OMBUDSMAN TASMANIA
DECISION

Right to Information Act Review **Case Reference:** R2503-021

Names of Parties: J and TasTAFE

Reasons for decision: s48(3)

Provisions considered: s31, s35

Background

1 The applicant in this matter (J) is a former employee of TasTAFE. J has brought proceedings against TasTAFE at the Fair Work Commission alleging that they were unfairly dismissed.

2 On 29 May 2024, J wrote to TasTAFE requesting information related to the processes and procedures it followed in terminating their employment.

3 Though this information request was acknowledged by TasTAFE, it was not considered by it to be a formal assessed disclosure application under s13 of the *Right to Information Act 2009* (Tas) (the Act). TasTAFE asserted this was because the request was not made in accordance with directions contained on its website guiding applicants on how to submit a formal assessed disclosure application under s13 of the Act.

4 On 26 November 2024, J wrote to TasTAFE to formally submit an assessed disclosure application under the Act, requesting the following:

1. *All records, including internal communications, emails, meeting notes, and reports, that mention my name or relate to my employment or interactions with TasTAFE.*
2. *Any correspondence, minutes, or decisions concerning my performance, complaints, or any other matters involving me.*
3. *Any documentation related to the handling of issues I raised or any decisions that directly affected me.*

5 On 9 December 2024, TasTAFE wrote to J to confirm receipt of this assessed disclosure application and to ask that J consider negotiating the scope of their request in accordance with s13(7) of the Act, or the timeframe in which it be required to respond to their request under s15(4)(a) of the Act.

6 On 19 March 2025, J wrote and advised Ombudsman Tasmania TasTAFE was yet to issue her a decision on her assessed disclosure

application. This correspondence was received as an application for external review pursuant to s45(1)(f) of the Act.

7 On 20 March 2025, my office wrote to TasTAFE to confirm whether a decision had been issued to J and received confirmation that this had not occurred. J's application for external review was accepted on this basis.

8 On 16 April 2025, TasTAFE's then Chief Executive Officer, Mr Grant Dreher, issued his decision on J's assessed disclosure application. This decision set out that all information identified in relation to J's application was exempt from disclosure pursuant to s31 of the Act as it was considered information subject to legal professional privilege.

9 J advised us that they wanted to extend their external review to a full consideration of Mr Dreher's decision and this request was accepted.

Issues for Determination

10 I must determine whether information not released by TasTAFE is exempt from disclosure under s31 of the Act, or any other relevant exemption provision such as under s35 of the Act.

11 As s35 is contained in Division 2 of Part 3 of the Act, my assessment would be subject to the public interest test in s33. Therefore, if I were to determine that the information was prima facie exempt under s36, I would then need to determine whether it would be contrary to the public interest to release it. In making this assessment I must have regard to all relevant matters and at least those contained in Schedule 1 of the Act.

Relevant legislation

12 I attach a copy of s31, s35 and Schedule 1 to this decision at Attachment 1.

Submissions

The Applicant

13 Relevantly for this external review, J's correspondence with my office dated 19 March 2025 set out the following about TasTAFE's delay in processing their assessed disclosure application (emphasis original):

> *I am lodging a formal complaint with your office regarding* ***TasTAFE's failure to comply with its obligations under the Right to Information Act 2009 (Tas).***
>
> *TasTAFE has failed to comply with my* ***Right to Information (RTI) request*** *submitted* ***Wednesday 29th May 2024****, in accordance with the statutory timeframes and procedural requirements set out under the Act.*

This complaint falls within the Ombudsman's jurisdiction under the ***Right to Information Act 2009 (Tas****), specifically:*

Section 45(1) *– where an applicant believes that an agency has failed to comply with its obligations under the Act, and*

Section 43 *– which provides for the Ombudsman to investigate an agency's actions or inaction regarding RTI requests.*

Background of the Complaint

a. On ***[insert exact date in May 2024]*** [sic]*, I submitted a formal* ***Right to Information application*** *to TasTAFE requesting access to documentation relevant to my employment and related matters.*

b. Under the ***Right to Information Act 2009 (Tas)****, TasTAFE was required to acknowledge receipt of my application promptly and respond with a decision within 20 working days (Section 15(1)).*

c. Despite repeated follow-ups and communication with TasTAFE regarding this application, they have ***failed to provide access to the requested information to date****—over* ***10 months*** *later.*

d. I have made ***repeated attempts*** *to seek clarification and resolution directly with TasTAFE through email, but no substantive response or action has been forthcoming.*

Breach of Statutory Obligations

TasTAFE has failed to:

1. ***Communicate any valid reasons for delay*** *or extend the processing time in accordance with the Act's provisions.*

2. Provide any ***transparent justification*** *for non-compliance with its RTI obligations.*

This constitutes a clear breach of TasTAFE's statutory obligations under the Right to Information Act 2009 (Tas) and undermines my legal right to access government-held information which is critical for my case with the Fair Work Commission.

14 The applicant did not make submissions to my office on the substantive issue of whether TasTAFE'S application of s31 to not release requested information was valid.

TasTAFE

15 TasTAFE did not make any submissions beyond the statement of reasons set out by Mr Dreher:

> *Pursuant to Section 31 of The Act, correspondence containing information from legal professionals has been withheld due to legal privilege.*

Analysis

Preliminary issue – delayed response to information request

16 While I am not empowered under the Act to make a finding as part of this external review regarding the delay to the acceptance of J's request for information, I will make the following comments.

17 Section 13(6) of the Act requires a public authority to take reasonable steps to assist a person to make a compliant application for information, if they have attempted to make a valid request but have not done so.

18 J clearly made a formal request for information in May 2024, though the right to information scheme was not mentioned in their request. TasTAFE needs to make greater efforts in future to liaise with persons requesting information to clarify whether they are seeking to use the process in the Act and to assist them to do so in a compliant way, if so.

Section 31 – Legal professional privilege

19 Section 31 of the Act sets out that *Information is exempt information if it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.* This exemption is not subject to the public interest test.

20 Legal professional privilege is a common law principle which protects the confidentiality of communications made between a lawyer and their client.[1] It is also codified in Part 10, Division 1 of the *Evidence Act 2001* (Tas) (the Evidence Act) as client legal privilege. Legal professional privilege can be split into two limbs: advice privilege and litigation privilege. Advice privilege is codified in s118 of the Evidence Act, while litigation privilege is codified in s119 of the Evidence Act.

21 Advice privilege attaches to confidential communications between a legal advisor and client for the dominant purpose of giving or receiving legal advice.[2] Litigation privilege extends to protect from disclosure confidential communications passing between a client, their lawyer and

[1] *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234 *18 September 2006* [44].
[2] See note 1 at [41].

third parties for the dominant purpose of use in or in relation to pending or anticipated proceedings.[3]

22 TasTAFE has applied s31 of the Act to 330 pages of information. This information consists solely of emails relating to J's Fair Work Commission matter, most of which were sent between TasTAFE officers and lawyers from Hobart law firm Page Seager.

23 TasTAFE has not taken a line by line approach to its assessment of this information. Some of the emails are sent to or from J and are clearly not subject to legal professional privilege. Other incidental information has also not been released but does not convey privileged information.

24 The following information should not be considered information communicated for the dominant purpose of litigation and therefore cannot be considered exempt under s31 of the Act:

- Information contained in address lines;
- information revealing when emails between lawyers and clients were sent;
- information revealing who has been copied into such correspondence;
- signature blocks;
- generic confidentiality and cyber security notices; and
- salutations within the body of emails.

25 In relation to the substance of this email correspondence contained in the body and subject lines of the emails, I am satisfied the majority does contain information subject to legal professional privilege. This information is exempt under s31 and not required to be released to J.

26 However, my finding in this regard does not extend to the following information, which I am not satisfied is exempt under s31 of the Act:

a. Any email sent or received by the applicant, or any email they were copied into;

b. All covering emails from Kate Gourlay and Emma Barry sent to TasTAFE issuing invoices for legal services;

c. Ange Williams' emails to the Fair Work Commission sent on:

    i. 29 October 2024 at 5:01pm;

    ii. 14 November 2024 at 3:53pm;

    iii. 15 November 2024 at 9:13am;

[3] *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2020] FCA 1232, at [41].

d. The Fair Work Commission's email to Ange Williams sent on 29 October at 3:37pm;

e. Ange Williams' emails to Vivek Foot sent on:

   i. 6 November 2024 at 9:24am; and

   ii. 12 November 2024 at 4:50pm and 4:55pm;

f. Vivek Foot's emails to Ange Williams sent on:

   i. 7 November 2024 at 9:01am and 9:18am;

   ii. 13 November 2024 at 1:07pm;

   iii. 14 November 2024 at 2:48pm; and

   iv. 26 November 2024 at 9:03am;

g. Vivek Foot's email to Jim Burden sent on 11 November 2024 at 12:18pm;

h. Jim Burden's email to Vivek Foot sent on 11 November 2024 at 4:37pm

i. Ange Williams' email to Timothy Witt and Jim Burden sent on 6 December 2024 at 12:01pm;

j. Vivek Foot's email to Timothy Witt sent on 9 December 2024 at 9:18am;

k. Troy Anning's email to Vivek Foot, Ange Williams and Jacqueline Thorpe sent on 11 December 2024 at 8:00am.

27 Any emails J was sent or copied into are clearly not exempt under s31.

28 It would appear that Kate Gourlay and Emma Barry are administrative staff at Page Seager and not lawyers. The emails they sent to TasTAFE consisted of Page Seagers notice of fees for services provided. These emails are not emails between a lawyer a client for the purpose of giving or receiving legal advice regarding litigation and so are not exempt under s31. Likewise, any emails sent between Ange Williams and the Fair Work Commission cannot be considered exempt under s31 for the same reason.

29 There is also internal correspondence between non-legal staff at TasTAFE which is connected to the legal proceedings but not covered by legal professional privilege or exempt under s31. I will assess these emails under s35, however, as to whether they are exempt as internal deliberative information.

Section 35 – Internal deliberative information

30 TasTAFE did not seek to exempt any information pursuant to s35, but I consider it is a more appropriate provision in relation to internal emails between TasTAFE staff. These are: the following emails which I found not to be exempt under s31 of the Act:

a. Ange Williams' emails to Vivek Foot sent on:
   i. 6 November 2024 at 9:24am; and
   ii. 12 November 2024 at 4:50pm and 4:55pm;
b. Vivek Foot's emails to Ange Williams sent on:
   i. 7 November 2024 at 9:01am and 9:18am;
   ii. 13 November 2024 at 1:07pm;
   iii. 14 November 2024 at 2:48pm; and
   iv. 26 November 2024 at 9:03am;
c. Vivek Foot's email to Jim Burden sent on 11 November 2024 at 12:18pm;
d. Jim Burden's email to Vivek Foot sent on 11 November 2024 at 4:37pm
e. Ange Williams' email to Timothy Witt and Jim Burden sent on 6 December 2024 at 12:01pm;
f. Vivek Foot's email to Timothy Witt sent on 9 December 2024 at 9:18am;
g. Troy Anning's email to Vivek Foot, Ange Williams and Jacqueline Thorpe sent on 11 December 2024 at 8:00am.

31 For information to be exempt from disclosure under s35 of the Act, I must be satisfied that it consists of:

- An opinion, advice, or recommendation prepared by an officer of a public authority (s35(1)(a));
- A record of consultations or deliberations between officers of public authorities (s35(1)(b)); or
- A record of consultations or deliberations between officers of public authorities and Ministers (s35(1)(c)).

32 Once the requirements of one of those subsections is met, I must then be 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 TasTAFE (s35(1)).

33 Section 35 does not apply to the following:

- Purely factual information (s35(2));
- A final decision, order or ruling given in the exercise of an adjudicative function (s35(3));
- Information that is older than 10 years (s35(4)).

34 As to the meaning of 'purely factual information' in s35(2), I refer to *Re Waterford and Treasurer of the Commonwealth of Australia (No 1)* where 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 quite unambiguous terms.[4]

35 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'.[5]

36 As I have just mentioned, information cannot be exempt under s35 of the Act if it is purely factual information. Accordingly, the identities of those who sent and received the abovementioned emails, the date and time these emails were sent, the names of attachments and salutations are not exempt from disclosure under s35. The subject lines of these emails are also purely factual in this matter.

37 The body paragraphs of these emails consist of internal communications between TasTAFE officers that are clearly connected to legal advice TasTAFE received from its external legal advisors. I am satisfied that these communications are connected to decisions made by TasTAFE about how to proceed in relation to its industrial proceedings with the applicant. Accordingly, they are prima facie exempt from disclosure under s35(1)(b) of the Act.

Section 33 – Public interest test

38 I now turn to consider whether it would be contrary to the public interest to release the documents I have identified as being prima facie exempt from disclosure under s35 of the Act. In making this assessment I am required to consider, at least, all the matters in Schedule 1 of the Act.

39 Having turned my mind to each of the matters in Schedule 1 of the Act, I find that schedule 1 matters (a) – *the general public need for government information to be accessible*, and (f) – *whether the*

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[4] *Re Waterford and the Treasurer of the Commonwealth of Australia (No 1)* (1984) AATA 518 at [14].
[5] *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588 at [58].

disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation, to be relevant and to weigh in favour of disclosure.

40 However, I find that Schedule 1 matter (j) – *whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law* – to be the key Schedule 1 matter to be relevant and weigh against disclosure.

41 As noted, the information identified as prima facie exempt is closely related to the information I identified as exempt under s31 of the Act and subject to legal professional privilege. The release of TasTAFE's internal correspondence that is closely related to privileged information risks undermining the confidentiality of the legal advice it received. This has the potential to undermine the proper administration of justice. Accordingly, I find this matter weighs very heavily against disclosure.

42 Having balanced the matters that I have considered relevant, I consider it would be contrary to the public interest to release the information that I have found to be prima facie exempt under s35 of the Act.

Preliminary conclusion

43 For the reasons given above, I determine:

- exemptions claimed pursuant to s31 should be varied;
- exemptions pursuant to s35 apply.

Conclusion

44 The above preliminary decision was made available to each party to provide their input pursuant to s48(1)(a) and (b) of the Act. Neither party elected to make any submissions and so I maintain the findings expressed in the preliminary decision.

45 Accordingly, for the reasons set out above, I determine:

- exemptions claimed pursuant to s31 should be varied;
- exemptions pursuant to s35 apply.

Dated: 12 June 2026

Dr Grant Davies
OMBUDSMAN

Attachment 1 – Relevant Legislation

Section 31 – Legal Professional Privilege

Information is exempt information if it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege.

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.

Schedule 1 – Matters Relevant to Assessment of Public Interest

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.