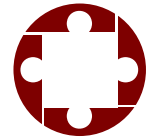


OFFICE OF THE TASMANIAN OMBUDSMAN
Freedom of Information Review under s.48 of the *Freedom of Information Act 1991*



Case Reference: 700-0610001

REASONS FOR DECISION

Introduction

On 29 September 2006 Mr Tim Morris MHA, Greens Shadow Minister for Native Forests applied under the *Freedom of Information Act 1991* (the FOI Act) for the review of a decision by Forestry Tasmania refusing access to information about the supply of wood by Forestry Tasmania to Gunns Limited (Gunns) in relation to the proposed bleached kraft pulp mill.

The FOI request

By a revised request dated 25 October 2006 Mr Morris sought Forestry Tasmania provide, under the FOI Act, access to “*all information pertaining to any agreement between Gunns Limited and Forestry Tasmania related to either an informal or formal wood supply agreement for the proposed pulp mill*” (the request). Forestry Tasmania identified a Memorandum of Understanding that it had entered into with Gunns in April 2004 (the MOU) as being the information responsive to the request.

On 30 November 2006 Forestry Tasmania refused Mr Morris access to the MOU on the basis that it was claimed to be exempt information under s 31 (the exemption for information disclosing an undertaking to competitive disadvantage), s 32 (the exemption for an agency engaged in trade or commerce) and s 33 (the exemption for information obtained in confidence) of the FOI Act. An agency does not have to give access to information which qualifies for exemption by virtue of any provision contained in Part 3 of the FOI Act.

For the purposes of this review the MOU is the only information that is in dispute.

External review process

For the following reasons the review in this matter has been protracted.

Firstly, it was necessary to extensively consult with Mr Morris and Forestry Tasmania about an initial request dated 25 July 2006 and the decisions Forestry Tasmania made in relation to the initial request.

Secondly, after Mr Morris agreed to revise and refine his initial request (and Forestry Tasmania maintained that the MOU was exempt information), it became necessary, under s 31 of the FOI Act, to notify Gunns of the review, and in particular to seek its views as to whether the MOU should be released.

Section 31 exempts from production information acquired by an agency from a business, commercial or financial undertaking if the information either relates to trade secrets or the disclosure of the information would be likely to expose the undertaking to competitive disadvantage.

Section 31 (3) of the FOI Act provides:

If –

- (a) a request is made for information under this Act; and*
- (b) the information was provided to an agency or Minister by an undertaking by way of information contained in a record –
an agency or Minister shall, before deciding whether the disclosure of the information under this Act would be likely unreasonably to expose the undertaking that provided the information to competitive disadvantage –*
- (c) notify the undertaking that the agency or Minister has received a request for the information; and*
- (d) state the nature of the information requested; and*
- (e) seek the undertaking's view as to whether the information should be provided.*

From the material provided by Forestry Tasmania, Gunns had not been consulted about the disclosure of the MOU. In addition to the requirement to consult under s 31 (3), s 31 (5) of the FOI Act provides that if an agency decides to disclose the information requested, an undertaking has a right to apply for a review of the decision. Whilst Forestry Tasmania claims that the MOU is exempt from production, should I decide otherwise Gunns would have a right to apply to the Ombudsman for a review of the decision. As a practical matter I decided that it was preferable for me to attempt to deal with all possible reviews at the same time. I therefore decided to invite Gunns to participate in the current external review process.

In response Gunns informs me that it strongly objects to the MOU being disclosed on several grounds, including on the basis that, if the MOU were disclosed under the FOI Act, it would be likely to unreasonably expose Gunns to competitive disadvantage.

By necessity, a review under the FOI Act must be conducted on the basis of the material provided by the participants during the external review process. Each case depends on the facts presented. In these reasons for decision I have not attempted to set out all of the submissions provided in any detail, but have taken them into account.

I will mention, however, one of the main themes in the submissions received from Mr Morris. That theme was that access to the information was in the public interest. I am unable to grant or deny access to information simply on that basis. I am limited by the terms of the FOI Act, which gives Tasmanians a general right to obtain information contained in the records of the Government and its agencies, but which also qualifies that right by permitting certain information to be claimed as exempt. The public interest is relevant to some of the exemptions in the FOI Act, but there is no right to information under the FOI Act purely on the ground that it is in the public interest for access to be given.

Preliminary issue

The submissions received from Forestry Tasmania raised a preliminary issue that two attachments to the MOU did not fall within the scope of the FOI request.

The Ombudsman can review the categories of decision set out in s 48 (2) of the FOI Act. The review in this matter falls within s 48 (2) (b), which allows for an application to be made to the Ombudsman for the review of a decision that the information requested is exempt information. It follows that if the attachments in dispute fell outside the terms of the FOI request, the attachments could not be the subject of an application for a review under s 48.

Forestry Tasmania claims the attachments in dispute fall outside the terms of the request on two grounds. Firstly, because the attachments comprise “*unsettled drafts, each of which falls a long way short of being an informal or formal wood supply agreement*”. Secondly, as “*they are not integral to the MOU in which they are cited, and in fact form (or would form when settled) entirely discrete documents/agreements*”.

For the following reasons I reject the above argument. By s 7 the FOI Act applies to “*information contained in records in the possession of an agency*”. The term “*record*” is defined in s 5 of the FOI Act and certainly includes the MOU (and all the attachments). On examination there is no doubt that the MOU was drafted with the intention that all the attachments (including the attachments in dispute) were to form part of the entire agreement entered into between Forestry Tasmania and Gunns.

In relation to the attachments in dispute the MOU states, “*current drafts of those two documents are attached*”. In my view, the MOU cannot be sensibly read and/or understood unless reference is made to all of the attachments, including the attachments in dispute. The argument advanced by Forestry Tasmania more relates to whether disclosure of the attachments would be relevant to the request than to the issue of whether the attachments fall within the terms of the request. In my view the MOU and attachments must be treated as a whole document and for the purposes of the FOI Act constitutes the “*record*” identified by Forestry Tasmania as being the information responsive to the request.

I am satisfied that the MOU and all the attachments fall within the terms of the request.

The claim for exemption under s 32

The main ground upon which Forestry Tasmania claims that the MOU is exempt is under s 32 (a) (ii) of the FOI Act which provides:

Information is exempt information –

(a) if it is –

(ii) in the case of an agency engaged in trade or commerce – information of a business, commercial or financial nature that would, if disclosed under this Act, be likely to expose the agency to competitive disadvantage (my emphasis)

Section 32 is the primary vehicle for reconciling the main objects of the FOI Act (i.e. promoting open and accountable government administration) with legitimate concerns for the protection from disclosure of commercially sensitive information. The basic object of s 32 is to provide a means whereby the general right of access to information in the possession of government agencies does not give rise to unwarranted commercial disadvantage to agencies, which carry on commercial activities.

To qualify for exemption under s 32 (a) (ii), information (in this case the MOU) must satisfy the cumulative requirements of the section. But importantly I note that s 32 (a) (ii) does not incorporate a public interest balancing test.

An agency engaged in trade or commerce

There is no doubt that Forestry Tasmania satisfies the first requirement for exemption under s 32 (a) (ii), being that the agency is “*engaged in trade or commerce*”. Forestry Tasmania is a corporation established under the *Forestry Act 1920*, and a government business enterprise within the meaning of the *Government Business Enterprises Act 1995*. An object of the corporation is to optimize the economic returns from its wood production activities. Forestry Tasmania has extensive functions, including the exclusive management and control of all forest products on State forest, and the processing, removal, selling or other disposition of those forest products. It is also required by the Act to foster an internationally competitive wood production and processing industry in Tasmania.

Information of a business, commercial or financial nature

The second requirement for exemption under s 32 (a) (ii) is that the information in issue consists of “*information of a business, commercial or financial nature*”. On examination, I am satisfied the MOU contains information about the commercial terms for the proposed sale of hardwood pulpwood, such that it is properly to be characterised as “*information of a business, commercial or financial nature*” for the purposes of s 32 (a) (ii).

Likely to expose the agency to competitive disadvantage

The final requirement for exemption under s 32 (a) (ii) is that the disclosure of the MOU under the FOI Act would be likely to expose Forestry Tasmania to competitive disadvantage. This is the issue in this review which has caused me the most difficulty.

Section 32 (a) (ii) requires evidence that an agency would be exposed to “*competitive disadvantage*” (my emphasis). The Macquarie Dictionary defines the word “*competitive*” to mean “*of, relating to, involving, or decided by competition*” and “*competition*” to mean “*the act of competing; rivalry*” and “*the rivalry between two or more business enterprises to secure prospective buyers*”. According to the Australian Concise Oxford Dictionary “*competitive*” means, “*involving, offered for, or by competition*” and “*(of prices) low enough to compare well with those of rival traders*”. There is nothing to suggest that in the application of s 32 anything other than these ordinary meanings should be attributed to the word “*competitive*”.

Attorney General's Department v Cockcroft (1986) 10 FCR 180 is authority for the proposition that the test commonly applied to determine whether there is a "reasonable likelihood" that disclosure could result in a specified harm requires "a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd, or ridiculous" and that "It is preferable to confine the inquiry to whether the expectation claimed was reasonably based".

Forestry Tasmania asserts the disclosure of the MOU would be likely to expose it to competitive disadvantage on three grounds. Firstly, disclosure "would alert other Forestry Tasmania customers of the residual volumes available for sale" which "could compromise (Forestry Tasmania's) ability to obtain the best price and terms of sale for this residual material to other customers". Secondly, overseas importers of hardwood woodchips could be able "to negotiate lower prices" affecting sales of pulpwood. Thirdly, disclosure of the "quantities or proposed quantities and prices or proposed prices to Gunns Limited" could disadvantage Forestry Tasmania selling pulpwood logs in competition with "other forest growers".

In my view the first and second grounds do not provide evidence capable of supporting a finding that disclosure of the MOU would expose Forestry Tasmania to "competitive disadvantage" in the sense required by s 32. The concerns expressed relate to customers of Forestry Tasmania, as distinguished from a competitor or rival, being able to use the information to negotiate lower prices.

As to the third ground Forestry Tasmania contends:

"Forestry Tasmania sells pulpwood into the State market (amongst others). In that market, the preference is for eucalypt plantation pulp logs, which is an increasing source. Forestry Tasmania has around 46,000 hectares of hardwood plantations, predominantly eucalypt species (see current annual report). The two major competitors within Tasmania are Gunns Ltd. itself, and Forest Enterprises Australia. The latter were Forest Enterprises Tasmania until expanding onto the mainland. The majority of the FEA plantations are in Tasmania. I have not been able to source publicly available figures on the exact breakdown State by State.

"As a successful investment manager, the FEA focus is on the establishment and cultivation of eucalypt plantations in Tasmania, Northern NSW and Southern Queensland. FEA Plantations will by June 2007 have in excess of 42,000 hectares of plantations under management with a growth target of 50,000 hectares" per <http://www.forestenterprise.com/>.

In regard to the overall pulpwood market in Tasmania, the Gunns IIS contains production estimates of private hardwood pulpwood (other than from Gunns). This shows production of hardwood pulpwood (native forest and plantation) at 1.3-1.8 M tpa over the period 2007-2032. This compares with the current State forest output of 2.3 M tpa, per the Forestry Tasmania annual report 2005/6.

Accordingly, to reveal Forestry Tasmania's pricing and supply agreements for pulplogs would leave it open to competitive disadvantage."

Section 32 (a) (ii) does not require a finding to be made as to any degree of competition that needs to exist and in that regard is to be contrasted with the factors to be taken into account under s 31 (2) in deciding whether disclosure of information would expose an undertaking unreasonably to competitive disadvantage. *Hart and Deputy Commissioner of Taxation* (2002) AATA 1190 is authority for the proposition that a provision comparable to s 32 (a) (ii) in the Commonwealth FOI Act was intended to provide agencies with the same level of confidentiality that a private individual or business would enjoy in managing its own financial and property assets.

The disclosure of the MOU would reveal detailed information about the proposed volumes, pricing and commercial terms contemplated by Forestry Tasmania that I am satisfied could have adverse consequences to the conduct of its ongoing business operations in the sense required by s 32. The disclosure of the information would enable a competitor (for example Forest Enterprises Australia) in the timber industry, with knowledge of and expertise in the pricing and supply components, to use the information to assess those areas in which it would need to find savings/efficiencies in order to be more competitive in future sales of pulpwood. I consider that a competitor could also use the information to predict with a greater degree of accuracy future pricing for contracts involving the sale of pulpwood.

As mentioned, information in issue under s 32 (a) (ii) does not need to survive a public interest balancing test, as is for example contained in s 31 in relation to the disclosure of similar information provided to Government by a business, commercial or financial undertaking.

On the material provided I am satisfied that the information contained in the MOU concerning proposed volumes and pricing is exempt under s 32 (a) (ii) with the result that it does not need to be disclosed under the FOI Act. However, after deleting the volume and pricing information, the information remaining in the MOU concerning, for example recitals and commercial terms, is not exempt under s 32 (a) (ii). Therefore, it is necessary for me to consider whether the information remaining is exempt under the other exemption provisions.

The claim for exemption under s 31

Both Forestry Tasmania and Gunns claim the MOU is exempt under s 31 of the FOI Act. Given my comments and the conclusion reached in relation to the application of s 32, which for all material purposes is substantially in the same terms as s 31 but applies to the disclosure of information acquired by an agency from a business, commercial or financial undertaking, I do not think that I need to take up much time in considering this claim.

I am satisfied Gunns is a “*business, commercial or financial undertaking*” within the meaning of s 31 (1). The submission from Forestry Tasmania about the application of s 31 is in general terms. In summary, Gunns submits the disclosure of the MOU would expose it to competitive disadvantage on two grounds. Firstly, that the MOU “*represents a stage*” in “*highly confidential*” commercial negotiations between Gunns and Forestry Tasmania about a wood supply agreement for the proposed pulp

mill that has not yet been finalised. Secondly, that the disclosure of the MOU would reveal “*pricing and commercial terms*” of a sensitive nature.

Having decided that the volume and pricing information contained in the MOU is exempt and can be deleted under s 32 (a) (ii) I cannot see any basis for contending, and none is provided, as to how a competitor of Gunns could possibly use the information remaining in the MOU to the detriment of Gunns. Accordingly, on the material provided I am not satisfied that the information remaining in the MOU is exempt under s 31 of the FOI Act

The claim for exemption under s 33

The final ground on which Forestry Tasmania claimed that the MOU is exempt was under s 33 of the FOI Act. Section 33 exempts from production information the disclosure of which would divulge information communicated to an agency in confidence, where the information would be exempt information if it were generated by an agency, and its disclosure would be contrary to the public interest because disclosure would be reasonably likely to impair the ability of an agency to obtain similar information in the future.

On examination the MOU is not marked as being confidential. Two of the attachments to the MOU contain a confidentiality clause, but there is an exception where “*the disclosure is required by law*”, which includes under the FOI Act.

As mentioned Mr Morris seeks access to the MOU on public interest grounds that are obviously connected with the consideration of the proposed pulp mill by the Resource Planning and Development Commission. The concerns expressed by Forestry Tasmania and Gunns relate to the volume and pricing information that I have already decided is exempt under s 32 of the FOI Act. Certainly, the volume and pricing information is the only material contained in the MOU which appears to be of a sensitive nature.

On the material provided I am satisfied that the MOU was prepared after confidential preliminary discussions took place between the then respective Managing Directors of Gunns (Mr J. E. Gay) and Forestry Tasmania (Mr Evan R Rolley) in relation to a wood supply agreement for the proposed pulp mill. However, I am not satisfied that the disclosure of the remaining information contained in the MOU would be reasonably likely to impair the ability of Forestry Tasmania to obtain similar information in the future.

Additional Matters

During the external review process Forestry Tasmania made two additional submissions concerning the provision of information to the access applicant as follows.

The first matter concerned whether the access applicant had complied with s 19 (2) of the FOI Act which provides:

(2) If part of the information requested by an applicant is exempt information that part of the information that is not exempt information shall not be supplied to the applicant unless the applicant –
(a) requests that the information be supplied; or
(b) indicated when making the request for information that the applicant wants any of the information requested that is not exempt information.

I can quickly deal with this issue. Whilst there is no prescribed form for the making of a request under the FOI Act, the initial request made by the access applicant to Forestry Tasmania dated 13 July 2006 was made on a form commonly adopted by government departments. A printed part of the form states, “*If you are entitled to only part of the information requested, do you wish to be provided with that part?*” In answer to the question the access applicant typed the response “*Yes*” in accordance with s 19 (2) (b) of the FOI Act.

The second matter concerns the effect of the repeal of s 32A of the FOI Act. Before being repealed s 32A provided that information relating to the performance and exercise of the functions and powers of Forestry Tasmania and Private Forests Tasmania was exempt information. Section 32A was repealed by s 5 of the *Forest Practices Administrative Reform (Transitional and Consequential) Act 2004*. The repeal took effect from 1 July 2005. It will be recalled that Forestry Tasmania and Gunns entered into the MOU in April 2004.

Forestry Tasmania submits that the repeal did not have the effect of removing the protection afforded to information generated (including the MOU) before 1 July 2005. Forestry Tasmania argues that, “*the right to access information may be characterised as (or analogous to) a cause of action. In this case, and even if the repealing amendment is seen as essentially procedural, the fact that our right to withhold information has changed means that to allow an applicant to reach back beyond 1.7.2005 is a retrospective act, and it is not permissible in the absence of clear statutory terms [Maxwell v Murphy (1957) 98 CLR 261 at 277-8]*”.

For the following reasons I am not persuaded that the repeal of s 32A has the effect for which Forestry Tasmania contends. Maxwell v Murphy was a case concerning whether an amendment made to the then Compensation to Relatives Act (NSW) by way of repeal allowed a claim to be brought in respect of a death which occurred. The facts and events on which the case turned (the death of the appellant’s husband) occurred before the repealed legislation came into operation. As mentioned the initial request in this matter was made to Forestry Tasmania on 13 July 2006, well after the repeal took effect on 1 July 2005.

The speech made by the Minister moving that the Bill be read a second time states:

“The Freedom of Information Act will be amended to ensure requests for access to information held by Forestry Tasmania and Private Forests Tasmania are treated in

the same way as requests to other government businesses and authorities... As members would be aware, section 32A of the Freedom of Information Act 1991 provides Forestry Tasmania and Private Forests Tasmania with an exemption from the release of information under the provisions of the act. The exemption covers the release of information if that information relates to the performance and exercise of the functions and powers of Forestry Tasmania and Private Forests Tasmania. This exemption is in addition to those contained in the act, and was inserted by the then Liberal Government when the former Forestry Corporation was split into the government business enterprise Forestry Tasmania, and the statutory authority Private Forests Tasmania. In deciding to repeal section 32A of the Freedom of Information Act 1991, I took advice from the board of directors of both Forestry Tasmania and Private Forests Tasmania, and consulted with the Attorney-General. The Government has made a considered decision to repeal section 32A of the Freedom of Information Act 1991 to address community concerns regarding the perception that Forestry Tasmania and Private Forests Tasmania were not accountable, or that the public could not access information on their activities. Mr Deputy Speaker, these are of course perceptions, as both organisations have consistently received and processed requests for information in accordance with the act, and have rarely used section 32A to exempt information. The decision to repeal section 32A has been taken after careful consideration of the possible impacts on the operations of Forestry Tasmania and Private Forests Tasmania, and forms part of a suite of reforms that are designed to increase the transparency and accountability of the forestry industry within this State. Mr Speaker, I commend the bill to the House” (my emphasis)

In my view in construing the FOI Act and its conjunction with the repeal of s 32A, the clear intention of the Parliament was to promote the underlying object of the FOI Act, being to give members of the public the right to obtain information contained in the records of the Government and its agencies limited only by necessary exceptions and exemptions. The result being that the exemptions which can be applied to the information requested by the access applicant are those existing as at the date when the request was made. In this matter s 32A was repealed before the request was made and has no application.

Conclusion

In accordance with s 48 (6) of the FOI Act I decide to vary the decision under review, by finding that the information in:

- Dot points 4, 5, 8 and acknowledgment (before the signature block) of the MOU
- The Gunns Price Attachment to the MOU
- Clauses 5A and 6 of the Draft Consolidated Supply Agreement Attachment to the MOU and including Clauses 4 and 10 of Schedule 1; Clauses 1-6 and 8 of Annexure 1 to Schedule 1; Clause 2 of Annexure 2 to Schedule 1; Clauses 2-2D and 4 of Annexure 2 to Schedule 1; Clauses 4, 6 and 7 of Schedule 2; Annexure 1 of Contract 563A; Clauses 4, 6, 7, 8 and 9 of Schedule 3; Clauses 4, 6 and 7 of Schedule 4; Clauses 4, 6, 7, 8, 10 and 12 of Schedule 5 and Clauses 4, 6 and 8 of Schedule 6

- The material already ruled out and new Clauses 1, 3, 4, 5, 6, 7 and Appendix 1 of the Draft Heads of Agreement Attachment to the MOU

is exempt under s 32 of the FOI Act. I decide that the remaining information in the MOU (and the attachments) does not qualify for exemption from disclosure to the access applicant under the FOI Act and should be released by way of implementing this decision.

Dated: 3 April 2007

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Simon Allston
Ombudsman