

Department of Health

LEGAL SERVICES

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Right to Information Decision

Right to Information No.: RTI202324-507

Date of Decision: 28 June 2024

Information Requested

An application made pursuant to the *Right to Information Act 2009* ('the Act'), received the Department of Health ("the public authority") on 14 June 2024 and accepted on 14 June 2024.

The information requested:

- Within the last 3 months of this request, any minute or advice related to vacancy control.*

Decision and Statement of Reasons

I have decided to release 6 pages of information to you, subject to exemptions under the Act.

Statement of Reasons

Section 36

Section 33 Public interest test

Section 33 provides

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 I but are not limited to those matters.

The section sets out how the decision maker determines if the disclosure of information is contrary to the public interest. For this the following matters of Schedule I have been applied in relation to the public interest test as required by s33:

Schedule I(1)(a)	the general public need for government information to be accessible;
Schedule I(1)(m)	whether the disclosure would promote or harm the interests of an individual or group of individuals;
Schedule I(1)(q)	whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

Section 36 Personal Information

Section 36 provides:

Personal information of 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.

The definition of personal information in s5 of the Act includes *...any information or opinion in any recorded format about an individual whose identity is apparent or reasonably ascertainable from the information or opinion and who is alive, or has not been dead for more than 25 years.*

Personal information can include a person's name, address, telephone number,¹ date of birth, medical records, bank account details, taxation information² and signature.³ Nevertheless the information needs to convey or say something about a person, rather than just identify them. Subsequently, where information that may seem individually harmless but capable of being combined with other pieces can generate a composite, a mosaic, which can be used to identify and say something about a person.⁴ For example, the mere mention of a person's name or signature may, however, reveal personal information about them depending on the context.⁵

The extent to which the information is well known and the availability from publicly accessible sources⁶ are matters to be given regard as part of the assessment.

¹ See *Re Green and Australian and Overseas Telecommunications Corporation* [1992] AATA 252.

² See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249 and *Re Jones and Commissioner of Taxation* [2008] AATA 834

³ See *Re Corkin and Department of Immigration & Ethnic Affairs* [1984] AATA 448.

⁴ See *Re McKnight and Australian Archives* [1992] AATA 225.

⁵ See *Re Veale and Town of Bassendean* [1994] WAICmr 4.

⁶ See *Re Jones and Federal Commissioner of Taxation* [2008] AATA 413.

It is, generally considered that the names and related information of State Service employees acting in the course of their duties and who are publicly identifiable will be disclosed if the person is not placed at risk by disclosure.⁷

In 'BA' and *Merit Protection Commissioner*,⁸ the Australian Information Commissioner reconsidered several earlier cases dealing with the disclosure of certain vocational information whereby:

... the notion of *disclosure to the world at large* has a different meaning with developments in information technology. It is now considerably easier for a person who has obtained information under the FOI Act to disseminate that information widely, to do so anonymously and to comment upon or even alter that information. ...

... There is also a growing and understandable concern that personal information that is made available on the web can be misused or used differently by others ...

These statements about the impact of technology and current attitudes to privacy, in particular, are relevant to employees' personal information, regardless of whether they are public or private sector employees.

In addition to the statements in 'BA', the disclosure of the identity of officers now has much greater privacy impacts than in the past. Before the broad community use of social media, the disclosure of an officer's name on a document might have permitted an applicant to determine an individual's telephone number or address. Today, an individual's identity may be connected effortlessly with a vast range of personal information available through social networks, such as: photographs; friends' and family members' identities and photographs; employment histories; social activities and interests; personal opinions, including political opinions, and so on.

Under the Act, disclosure to an applicant of the information is considered to be, in effect, disclosure to the world at large because no restrictions can be placed on the use that may be made of the information to which access is given.⁹ Additionally, the area of work associated with the delivery of a health service warrants a cautionary approach to the management of personal information.

However, I also recognise that names of public officers performing their regular duties are not usually exempt under s36, unless there are exceptional circumstances. The Department of Health is a public authority that for business and security reasons does not display personal employee contact details in the public view function of the directory.¹⁰ The public authority should be entitled to having direct contact from the public via the appropriately established channels.¹¹ For this reason I am satisfied the direct contact information of officers and other parties is personal information and exempt information.

Public Interest

There has been drawn a distinction between *the public interest* in disclosure and matters that are of interest to members of the general public. The fact that there is a section of the public interested in a certain activity will not necessarily lead to the conclusion that disclosure of information relating to it will be in the public interest.¹²

Public interest has been variously described as the sum of special interests, the sum of all private interests, the net result of individuals pursuing their self-interest, the broad shared interests of society, and the shared or collective values of the community – the goals or values on which there is consensus.

The meaning of the term was considered in some detail by the Full Court of the Federal Court of Australia in its decision *McKinnon v Secretary, Department of Treasury*¹³ where Tamberlin J noted:

⁷ See <http://www.directory.tas.gov.au/cgi/access.pl>

⁸ [2014] AICmr 9 (30 January 2014)

⁹ See *Re Australia First Party (NSW) Inc. and Department of Commerce* [2010] WAICmr 32.

¹⁰ See [http://www.directory.tas.gov.au/help6.html#What Agencies don't display information in the Public View?](http://www.directory.tas.gov.au/help6.html#What%20Agencies%20don't%20display%20information%20in%20the%20Public%20View?)

¹¹ *T v Department of Health* 12 March 2024 [Ombudsman Tasmania R2311-023], [28].

¹² *Re Public Interest Advocacy Centre and Department of Community Services and Health (No 1)* (1991) 14 AAR 180 at 187; *Re Angel and Department of Arts, Heritage and Environment* (1985) 9 ALO 113.

¹³ [2005] FCAGFC 142

- 9 The expression *in the public interest* directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances. There will, as in the present case, often be competing facets of the public interest that call for consideration when making a final determination as to where the public interest lies and these are sometimes loosely referred to, in my view, as opposing public interests...
- 10 The expression *the public interest* is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest. It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination...

The High Court considered the phrase *public interest* in *O'Sullivan v Farrer*,¹⁴ and described it as:

... the expression *in the public interest*, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only ... *in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view...*

Who may be considered the relevant *public* when public interest is at issue has also been considered by the High Court, which found that the public need not include the entire population, but rather, it may include only the interests of a substantial section of the public.¹⁵

So, the public interest test requires a balancing of the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper workings of government and its agencies on the other.¹⁶

The (a), (m), and (q) matters of Schedule 1 have been applied in relation to the Public Interest Test as required by s33 to the personal information of the information custodian.

I accept that the disclosure of the information reflects public interest with the community having an understanding of and an involvement in the democratic processes. I am satisfied the information held by the public authority should be accessible (a).

However, as to matter (m), I consider disclosure would harm the interests of third parties by the mere fact that disclosure of the information could create apprehension in the mind of the person concerned is enough to render disclosure unreasonable.¹⁷

I consider that for (q), disclosure would have an adverse effect on the industrial relations of the public authority. Industrial relations covers the operation of the public authority. The public authority maintains specific channels for the public at large to make contact. The disclosing of direct contact details would enable members of the public to contact individual public authority officers directly outside the public authority's preferred contact points.

In my view, it is contrary to the public interest to disclose the direct contact information relating to third parties.

¹⁴ [1989] 168 CLR 210

¹⁵ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473

¹⁶ *Harris v Australian Broadcasting Corporation* (1983) 5 ALD 545

¹⁷ *Akers v Victoria Police (No 1)* [2003] VCAT 397; *Koch v Swinburne University* [2004] VCAT 1513 at [28].

Section 35

Section 33 Public interest test

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Public interest test

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(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 I but are not limited to those matters.

The section sets out how the decision maker determines if the disclosure of information is contrary to the public interest. For this the following matters of Schedule I have been applied in relation to the public interest test as required by s33:

Schedule I(1)(a)	the general public need for government information to be accessible;
Schedule I(1)(b)	whether the disclosure would contribute to or hinder debate on a matter of public interest;
Schedule I(1)(c)	whether the disclosure would inform a person about the reasons for a decision;
Schedule I(1)(d)	whether the disclosure would provide the contextual information to aid in the understanding of government decisions;
Schedule I(1)(f)	whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation;
Schedule I(1)(g)	whether the disclosure would enhance scrutiny of government administrative processes;
Schedule I(1)(i)	whether the disclosure would promote or harm public health or safety or both public health and safety;
Schedule I(1)(q)	whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;
Schedule I(1)(s)	whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;

Section 35 Internal deliberative information

Section 35 provides

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.

A deliberative process involves the exercise of judgement in developing and making a selection from different options:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.¹⁸

The expression *deliberative processes* in section 35 refers to pre-decisional thinking processes within a public authority as it moves towards the making of a decision or towards embarking upon a course of action.¹⁹ This *thinking* generally refers to the process of weighing up or evaluating competing arguments or considerations – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.²⁰

The deliberative process must relate to the functions of a public authority or minister. The functions of a public authority include both policy making and the processes undertaken in administering or implementing a policy. The functions also extend to the development of policies in respect of matters that arise in the course of administering a program. The non-policy decision making processes required when carrying out agency, ministerial or governmental functions, may also be deliberative processes.²¹

A deliberative process may include the recording or exchange of:

- opinions;
- advice;
- recommendations;
- a collection of facts or opinions, including the pattern of facts or opinions considered;²² or
- interim decisions or deliberations.

An opinion or recommendation does not need to be prepared for the sole purpose of a deliberative process. Furthermore, an opinion connotes a 'view held about a particular subject or point; a judgement formed; a belief'.²³

Deliberative matter does not include purely factual material like operational information. Material that is not deliberative matter, would include:

- content that is merely descriptive;
- incidental administrative content;²⁴
- procedural or day to day content;²⁵
- the decision or conclusion reached at the end of the deliberative process;²⁶

¹⁸ See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67. See also *Carver and Fair Work Ombudsman* [2011] AICmr 5.

¹⁹ see *Re Waterford and Department of Treasury (No. 2)* (1984) 5 ALD 588

²⁰ *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18].

²¹ See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249, *Re Reith and Attorney-General's Department* [1986] AATA 437, *Re Zacek and Australian Postal Corporation* [2002] AATA 473.

²² See *Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210

²³ *Re Murtagh and Commissioner of Taxation* [1984] AATA 249, [13].

²⁴ See *Re VXF and Human Rights and Equal Opportunity Commission* [1989] AATA 107.

²⁵ See *Subramanian and Refugee Review Tribunal* [1997] AATA 31.

²⁶ See *Chapman and Chapman and Minister of Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210; *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19; *Briggs and the Department of the Treasury (No. 3)* [2012] AICmr 22.

- matter that was not obtained, prepared, or recorded in the course of, or for the purposes of, a deliberative process.

The exclusion of purely factual information is intended to allow disclosure of information used in the deliberative process. A conclusion involving opinion or judgement is not purely factual material. Similarly, an assertion that something is a fact may be an opinion rather than purely factual material.

Purely factual information does not extend to factual information that is an integral part of the deliberative content and purpose of a document or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.²⁷

To be satisfied that this information is exempt under section 35(l) specifically, consideration must be given that it consists of opinion, advice or recommendation prepared by a public officer in the course of, or for the purposes of the deliberative processes of a public authority and, amongst other things, that it does not contain purely factual information.

As noted, section 35(2) excludes from exemption any information which is purely factual information.

The information contains both fact and deliberation across the documents, and that it is impractical to sever fact and opinion/deliberation.²⁸ I am satisfied that the information in which I have applied section 35 redactions consists of opinion, advice or recommendation for the purpose of the deliberative processes related to the official business of the public authority.

Section 35(4) further excludes from exemption any information that is older than 10 years. It is clear from the information before me that the information at issue is not older than 10 years.

The information consists of two emails from the Acting Secretary of the public authority. These emails are addressed directly to the public authority's executive staff and senior management. I am satisfied that all of the information is directly related to the functions of a public authority or minister.

In these emails, the Acting Secretary expresses an *opinion* as to the public authority's current operating position, and the measures that he believes are necessary to address the current circumstances. The information contains both elements of actions taken, and recommendations, based on opinion.

I have applied section 35 to those elements which are expressive of an opinion or provide deliberative foundation for a particular action. These, I consider, to involve the weighing up or evaluation of the arguments or considerations that may have a bearing on the course of action.²⁹ As discussed previously, pre-decisional thinking processes within a public authority as it moves towards the making of a decision or towards embarking upon a course of action are considered 'deliberative' in nature. The public authority must be allowed to undertake robust deliberations and weigh up options without fear and provide frank advice about the issue. This aligns with the basis for section 35. The early thinking processes are intended to be covered by section 35, however, the section should not apply to those parts that express an already determined course of action, where that information is in itself severable from the internal deliberative material.³⁰ 'Officers of public authorities should expect that communications made in the ordinary course of their duties might be made subject to disclosure under the Act and should still undertake their duties frankly and fearlessly despite this'.³¹ I do not consider it to be in the public interest to withhold the decisions of government and its public authorities where those decisions directly affect the general public and are not captured by circumstances that warrant additional public interest concerns or confidentiality arising from other obligations.

²⁷ *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18].

²⁸ See *Re Evans and Ministry for the Arts* (1986) 1 VAR 3 15.

²⁹ *Murtagh v Federal Commissioner of Taxation* (1984) 54 ALR 313, 320.

³⁰ This approach aligns with that of purely factual material as explicit in the Act and discussed in *Harris* (n 16). Where the internal deliberative elements of the information are severable from the exempt information, they should not be captured by the exemption. Additionally, this was discussed in *Linda Poulton v Department of Justice* 29 April 2024 [Ombudsman Tasmania R2202-110], [113]-[114].

³¹ *Linda Poulton v Department of Justice* 29 April 2024 [Ombudsman Tasmania R2202-110], [114].

Public Interest³²

For (a) and (d), I consider they weigh in favour of disclosure. Information should be accessible to the general public, and that information may provide important context as to why a particular decision has been made.

For matters (b), I consider this relevant and weighing in favour of disclosure. The provision of health services continues to be an important matter of public interest and debate.

I consider (c) to be relevant here. While it does not give reasons for a decision being made that affect any one individual, it may assist in understanding an overarching decision that has been made regarding the practices of the public authority.

I consider (f) and (g) to weigh in favour of disclosure. The information provides information relating to the public authority's administrative processes and how it is making specific decisions. I do not believe disclosure would prevent participation and accountability.

Schedule 1(1)(i) and (q) I strongly consider weighing against disclosure. The information relates to the delivery of health services and how the public authority can internally manage its resources to appropriately deliver its primary purpose. The information was circulated to the health executive for the purposes of informing them of changes to the public authority's hiring practices. This impacts directly on the public authority's own staff and on its relationships with external employers/contractors that the public authority engages from time to time. The public authority should be entitled to go about these hiring practices with the appropriate level of confidentiality to ensure its strategic aims are protected.

Schedule 1(1)(s) strongly weighs against disclosure as it relates directly to the public authority's business affairs and has the potential to affect its ongoing relationships with third parties and their strategic plans in the state.

Therefore, I am satisfied that the release of exempted information under section 35 is contrary to the public interest and have redacted accordingly.

³² For discussion on the meaning of 'Public Interest', see the same heading under Section 36.