interest.</p>

18	16/04/08	Media Release Doug Parkinson	No	Yes	The original decision was that this should not be disclosed because it was in the public domain. As stated above, that is not a ground for refusing disclosure. Neither of the paragraphs of s 9, which was presumably in contemplation, apply to a media release. The full document should be released.
19	17/04/08	Letter from Tasmanian Industrial Commission to Secretary DPAC enclosing application for hearing	No	Yes	The letter to the Secretary is not covered by any exemption. Some information in the application is information relating to Mr Burch's personal affairs, but he has no objection to the disclosure of the document. For reasons given in the attached Reasons for Decision, it is not unreasonable to disclose it, and the application is not therefore exempt under s 30.
20	18/04/08	Fax sheet from Solicitor General to Chief of Staff (Premier's Office) attaching application for hearing Tasmanian Industrial Commission	No	Yes	The fax sheet was called a memo in the original decision, and was said to be covered by legal professional privilege. The fax sheet carries no information, and there is no evidence that it and the attachment were sent for the dominant purpose of giving legal advice. The fax was presumably sent just to provide the Chief of Staff with a copy of item 19 above, which was the attachment. I have already ruled that item 19 is not exempt. There are no grounds for holding this document to be

					exempt.
21	undated	Memo from Manager Industrial Relations (DPAC) to Chief of Staff, Premier's Office regarding Tasmanian Industrial Commission matter	Yes, in part	No	<p>This document provided advice to the Chief of Staff in relation to Mr Burch's application to the Industrial Commission. It is clear from its contents that it was intended to assist in deliberative processes within Government over how it should respond to the application. The disclosure of the information in the document would be contrary to the public interest, in that disclosure of such information might impair the ability of Government to obtain full and frank written advice from its officers on how best to handle such litigation.</p> <p>The document is therefore exempt under s 27.</p>
22	undated	Document entitled 'Rough Chronology of Booth Claims on Kons Document' – author unknown	No	Yes	<p>I have been provided with pp 3 to 6 of this chronology. I have no evidence about why the chronology was prepared, or about who prepared it.</p> <p>It was said in the original decision that the document is exempt under ss 27 and 30.</p> <p>Pp 3 to 5 of the document detail public statements made by various public figures. Since this information is in the public domain, it cannot be unreasonable to release it, and hence these statements cannot be exempt under s 30.</p> <p>P 6 records various</p>

					<p>"questions and contradictions", apparently raised by the preceding material. I have no evidence enabling me to find that this material came into existence as part of the deliberative processes of any agency or Minister or of the Government. I do not find it to be exempt.</p>
	23/04/08	Tasmanian Industrial Commission Notice of Hearing	No	Yes	<p>The release of this document was refused in the original request, on the ground that it was a public document. This is not a ground for refusal under s 9. There are also two copies of the document on file, one of which carries a copy of a business card. That copy is not a public document.</p> <p>No exemption applies to these two documents.</p>