

TASMANIAN OMBUDSMAN



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

**PACIFIC NATIONAL TASMANIA AND THE DEPARTMENT OF INFRASTRUCTURE,
ENERGY AND RESOURCES
Case Reference: 700-0807012**

REASONS FOR DECISION

Introduction

This decision relates to information held by the Department of Infrastructure, Energy and Resources (DIER) about the cause of a train derailment on the Emu Bay Railway on the West coast of Tasmania on 6 September 2007.

The application for review has been made by "Pacific National Tasmania". Since this is a business name owned by three companies, Pacific National (Tasmania) Pty Ltd, PN Tas (Operations) Pty Ltd and PN Tas (Services) Pty Ltd, I infer that it was intended as an application by all three entities in combination. I refer to them both collectively and individually as "Pacific National". It is not necessary for me to know the exact relationship or functions of the three companies for the purposes of this decision.

Pacific National was the operator of the railway. The train which derailed was hauling copper concentrate from the Mt Lyell mine in Queenstown to Burnie. The copper concentrate was owned by Copper Mines of Tasmania Pty Ltd (Copper Mines). A significant quantity of the concentrate was spilt in the accident.

Copper Mines made a request to DIER under the *Freedom of Information Act 1991* (the Act) for "copies of all reports, statements, correspondence, records, photographs and the like relating to the cause of the derailment". The FOI officer who made the initial decision on the request found that all of the information held by DIER and considered to fall within the scope of the request was exempt from release.

Copper Mines applied for internal review of this decision under s 47 of the Act. The internal review officer, Stephen Shirley, decided that information in 7 paragraphs and one sentence in an Accident Investigation report which DIER had obtained from Pacific National (the information at issue) fell within the ambit of the request, and that this should be released. Before reaching that conclusion, he consulted with Pacific National, apparently under s 31(3), which relates to the exemption of information which would be likely to expose an undertaking to competitive disadvantage. Pacific National provided him with submissions as to why the information at issue should not be released.

When Mr Shirley made his decision that the information at issue should be released, he informed Pacific National of this fact, and advised them of their "right to seek a review of (his) decision to the Ombudsman. In so doing, he did not mention the section under which he was purporting to act, but this was presumably s 31(5).

It is presumably because of this advice from Mr Shirley that Pacific National made the application for review. In making its application, Pacific National did not specify the provision of the Act under which it was made.

Jurisdiction

I do not have jurisdiction to carry out the review requested.

An application for review by the Ombudsman is made under s 48 of the Act. Ss 48(2) and (3) set out the types of decision which I may review. The relevant one here is s 48(3)(b), which provides that a person may apply for the review of a decision "to provide information which is likely to expose the person (being an undertaking) to competitive disadvantage".

I say that this is the relevant one because it is the only provision in ss 48(2) and (3) which gives a right of review to a person other than the person who requested the information under the Act, and because Pacific National claimed the potential for competitive disadvantage in submissions made to FOI officer who made the original decision. That is presumably why Mr Shirley consulted with Pacific National prior to the making of his internal review decision, although he did not specify why he was doing so. Perhaps also it is because he did not specify why he was consulting that the submissions made by Pacific National to him in response did not refer to s 31 or competitive disadvantage at all, and only argued for exemption under s 33, which relates to information obtained in confidence. The submissions may also have been limited in this way because Mr Shirley had by then appropriately identified only a very limited part of the Accident Investigation report as falling within the scope of the request made under the Act.

S 48(1) of the Act effectively requires that a person who wishes to make an application for review under s 48(3)(b) first make application for internal review under s 47(4). The only exception to that is where the decision which it is sought to review was made by the responsible Minister or by the principal officer of the agency, which was not the case here.

Pacific National should therefore have sought internal review of Mr Shirley's decision before coming to me. Since by virtue of s 48(1) they had no entitlement to seek a review from me without first seeking internal review under s 47(4), I correspondingly have no jurisdiction to carry out the review sought.

I observe that it is now too late for Pacific National to seek internal review of Mr Shirley's decision. Such an application needed to be made within 21 days of receipt of the decision made : s 47(5).

Additional comments

Since there is perhaps some prospect of the matter coming back before me in some other way, by way of an application for review by Copper Mines or under the *Ombudsman Act* 1978 (noting however the terms of s 48(8) of the FOI Act), it may be helpful to DIER and to the companies involved if I express some preliminary conclusions on relevant issues. I do not intend to prejudge these matters however, and will be open to whatever submissions may be made to me in the future.

My preliminary conclusions are these -

1. The information at issue, identified by Mr Shirley, is not the only information in the Accident Report which falls within the scope of the request. I draw attention in this respect to paragraphs (8), (10) and (11) on p 11, under the heading "Findings", and to some of the information on the third page of Schedule 3. I also presently consider that the whole of Schedule 4 is covered. The words "relating to" in the request are of wide import.
2. Pacific National has not made out a case that the information at issue, including the information just mentioned, is exempt under s 31(1)(b) of the Act. Evidence is needed to sustain a claim of competitive disadvantage. It is necessary for a party which claims that it is likely to be exposed to competitive disadvantage by the release of information to provide evidence to make good that claim - about the relevant markets in which it operates, about the competition to which it is exposed in those markets, and about how the information which it is proposed to release might advantage its competitors in competing with it. No such evidence was provided in this case, either to the agency or to me.
3. The information held by DIER in relation to the cause of the accident is not exempt under s 33. This is because that section relevantly requires both that the information was communicated in confidence, and that disclosure of the information would be reasonably likely to impair the ability of the agency to obtain similar information in the future. I have no evidence that the information in relation to the cause of the derailment was communicated by Pacific National to DIER in confidence. Further, disclosure of the contents of the Accident Investigation report which relate to the cause of the derailment would not impair the ability of the agency to obtain such information in the future because the provision of that information can be compelled under s 34 of the *Rail Safety Act* 1997.

4. The next step is for DIER to act on Mr Shirley's decision by releasing all of the information at issue to Copper Mines. It should also in my view release the additional information identified in paragraph 1 above, doing so voluntarily under s 12 of the Act. I say that this should happen voluntarily because Mr Shirley has no power to revisit his decision, and Copper Mines is now out of time to apply to me for the review of that decision, of which notice was sent to it (through its solicitors) on 26 June 2008. If DIER is not willing to volunteer that information, and Copper Mines wishes to seek its production, Copper Mines will need to put in a fresh request under the Act.

Conclusion

For the reasons given, I have no jurisdiction to carry out the review requested by Pacific National.

I am providing a copy of these reasons to DIER, Pacific National and Copper Mines.

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SIMON ALLSTON
OMBUDSMAN

18 September 2008