OMBUDSMAN TASMANIA

FINAL DECISION

Right to Information Act Review **Case Reference:** R2502-009

Names of Parties: Adam Holmes and the Department of Premier and Cabinet

Reasons for decision: s48(3)

Provisions considered: s30, s31, s36, s39

Background

1 Mr Adam Holmes is a journalist at the Australian Broadcasting Corporation. On 24 September 2024, Mr Holmes submitted an assessed disclosure application under s13 of the *Right to Information Act 2009* (the Act) to the Department of Premier and Cabinet (the Department). Mr Holmes' request for information was set out as follows:

> *In relation to document titled "Legal Fees related Ministers or Members of Government" tabled in Legislative Council Estimates Committee 2024*
>
> *For each amount listed*
>
> - *The type of legal service*
> - *Where applicable, the court/tribunal matter to which the legal service relates*
> - *The minister to whom the legal fee is related to*
> - *The government MP to whom the legal fee is related to*
> - *Invoice of each item*

2 On 27 September 2024, the Department issued its original decision to Mr Holmes. The Department relied upon s22(4) to neither confirm nor deny the existence of the information sought by Mr Holmes.

3 Mr Holmes was not satisfied with the Department's original decision and, on 7 October 2024, sought internal review. On 11 February 2025, the Department issued Mr Holmes its internal review decision. This decision set out that the Department had located 54 pages of information relevant to Mr Holmes' request after conducting a fresh search for information. This information consisted of the requested invoices and was released to Mr Holmes in part, with some of this information claimed to be exempt under s31 (legal professional privilege) and s36 (personal information) of the Act. This decision also relied on s22(4) of the Act in relation to the balance

of information relevant to Mr Holmes' request, neither confirming nor denying the existence of the requested information.

4 Mr Holmes was again not satisfied with the Department's decision and, on 12 February 2025, applied to my office for an external review of the internal review decision. This application was accepted under s44(1)(b)(i) of the Act.

Issues for Determination

5 I must determine whether the information not released is eligible for exemption under ss31 and 36, or any other relevant section of the Act.

6 As s36 is contained in Division 2 of Part 3 of the Act, my assessment is subject to the public interest test in s33. This means that, should I determine the information is prima facie exempt under this section, I must then determine whether it is contrary to the public interest to disclose it. In making this assessment I must have regard to all relevant matters and at a minimum those contained in Schedule 1 of the Act.

7 I must also review whether the Department's use of s22(4) of the Act was appropriate, as this provision may only be used if relevant information (if in existence) would have been exempt information on a ground specified in Division 1 of Part 3 of the Act.

Relevant legislation

8 I include copies of ss22, 31, 33, 36, 39 and Schedule 1 of the Act at Attachment 1.

Submissions

Applicant

9 When applying for external review, Mr Holmes made the following submissions to my office setting out why he considered the Department was not entitled to rely on s22(4) of the Act to neither confirm nor deny the existence of requested information:

> *I do not contest the way in which the initial 54 pages of invoices were released, regarding the use of s31 and s36 (1).*
>
> *Assuming that the list of legal fees provided to the Legislative Council Estimates Committee is complete and accurate, I have cross referenced it with the invoices provided in the RTI. This indicates that the following invoices (or information relating to these figures, as initially requested) were not provided in the RTI:*
>
> *28 May 2021 – $2,229*

28 May 2021 – $624

22 December 2021 – $2,094

22 December 2021 – $8,663

22 December 2021 – $1,364

22 December 2021 – $2,172

22 December 2021 – $125

30 November 2022 – $25,200

5 February 2024 – $1,032

19 March 2024 – $7,895

10 April 2024 – $2,770

30 May 2024 – $4,950

30 May 2024 – $7,794

30 May 2024 – $5,750

30 May 2024 – $2,106

17 June 2024 – $32,000

17 June 2024 – $195

17 June 2024 – $21,416

17 June 2024 – $68,000

17 June 2024 – $9,000

17 June 2024 – $28,023

1 August 2024 – $20,000

It can therefore be assumed (without any other information or explanation to rely upon) that these figures were captured by this paragraph in the decision letter:

As to the balance of your request, I neither confirm nor deny the existence of information which is the subject of your application in accordance with section 22 (4) of the Act. In my view, the information that you seek, if it exists, would be exempt information on a ground or grounds specified in Division 1 of Part 3 of the Act.

The use of section 22 (4) requires me to assess generally the provision of public funds for a Minister or member of government to utilise for legal fees against each of the grounds specified in Division 1 of Part 3.

25. Executive Council information

The provision of specific legal fees for a minister or member of government, and the identity of the minister or member of government in receipt of this, would not be Executive Council information.

26. Cabinet information

The provision of specific legal fees for a minister or member of government, and the identity of the minister or member of government in receipt of this, would not be Cabinet information.

27. Internal briefing information of a Minister

The provision of legal fees for a minister or member of government, and the identity of the minister or member of government in receipt of this, would not be internal briefing information of a Minister.

28. Information not relating to official business

The very nature of being deemed eligible to use public funds for legal fees would indicate that the legal matters relate to their official business. This was explained during the Estimates hearing during which the list was provided by the government.

Section 28 also only mentions "Minister", without reference to "members of government", so if a non-minister was able to utilise public funds for legal fees, they would not be covered by this section. It references "information in the possession of a Minister", whereas this information appears to be in the possession of DPAC, and so it unclear how this section could be used.

The majority of the invoices provided in the RTI relate to then-cabinet minister Michael Ferguson utilising the services of the law firm Page Seager. During the relevant period, Page Seager represented Mr Ferguson during a defamation action against an individual named Kane Dallow, and subsequent contempt of court matter involving Mr Dallow (see: Ferguson v Dallow (No 2) [2021] FCA 152, among others). That matter did not involve the "Minister's official business", but the invoices were released, providing a bar by which the use of s28 can be measured (ie. if s28 was used to refuse the release of the remaining invoices/information, then it must be considered against the non-use of s28 in the case of Mr Ferguson's invoices).

29. Information affecting national or state security, defence or international relations

Not relevant.

30. Information relating to enforcement of the law

The release of information pertaining to a Minister or member of government's use of publicly-funded legal fees would not prejudice investigation of a breach or possible breach of the law, the enforcement or proper administration of the law, the fair trial of a person or the impartial adjudication of a case.

Regarding 30 (f), the existence of a figure for legal fees for a Minister or member of government would not prejudice an investigation of a breach or possible breach of the law which is not yet complete. Should such an investigation exist, the investigating officers would be aware that an individual has obtained legal counsel.

30 (2) is not relevant.

31. Legal professional privilege

The decision letter provides a description of the information that can be considered legal professional privilege, that is, "communication undertaken, or … a document brought into existence, for the dominant purpose of obtaining legal advice".

Using this definition as a guide, the information sought does not include "communication".

An invoice would not be considered a "document brought into existence for the dominant purpose of obtaining legal advice". It does not contain opinion, it cannot prejudice a matter even if those in the list are ongoing, and it is assumed by all parties to a matter that a fee is being accrued.

32. Information related to closed meetings of council

Not relevant.

The release of the initial 54 pages of invoices provides a guide by which invoices attached to the outstanding figures can be released while satisfying s31 and s36 (1), assuming such invoices exist.

If invoices have not been generated for these legal fees, then an itemised list which contains the same type of information as released in the initial 54 pages, would satisfy *my request. For example, this could come in the form of a list that contains the dollar figure (before and after GST), the Minister or member of government related to the dollar figure, the date on which the payment was generated, and the law firm that was engaged.*

As I argue above, it is unclear how any of the grounds in Division 1 of Part 3 would prevent the release of this information.

10 On 13 February 2025, Mr Holmes made further submissions setting out why he considered s22(4) of the Act was not relevant:

> *Page 61 of the Ombudsman's Manual regarding the Right to Information Act provides some guidance on use of section 22 (4):*
>
> *Such an approach should be avoided wherever possible in order not to deprive an applicant of knowledge of the existence of the information, and the opportunity to test whether access to it has been properly refused. Where this course is adopted, the existence of the information must be disclosed to the Ombudsman in any later review by the Ombudsman of the decision.*
>
> *In this matter, the existence of the information has already been established in a publicly accessible list. The use of section 22 (4) has therefore not been "avoided wherever possible". It therefore follows that the exemptions relied upon in Division 1 of Part 3 be articulated for each item in the list, and the voracity of the use of these exemptions be tested, for me to be afforded procedural fairness in this matter.*
>
> *My attempt (in previous email) to assess each item against Division 1 of Part 3 of the Act still applies.*
>
> *Further to my previous submission regarding the potential use of s30 as an exemption, in particular (1) (a) (i), (ii) (iv) and (1) (f):*
>
> *Should a Minister or member of government be the subject of a law enforcement or other type of investigation during which legal fees have been accrued, and in which their identity cannot be disclosed for legal reasons (as in Integrity Commission investigations, for example) or due to potential to prejudice the administration of law, it does not automatically follow that disclosing each Minister or member of government alongside each fee (with the same exemptions applied in the initial RTI release) would disclose*

the identity of any specific type of investigation. The information would not include the purpose of the legal fees or the jurisdiction. As mentioned in previous submission, it would not prejudice these investigations.

The Department

11 The Department made some specific submissions to my office in relation to its use of s22(4) to neither confirm nor deny the existence of information relating to Mr Holmes' request. These set out why it considered this information (if in existence) would be exempt on a ground specified in Division 1 of Part 3 of the Act.

12 Beyond those submissions, the Department relied on the reasoning in its internal review decision of 11 February 2025, which set out the following:

> ***Assessment***
>
> *In accordance with section 43(5) of the Act, I have made a fresh decision on your original application. In doing so, I consider that your application concerns primarily Ministerial and Parliamentary Support information, and therefore, I have assessed your application as both a request to the Premier and to DPAC* [the Department]*, both authorities being in possession of relevant information to your request.*
>
> *A fresh search of DPAC's and the Premier's records has been conducted for relevant information.*
>
> *54 pages of invoice information have been located. I am releasing these invoices to you in part, with certain information exempted under section 31 (legal professional privilege). I have also determined to exempt from release several individual's names and bank details under section 36 (personal information of a person) of the Act. I consider that the names and details redacted are not material to your request for information.*
>
> *As to the balance of your request, I neither confirm nor deny the existence of information which is the subject of your application in accordance with section 22(4) of the Act. In my view, the information that you seek, if it exists, would be exempt information on a ground or grounds specified in Division 1 of Part 3 of the Act.*
>
> *The reasons for my decision are set out below.*
>
> ***Reasons for Decision***
>
> *In making my assessment, I have carefully considered your reasons for making the request for an internal review.*

Exemption not subject to the public interest test

Legal Professional Privilege (section 31)

Section 31 of the Act provides 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'.

I have decided to release the 54 pages of invoice information identified as within scope of your request, except information which I have determined is exempt under section 31 (and section 36) of the Act.

Legal professional privilege attaches to a communication undertaken, or to a document brought into existence, for the dominant purpose of obtaining legal advice. However, privilege also protects the disclosure of documents that record legal work carried out by a lawyer for the benefit of a client. Such documents include bills of costs rendered by a solicitor that are in a detailed form and disclose matters protected by privilege (see Hodgson v Amcor Ltd [2011] VSC 204 at paragraphs 53 to 65).

Consequently, I consider the descriptions of the legal services are exempt under section 31 of the Act and I have accordingly redacted that information.

Exemption subject to the public interest test

Personal information of a person (section 36)

Section 36(1) of the Act provides that:

Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13.

I have redacted certain personal information, including names and bank details of legal practitioners and other persons who are not material to your request in the information that I have released to you, on the grounds that the information is exempt under section 36 (personal information) of the Act.

In making this decision, I have considered the matters relevant to assessment of the public interest provided under Schedule 1 of the Act. I have determined that there are no matters relevant to assessment of public interest that weigh positively in favour of release of the information, other than *the general public need for government information to be accessible*

(Schedule 1 (1)(a)) and whether the disclosure would contribute to or hinder debate on a matter of public interest (Schedule 1 (1)(b)). On balance, I consider that disclosing the personal names and bank details of individuals who are third parties to your request would harm the interests of those individuals (Schedule 1 (1)(m)) and it is contrary to the public interest to release that information. I note that, in my view, the redacted information is not material to your request.

Analysis

13 As noted, the Department's internal review decision applied s22(4) of the Act to neither confirm nor deny the existence of information responsive to Mr Holmes' assessed disclosure application.

14 Mr Holmes applied for the invoices and information relating to the expenditure of government funds on legal expenses for Ministers or government members of parliament. The amount of this expenditure had already been tabled in the Tasmanian Parliament. The Department assessed and partially released information relating to one batch of invoices and used s22(4) to neither confirm nor deny the existence of other information relevant to Mr Holmes' request.

15 I will now assess the Department's use of exemptions under ss31 and 36 of the Act to the invoices partially released to Mr Holmes on internal review, before reviewing its use of s22(4).

Section 31 – Legal Professional Privilege

16 For information to be exempt under s31, I must be satisfied that it is of such a nature that the information would be privileged from production in legal proceedings on the grounds of legal professional privilege.

17 I am not required under the Act to consider the public interest test in relation to communications that are exempt by reason of legal professional privilege. As the Courts have noted, legal professional privilege exists to serve the public interest in the administration of justice by promoting free disclosure between clients and their lawyers to enable lawyers to give proper legal advice.[1] It is a common law principle which protects the confidentiality of communications made between lawyer and client if they were made for the dominant purpose of giving or obtaining legal advice, providing legal services, or for use in connection with existing

[1] Grant v Downs (1976) 135 CLR 674 per Stephen, Mason and Murphy JJ.

or anticipated litigation.[2] This privilege also applies to advice provided by in-house lawyers.[3]

18 I have reviewed the information provided to Mr Holmes which was identified as exempt under s31 of the Act, though he did not raise concerns with the application of this exemption to these documents. From this review I can see that the Department has applied s31 to information revealing descriptions of legal services that have been provided to the Tasmanian Government, and the matter/s to which those services relate.

19 The invoices were brought into existence to notify the Tasmanian Government of the fees the relevant legal service providers charged it for their services, which is not inherently privileged information as the content of the communication is not legal advice. However, if the specific information identified as exempt under s31 was released (distinct from the fees charged, and other information contained on these invoices), I accept that it would reveal details of the type and subject of legal advice provided to the Government, which is privileged information. Accordingly, I find the Department's use of s31 to be valid. The relevant information is exempt under s31 and is not required to be disclosed.

Section 36 – Personal Information of a Person

20 For information to be exempt under s36 of the Act, I must be satisfied that its release would reveal the identity of a person other than the person seeking the information, or that the information would lead to that person's identity being reasonably ascertainable.

21 Section 5 of the Act defines personal information as:

> *Any information or opinion in any recorded format about an individual –*
>
> *(a) whose identity is apparent or is reasonably ascertainable from the information or opinion; and*
>
> *(b) who is alive or who has not been dead for more than 25 years.*

22 The Department has claimed that the names of legal service providers, their signatures, and banking details are exempt from disclosure under s36 of the Act on the basis that releasing this information would reveal the identity of a person other than the applicant. I agree that the names of legal practitioners and their signatures are personal information and prima facie exempt under s36 of the Act.

[2] Daniels Corporation International Pty Ltd v ACCC 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ, where the high Court re-affirmed the 'dominant purpose test' as established in Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49.
[3] AWB Ltd v Cole (No 5) (2006) 155 FCR 30.

23 In relation to banking details, I consider it is more appropriate to consider these under s39 (information provided in confidence). Accordingly, I will assess that information under my analysis of that section later in my decision.

The public interest test

24 The Department has redacted the names of legal practitioners and their position titles contained on various invoices, claiming that the release of this information would harm the interests of those persons and would be contrary to the public interest.

25 In assessing the factors in Schedule 1 and any other relevant matters, as is required in the s33 public interest test, it is not clear to me why the release of this information would be of concern to the relevant individuals, as their names appear only in connection to the paid professional services they provide. The Department has not provided any explanation for its assertion that harm is likely to be caused to their interests and it is not apparent to me what this harm would be. I am not satisfied that it would be contrary to the public interest to release this information and it should be provided to Mr Holmes.

26 My finding here does not extend to signatures also claimed to be exempt under s36 of the Act. I accept that the release of this information may harm the interests of the relevant individuals and that it would be contrary to the public interest for this information to be released. This information is exempt under s36 and the Department is not required to provide it to Mr Holmes.

Section 39 – Information Obtained in Confidence

27 For information to be exempt under s39(1), I must be satisfied that its disclosure would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –

a) the information would be exempt information if it were generated by a public authority or Minister; or

b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.

28 Section 39(2) sets out that this does not include information that –

a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and

b) relates to trade secrets or other matters of a business, commercial or financial nature; and

c) was provided to a public authority or Minister pursuant to a requirement of any law.

29 The Department applied s36 of the Act to exempt the bank account details of the relevant law firms which issued the invoices subject to this external review. However, as I noted earlier in my decision, I find it more appropriate to consider this information under s39 of the Act.

30 The banking details of any business or individual are confidential information. If this type of information was routinely released by Government, it would impair the ability of public authorities to obtain such information in future. Accordingly, I am satisfied that this information is prima facie exempt from disclosure pursuant to s39(1)(b) of the Act.

Section 33 – Public interest test

31 In assessing the public interest test, I am unable to identify any Schedule 1 matter, nor any other matter, that would weigh significantly in favour of the disclosure of the banking details that I have identified as prima facie exempt under s39(1)(b) of the Act.

32 I find that the release of this information, which has been provided to the Government in confidence, has the potential to harm the interests of the law firms who provided this information as it might be used in the commission of fraud, or leave them exposed to other financial crime. Accordingly, I find that Schedule 1 matter (m) – *whether the disclosure would promote or harm the interests of an individual or group of individuals* – weighs heavily against disclosure.

33 I am satisfied that it would be contrary to the public interest for the relevant banking details to be released. They are exempt under s39(1)(b) and the Department is not required to provide this information to the applicant.

Section 22(4) – Neither confirm nor deny the existence of requested information

34 Section 22(4) of the Act sets out:

> *A public authority or Minister may, in a notice given under subsection (1) , state the decision in terms which neither confirm nor deny the existence of any information which on a ground specified in Division 1 of Part 3 would be exempt information.*

35 This provision is confined and may only be used if an exemption on a ground not subject to the public interest test is applicable. Even if that is the case, the drafting of s22 and the explicit intention of the Act that discretions conferred be exercised to release the maximum amount of official information mean that this provision should only be used when genuinely necessary.

36 The Department provided further information to my office on request to explain why it considered such information would be exempt on a ground specified in Division 1 of Part 3 of the Act. While there were legitimate concerns which prompted its reliance on s22(4), I do not consider that this was the correct course of action. Mr Holmes requested information as its existence had been confirmed by information tabled in the Tasmanian Parliament. Mr Holmes' frustration that the Department then neither confirmed nor denied the existence of this information was understandable.

37 I consider that the Department should not have applied s22(4) and should have claimed the relevant exemptions in the ordinary way, providing reasons for its decision. This would not require it to reveal exempt information, provided these reasons were drafted appropriately, and would not lead to this somewhat absurd situation in which a public authority will not confirm the existence of information which clearly exists.

38 The Department relied upon s22(4) the Act to neither confirm nor deny the existence of various invoices issued to the Government from legal service providers based in Hobart. To assist me in progressing this external review, the Department provided me its reasoning for finding this information exempt in full. It set out that it considered that these invoices were exempt in full pursuant to ss30 (information relating to the enforcement of the law) and 31 (legal professional privilege) of the Act.

39 I have reviewed these invoices and do not agree that these exemptions are applicable for the entirety of this information. I consider that they can, for the most part, be released to the applicant in a manner consistent with my findings on the other invoices I have considered in this external review. As such, I make the following findings regarding the relevant invoices:

- the description of the legal matter/file name and the description of legal services provided are not required to be released, as these are exempt under s31;
- signatures of legal professionals are not required to be released, as these are exempt under s36; and
- the banking details of various legal service providers are not required to be released, as these are exempt under s39.

Section 30 – information relating to the enforcement of the law

40 I must also consider the information regarding the identity of the relevant Ministers or Government Members of Parliament to whom the legal services invoices relate, which was released in the first batch of invoices but is claimed to be exempt in the second under s30.

41 Section 30(1)(a) provides that information may be exempt if its disclosure would, or would be reasonably likely to:

(a) prejudice –

(i) the investigation of a breach or possible breach of the law; or

(ii) the enforcement or proper administration of the law in a particular instance; or

(iii) the fair trial of a person; or

(iv) the impartial adjudication of a particular case…

42 I am satisfied that the revelation of the name/s of relevant members of parliament would prejudice the proper administration of the law in this particular instance and at this point in time. To provide more information would reveal exempt information, which I must not do pursuant to s48(4)(a) of the Act, but I have carefully reviewed the relevant material and further information provided by the Department and am satisfied that the release of this information would prejudice the operation of other law enforcement legislation.

43 Accordingly, I find that the name of any relevant Minister or Government Member of Parliament, their address/es and the name/s of their staff in the second batch of invoices is exempt under s30(1)(a) of the Act.

44 The parts of the invoices which are not exempt under ss30, 31, 36 and 39 should be released to Mr Holmes.

Preliminary Conclusion

45 For the reasons set out above, I determine:

- exemptions claimed pursuant to ss30, 31 and 36 should be varied; and
- exemptions under s39 apply.

46 I apologise to the parties for the delay in finalising this decision.

Response to Preliminary Conclusion

47 As my preliminary decision was adverse to the Department, it was given an opportunity to provide input on the draft decision in accordance with s48(1)(a) of the Act on 25 March 2026.

48 On 22 April 2026, the Department provided its response to my preliminary decision. I have carefully considered the full response but am only able to provide the following limited analysis of that response in order not to reveal exempt information.

49 After considering the Department's input, I provided the applicant an opportunity to provide his input pursuant to s48(1)(b) of the Act on 20 May 2026. On 9 June 2026, Mr Holmes confirmed that he did not want to provide submissions responding to my preliminary decision.

Further analysis

50 First, the Department objected to my use of s39 though ultimately did not object to my findings that bank details should not be released. The Department set out that because the relevant banking details were of the relevant barristers own personal banking accounts that s36 should apply to that information rather than s39.

51 I acknowledge that s36 could be an applicable provision to this category of information. However, I note that s39 is also applicable to information obtained by government from *individuals* and the application of s39 is consistent with previous decisions of this office in relation to such information. Accordingly, I maintain my finding that this information is exempt from disclosure pursuant to s39 of the Act and do not consider it necessary to also consider s36 in relation to this information.

52 Second, the Department suggests information revealing the instructing solicitor to whom the invoice from Barrister Chris Gunson SC was addressed and information revealing the names, initials, titles and rates of the Thomson Geer lawyers who provided legal services, should be exempt under s36. The Department set out that releasing this information would harm the interests of those people. Specifically, the Department stated:

> *. . . the Department considers this information should be found to be exempt under s 36. The relevant matter for the public interest test being whether disclosure would harm the interests of an individual (Sch 1 (m)). The use of public funds by Ministers and Members of Government has proven to be highly controversial. This is evidenced by articles in the media and discussion in Parliament.*
>
> *The Department considers that revealing the identities of the lawyers who provided these services to Ministers and Members of Government, and their rates, has the potential to expose them to negative treatment from those who are critical that public money was spent in such a manner. Given that the individual names and rates are not required for the decision to grant legal indemnity to be scrutinised, the Department considers this potential harm should weigh more heavily against disclosure than the matters which weigh in favour of disclosure.*

53 I give this submission by the Department little weight. Legal professionals elect to represent and provide legal advice to their clients and are reimbursed for that service. Representing and providing advice to clients that are parties to matters of controversy, is part of the ordinary work of the modern-day legal professional. I am not persuaded that their interests would be harmed or that it would be contrary to the public interest to

release this information. I maintain my original findings in relation to this information.

54 Third, the Department asserted:

> *Generally, the Department rebuts the suggestion that s 22(4) ought only to be used to deny the existence of information and, as suggested by your preliminary decision, can only be used when the existence of information is in doubt. By virtue of the very operation of ss (4), in that it can only be used if an exemption on a ground not subject to the public interest test is applicable, its use already confirms the existence of information. This signals that its inclusion in the Act is not simply to allow the denial of information, but for some other purpose.*

55 I do not agree with this characterisation of my reasoning. I can clarify I do not consider that s22(4) may only be used when the existence of information is in doubt but this is the most common and reasonable application. I also disagree that use of s22(4) is only possible when information exists or is known to exist.

56 The first assessment in relation to s22(4) can be a hypothetical one – if information of that type existed, would it be exempt on a ground specified in Division 1 of Part 3 of the Act? If so, consideration must be given to whether s22(4) should be used. If information does not exist, it still might be appropriate to use s22(4) – such as if information were requested regarding whether a telephone intercept was in place. When information does exist, whether it is publicly known to exist will be a significant factor in this assessment of whether to use s22(4) and a strong justification as to why its use was appropriate would need to also exist in this situation.

57 In order not to reveal exempt information, I am unable to analyse the Department's submissions beyond what I have already articulated at paragraphs 36 and 37 above. These set out that the Department was incorrect to rely on s22(4) to deny the existence of invoices which the Government had previously confirmed to exist. The correct approach was to simply assess information responding to the applicant's request in the ordinary way by considering relevant exemption provisions in the Act.

58 While I acknowledge it might only have been possible to provide brief and non-specific reasoning given the surrounding circumstances, the Act is clear that discretions conferred should be exercised so as to provide the maximum amount of official information. I maintain my view that relying on s22(4) to neither confirm nor deny the existence of information which has been confirmed to Parliament to exist is not the correct course of action.

59 Finally, the Department submits that even the reference to s30 in my decision would provide further information about the subject of the relevant legal advice and representation, which it would not be appropriate to release.

60 I again do not accept the Department's submission. Section 30(1) is a provision that has broad application to a large variety of circumstances. I do not accept that merely citing s30(1) and providing the high-level reasons to support its application above reveals exempt information.

Conclusion

61 For the reasons set out above, I determine:

- exemptions claimed pursuant to ss30, 31 and 36 should be varied; and
- exemptions under s39 apply.

62 I apologise to the parties for the delay in finalising this decision.

Dated: 12 June 2026

Dr Grant Davies
OMBUDSMAN

Attachment 1
Relevant Legislation

Section 22 – Reasons to be given

(1) If, in relation to an application for information made to a public authority or Minister, the public authority or Minister decides –

> (a) that the applicant is not entitled to the information because it is exempt information; or
>
> (b) that provision of the information be deferred in accordance with section 17 ; or
>
> (c) that provision of the information be refused by virtue of section 19 or 20 –

the public authority or Minister must give the applicant written notice of the decision.

(2) Notice given under subsection (1) is to –

> (a) state the reasons for the decision; and
>
> (b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and
>
> (c) inform the applicant of –
>
> > (i) the applicant's right to apply for a review of the decision; and
> >
> > (ii) the authority to which the application for review can be made; and
> >
> > (iii) the time within which the application for review must be made; and
>
> (d) if the decision involves or relies upon consideration of the public interest in the application of a provision of this Act, state the public interest considerations on which that decision was based.

(3) A public authority or Minister is not required by subsections (1) and (2) to include in a notice given under subsection (1) any exempt information.

(4) A public authority or Minister may, in a notice given under subsection (1) , state the decision in terms which neither confirm nor deny the existence of any information which on a ground specified in Division 1 of Part 3 would be exempt information.

Section 30 – Information relating to enforcement of the law

(1) Information is exempt information if its disclosure under this Act would, or would be reasonably likely to –

> (a) prejudice –
>
> > (i) the investigation of a breach or possible breach of the law; or
> >
> > (ii) the enforcement or proper administration of the law in a particular instance; or
> >
> > (iii) the fair trial of a person; or
> >
> > (iv) the impartial adjudication of a particular case; or

(b) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law; or

(c) disclose methods or procedures for preventing, detecting or investigating, or dealing with matters arising out of, breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or

(d) endanger the life or physical, emotional or psychological safety of a person, or increase the likelihood of harassment or discrimination of a person; or

(e) disclose information gathered, collated or created for intelligence, including but not limited to databases of criminal intelligence, forensic testing or anonymous information from the public; or

(f) hinder, delay or prejudice an investigation of a breach or possible breach of the law which is not yet complete.

(2) Subsection (1) includes information that –

(a) reveals that the scope of a law enforcement investigation has exceeded a limit imposed by law; or

(b) reveals the use of an illegal method or procedure for preventing, detecting or investigating, or dealing with a matter arising out of, a breach or evasion of the law; or

(c) contains a general outline of the structure of a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or

(d) is a report on the degree of success achieved in a program adopted by a public authority for investigating breaches of or enforcing or administering the law; or

(e) is a report prepared in the course of a routine law enforcement inspection or investigation by a public authority with the function of enforcing and regulating compliance with a particular law other than the criminal law if the inspection or investigation is complete; or

(f) is a report on a law enforcement investigation, if the substance of the report has been disclosed to the person or the body that is the subject of the investigation –

if it is contrary to the public interest that the information should be given under this Act.

(3) The matters which must be considered in deciding if the disclosure of information under subsection (2) is contrary to the public interest are specified in Schedule 1 but are not limited to those matters.

(4) The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of information under subsection (2) is contrary to the public interest.

Section 36 – Personal information of a person

(1) Information is exempt information if its disclosure under this Act would involve the disclosure of the personal information of a person other than the person making an application under section 13 .

(2) If –

(a) an application is made for information under this Act; and

(b) the information was provided to a public authority or Minister by a third party; and

(c) the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party –

the principal officer or Minister is to, if practicable and before deciding whether the disclosure of the information under this Act should occur, by notice in writing to the third party –

(d) notify that person that the public authority or Minister has received an application for the information; and

(e) state the nature of the information that has been applied for; and

(f) request that, within 15 working days from the date of the notice, the person provide his or her view as to whether the information should be provided.

(3) If a public authority or Minister, after receipt of a person's view referred to in subsection (2)(f) , decides to provide the information, the public authority or Minister must, by notice in writing given to that person, notify that person of the decision.

(4) A notice under subsection (3) is to –

(a) state the nature of the information to be provided; and

(b) if the decision was made on behalf of a public authority or Minister, state the name and designation of the person who made the decision; and

(c) inform the person to whom the notice is addressed of –

(i) that person's right to apply for a review of the decision; and

(ii) the authority to which the application for review can be made; and

(iii) the time within which the application must be made.

(5) A public authority or Minister must not provide the information referred to in a notice given to a person under subsection (3) –

(a) until 10 working days have elapsed after the date of notification of that person; or

(b) if during those 10 working days the person applies under section 43 for a review of the decision, until that review determines that the information should be provided; or

(c) until 20 working days after notification of an adverse decision under section 43 ; or

(d) if during those 20 workings days the person applies for a review of the decision under section 44 , until that review determines that the information should be provided; or

(e) if the information is information to which a decision referred to in section 45(1A) relates –

(i) during 20 working days after the notification of the decision; or

(ii) where the person applies for a review of the decision under section 45(1A) – until that review determines the information should be provided.

Section 39 – Information obtained in confidence

(1) Information is exempt information if its disclosure under this Act would divulge information communicated in confidence by or on behalf of a person or government to a public authority or Minister, and –

(a) the information would be exempt information if it were generated by a public authority or Minister; or

(b) the disclosure of the information would be reasonably likely to impair the ability of a public authority or Minister to obtain similar information in the future.

(2) Subsection (1) does not include information that –

(a) was acquired by a public authority or a Minister from a business, commercial or financial undertaking; and

(b) relates to trade secrets or other matters of a business, commercial or financial nature; and

(c) was provided to a public authority or Minister pursuant to a requirement of any law.

Section 33 – Public interest test

(1) In this Division, information is exempt information if the principal officer of the public authority or Minister considers, after taking into account all relevant matters, that it is contrary to the public interest to disclose the information.

(2) The matters which must be considered in deciding if the disclosure of the information is contrary to the public interest are specified in Schedule 1 but are not limited to those matters.

(3) The matters specified in Schedule 2 are matters that are irrelevant in deciding if the disclosure of the information is contrary to the public interest.

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.