

# TASMANIAN OMBUDSMAN



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

**A WAKEFIELD ON BEHALF OF G WAKEFIELD AND THE CLARENCE CITY COUNCIL**  
**Case Reference: 0901012**

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### REASONS FOR DECISION

#### The FOI request

On 9 September 2008, Glenn Wakefield requested information from the Clarence City Council (the Council) under the *Freedom of Information Act 1991* (the FOI Act) in the following terms:

*All matters relative to Council's notices concerning 557 Gellibrand Drive, Sandford.*

#### The decision on the request

On 9 October 2008 the Council released certain information to Mr Wakefield, but claimed an exemption under s 36 of the FOI Act for a report provided to Council which was dealt with in a closed meeting. The report (the enforcement report) detailed Council's decision in respect of possible demolition enforcement action. Further documents were released on 13 October 2008.

Mr A Wakefield applied under s 47 of the FOI Act, on behalf of Mr G Wakefield, for an internal review of the decision. In the application Mr A Wakefield listed a number of documents that should have been released by the Council. This application was received by the Council on 3 November 2008. On 18 November 2008 the Council stated that the listed documents were beyond the scope of the FOI request but that it had reviewed Mr G Wakefield's file in the 'context' of the original request and the specific information sought in the application for internal review. Some further documents were released and the initial decision in relation to the enforcement report was affirmed on the basis that the *Local Government (Meeting Procedures) Regulations 2005* (the Regulations) required all reports relating to a closed meeting to be kept confidential.

#### This review

Mr A Wakefield applied to me on behalf of Mr G Wakefield under s 48 of the FOI Act for a review of the Council's decision.

The review relates to the enforcement report only. This is a 28-page document which was prepared for the purpose of advising Council about possible enforcement action in respect of allegedly illegal building work at 8 locations, one of which was the property referred to in Mr Wakefield's FOI request. The report was submitted to a closed meeting of the Council on 30 June 2008.

## Relevant Legislation

Under r 15 (1) of the Regulations a council may close a council meeting to the public for a reason specified in r 15 (2). R 15 (2) states that a meeting or part of a meeting may be closed to the public when any one or more of various listed matters are being or are to be discussed. The list includes, at r 15 (2) (h) -

*"matters relating to actual or possible litigation taken by or involving the council ...".*

Related to this, rr 9 (3) and (6) provide -

*"(3) The general manager must withhold from the public any associated reports and documents which, in the opinion of the general manager, relate to any matter likely to be referred to in regulation 15(2).*

and

*(6) Any report or document withheld under subregulation (3) and considered at a closed meeting is exempt information under the provisions of the Freedom of Information Act 1991."*

R 34 (5) of the Regulations subsequently provides that -

*"The minutes and associated reports and documents relating to matters discussed at a closed meeting are exempt information under the provisions of the Freedom of Information Act 1991."*

A "closed meeting", as defined in r 3, is "part or all of a meeting which is closed under regulation 15".

## Legal Opinion from Solicitor-General

Not being able to find any power in the *Local Government Act 1993* to make regulations which are inconsistent with the FOI Act, I sought an opinion from the Solicitor-General on whether r 9 (6) and 34 (5) are valid. I was advised that they are not, and that I am at liberty not to apply them.

The reason for the invalidity is fundamental. It is not legitimate for a regulation to be made which is "repugnant to any express enactment in force" (*Acts Interpretation Act 1931*, s 47 (1)), unless express authority for such repugnancy has been given by another statute. An example of such authority can be seen in the *Local Government Act* itself, at s 322 -

*"The provisions of the Freedom of Information Act 1991 do not apply to any electoral material."*

There is no power in the *Local Government Act* to make regulations giving such authority. Indeed, I cannot find any State Act which gives the power to make regulations declaring information to be exempt under the FOI Act. This is hardly surprising, because it is rare for an Act to give power to exclude the operation of statute, and FOI is a policy environment in which one would not expect such power to be given.

Since I am satisfied that rr 9 (6) and 34 (5) are invalid, I am determining the application for review as if they did not exist.

I note in passing that the origin of r 9(6) and 34(5) lies in clauses 10(6) and 13(6) of Schedule 4 to the *Local Government Act*, which was repealed on 1 July 2005. It does not appear to have been appreciated by the drafter of the Regulations that took the place of that Schedule that the Regulations could not achieve all that the Schedule had done.

### **Exemption provisions of the FOI Act**

For completeness I note that s 36 of the FOI Act, which was relied upon by the Council at first instance, ceased to have effect from 1994.

As I see it, the only exemption under the Act which is of potential relevance is s 27. This section provides exemption for the internal working information of an agency.

The basic requirements of s 27 are as follows:

- 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. The enforcement report came into being as part of the deliberative processes within the Council on whether enforcement action should be taken, making s 27 directly relevant.

The report contains a mix of information, which can be classified into certain broad categories. It contains information in relation to 7 properties other than 557 Gellibrand Drive, all of which falls outside Mr Wakefield's FOI request, and which should not be released on this basis. Then, in so far as it relates to Mr Wakefield's request, it contains much purely factual material, such as detail about legislative requirements and options, and the general factual background, which is not exempt and to which Mr Wakefield therefore has a right under s 7 of the Act. Finally, it contains some passages which contain recommendations for consideration by the Council, prepared by Council officers. The tight issue raised by this application is whether it would be "contrary to the public interest", in the terms of s 27 (1) (b) of the Act, for these recommendations to be released.

It might be thought that it must be contrary to the public interest to release such recommendations because the Regulations authorise the holding of certain discussions behind closed doors, and that to

then expose the reports which have been discussed to public gaze would undermine the confidentiality so authorised.

However, as I have indicated, a considerable part of the report, in so far as it relates to 557 Gellibrand Drive, is not entitled to exemption on any count. Why then should it be assumed that it is contrary to the public interest for the recommendations in the report, which flow from that information, to be released?

This directs attention to the nature of the recommendations. Are they of such a character, or do they include such information, that it would be contrary to the public interest for them to be published? Or is there some wider public policy reason why they should not be released - for instance that releasing them might distort, in some way which would be deleterious to the public interest, the relationship between Councils and the officers who advise them?

The recommendations at issue are totally unremarkable. They put before Council bare recommendations to enforce what are said to be clear breaches of the law, and point out the obvious. I see no reason for saying that it would be contrary to the public interest for these particular recommendations, or for recommendations such as these, to be released, and it is my determination that this should occur.

### **Submissions from Council**

I sent a draft of this decision to the Council by letter dated 28 April 2009, to give the Council the opportunity to make submissions. I had a few days earlier written to all Councils in Tasmania, informing them of the Solicitor-General's advice.

In replying to the earlier letter, the General Manager observed -

*"The Local Government Act 1993 further provides under s 338A that, unless authorised by the Council, the disclosure of information from the "Closed Meeting" section [of a meeting of Council or a Council committee] by either a Councillor or an employee of Council is a breach of the Act. In these circumstances the current practice of non disclosure of "Closed Meeting" information will be continued until such time as the relevant provisions have been amended, or the regulations are overturned."*

The General Manager also said this, in his submissions in relation to the draft decision -

*" ... (I)n this particular matter, given my obligations under Section 338A of the Local Government Act, 1993 the issue of the "released" documentation will need to be carried out by your office."*

I understand this latter sentence to mean that the General Manager would expect me to release the information concerned, since he would otherwise be in breach of s 338A. However, I have no power to release information which is the subject of a determination by me under the FOI Act. This is the responsibility of the agency which is the respondent to the application for review : s 48(7).

I observe that s 338A of the *Local Government Act* does not in fact impose any specific obligation upon an employee of a Council in relation to information from a closed meeting. Ss 338A(1) and (2) cover such information, but they deal with councillors. S 338A(3) deals with members - a term defined in s 3. Only s 338A(4) deals with employees, and it relevantly says this -

*"An employee of a council ... must not disclose information acquired as such an employee on the condition that it be kept confidential."*

It is possible to conceive of circumstances in which these words might attach to information from a closed meeting, but they would not ordinarily do so. Nor can they apply to the General Manager of a Council in relation to the general run of information which that officer puts before a closed meeting.

I have seen no evidence that the information at issue in this case was acquired by the General Manager or by any other Council employee on condition that it be kept confidential, and it would be surprising if this was the case. The information consists of a report prepared for the purpose of submission to Council, presumably by the General Manager, so that the Council could be informed about various episodes of allegedly illegal building work, and determine what consequential action it should take. It is inherently improbable that the information in the report was provided to the General Manager or to any other Council employee on the condition that it be kept confidential, for who could have had authority to impose such a condition, and why would one have been seen as necessary?

I note that no such condition arises from the operation of r 15(9) of the Regulations.

I conclude on this reasoning that s 338A(4) of the FOI Act cannot legitimately be seen as providing a form of exemption from release under the Act, or stand in the way of an obligation arising under s 48(7) of the Act.

## **Conclusion**

The attached, annotated copy of the enforcement report identifies the information in the report which should not be released because it is outside the terms of the request. As follows from these reasons, the balance of the report should be released by the Council to Mr Wakefield, in fulfillment of its obligations under s 48 (7) of the FOI Act to which I have referred.

DATED: 21 MAY 2009

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**SIMON ALLSTON**  
**OMBUDSMAN**