

3 March 2022

By email: Clive.Stott@bigpond.com

Mr Clive M. Stott
33/22 Waldhorn Drive
GRINDELWALD TAS 7277

Dear Mr Stott,

RIGHT TO INFORMATION ACT 2009 – APPLICATION FOR ASSESSED DISCLOSURE – BASSLINK SUBSEA INTERCONNECTOR FAULT – DETERMINATION

I refer to your application for assessed disclosure (**Application**) made pursuant to the *Right to Information Act 2009* (**Act**) dated 2 November 2016.

1. BACKGROUND

The history of the Application is both lengthy and complex. In the interests of certainty, I have set out **below** a history of the key events:

1. The Application was received by Hydro Tasmania (**Hydro**) on 2 November 2016.
2. Relevant to this determination, the Application included a request for all information in Hydro's possession concerning all "*emails, diary entries, reports, notes, phonographs, pertaining to..... 3) The fault.*" (here referred to as **Paragraph 3**).
3. On 23 December 2016 a delegated officer of Hydro released a decision to you (the **Initial Decision**) which, in terms of Paragraph 3, relied upon s.19(1)(a) of the Act to refuse to deliver the requested information on the basis that to do so "*would substantially and unreasonably divert the resources of the public authority from its other work*".
4. On 10 January 2017 you requested an internal review of the Initial Decision.
5. In response to the expiration of the timeframe for delivering a decision on the internal review, on 13 February 2017 you sought external review of the Initial Decision from the Office of the Tasmania Ombudsman (**Ombudsman**).

6. After assessing your request for internal review, by letter dated 15 February 2017 the Ombudsman drew your attention to a defect regarding your request – i.e. the application fee on the Application had never been formally waived by Hydro.
7. Between 8 March 2017 and 1 April 2017 the following occurred:
 - (a) Hydro formally waived the application fee on the Application and re-issued the Initial Decision in identical terms;
 - (b) you sought internal review of the Initial Decision;
 - (c) a decision on the internal review was delivered to you (dated 22 March 2017) which drew the same conclusions as to the Initial Decision (the **Internal Review**); and
 - (d) on 1 April 2017 you sought external review of the Internal Review from the Ombudsman (the **External Review**).
8. On 18 February 2021 the Ombudsman delivered their decision on the External Review and, most relevant to this correspondence:
 - (a) *held that, with respect to Paragraph 3, Hydro had not complied with the requirements of s.19 of the Act (specifically s.19(2)) in that no reasonably opportunity had been afforded to consult with Hydro with a view to amending Paragraph 3 to a form that removed s.19 as a basis for refusal; and*
 - (b) returned Paragraph 3 of the Application to Hydro for reconsideration under the Act, but went on to determine the balance of the Application.¹
9. On 3 March 2021, in accordance with the Ombudsman's decision, Hydro contacted you with a view to narrowing the scope of Paragraph 3 and removing s.19 of the Act as a basis for refusal. Those negotiations did not result in any change to Paragraph 3, and on 19 March 2021 Hydro issued its fresh determination with respect to Paragraph 3 (the **Fresh Determination**).
10. On 23 March 2021 you requested an internal review of the Fresh Determination, which was followed by extended consultation between you and Hydro with a view to narrowing the scope of Paragraph 3.
11. On 28 September 2021 you and Hydro agreed to the following revised scope of Paragraph 3:

"any forensic analysis report and non-destructive (x-ray) report including x-

¹ Clive Stott and Hydro Tasmania, Case Reference O1702-115 dated 18 February 2021, paras 36-46 (inclusive)

rays (if in existence) of the damaged section of cable, inc any relevant photographs”

(here referred to as **Revised Paragraph 3**).

12. In December 2021 Hydro sent a letter to you which:

- (a) *confirmed the scope of Revised Paragraph 3;*
- (b) *provided an update regarding consultation with various third parties pursuant to s.37(2) of the Act; and*
- (c) *committed to providing a final determination regarding Revised Paragraph 3 by the end of February 2022.*

2. INTERNAL REVIEW

The Fresh Determination was made by Ms Harle acting in her capacity as a delegated officer for the purposes of the Act.

I have reviewed the Fresh Determination in my capacity as a delegated officer for the purposes of the Act, taking into account Revised Paragraph 3.²

As previously noted, the narrowed scope of Paragraph 3 has removed s.19(1) of the Act as a basis for refusing Paragraph 3.

3. REVISED PARAGRAPH 3

Revised Paragraph 3 is in the following terms:

“any forensic analysis report and non-destructive (x-ray) report including x-rays (if in existence) of the damaged section of cable, inc any relevant photographs”

Broken into its constituent parts, the request seeks the following information:

- forensic analysis reports of the damaged section of cable;
- forensic non-destructive (e.g. x-ray) reports of the damaged section of cable (including any x-rays); and
- any photographs of the damaged section of cable relating to the above.

4. SEARCH OF RECORDS

I have caused Hydro’s records to be searched for information that falls within the scope of Revised Paragraph 3 as at 28 September 2021.³

² Right to Information Act 2009, s.43(4)(b).

³ Strictly speaking, the scope of the information to be considered ought be limited to materials in Hydro’s possession as at 8 March 2017, however given the history of this matter 28 September 2021 has been

That search has identified a total of 23 documents, 5 of which are photographs (here referred to as the **Identified Information**).

In summary, with the exception of certain photographs, all of the Identified Information is comprised of technical reports concerning investigations related to the Basslink cable and why the Basslink cable failed in December of 2015.

5. THIRD PARTY CONSULTATION

Following agreement regarding Revised Paragraph 3, Hydro engaged in third party consultation with relevant stakeholders regarding the Identified Information.

In making my determination regarding Revised Paragraph 3 I have considered the responses resulting from that consultation.

6. ASSESSMENT OF EXEMPTIONS

The Act provides that certain information is exempt from release.

Relevant sections of Act

I have assessed the Identified Information in accordance with the Act. As a result of that assessment, I regard the following exemptions as being relevant:

- (a) *section 30 (Information relating to enforcement of law);*
- (b) *section 36 (Personal information of a person);*
- (c) *section 37 (Information relating to business affairs of third party); and*
- (d) *section 39 (Information obtained in confidence).*

Excepting s.30, each of the identified exemptions are subject to the public interest test set out in section 33 of the Act.

Assessment

Section 30 (Information relating to enforcement of law)

- (a) Information is exempt from disclosure under the Act if its disclosure would, or would be reasonably likely to, amongst other things “prejudice... the enforcement or proper administration of the law in a particular instance” (s.30(1)(a)(ii) of the Act). Under the circumstances, this exemption gives rise to several considerations.
- (b) Firstly, I have considered whether any exemptions in s.30 of the Act (including

selected, this being the date when Revised Paragraph 3 was settled and Hydro conducted third party consultation regarding Revised Paragraph 3.

s.30(1)(a)(ii)) apply to the Identified Information merely because much of the information is subject to ongoing confidentiality obligations imposed by the Commercial Arbitration Act 2011 (Vic).⁴ Relevantly, these obligations of confidentiality:

- i. are subject to certain exceptions, including exceptions set out in s.27F; and
- ii. one such exception is s.27F(9) which, in summary, permits disclosure authorised or required by a relevant law which, as that term is defined,⁵ I consider includes disclosure required by the Act.

(c) In summary, I have determined that the enforceable right to information granted by the Act is an exception to the obligations of confidentiality imposed by the Commercial Arbitration Act 2011 (Vic), subject to satisfying the notification requirements in s.27F(9). Accordingly, the exemptions in s.30(1) of the Act do not apply to any of the Identified Information merely because it is subject to ongoing confidentiality obligations imposed by the Commercial Arbitration Act 2011 (Vic).

(d) Secondly, I have considered whether s.30(1) of the Act might otherwise apply to the Identified Information where that information was used in commercial arbitration conducted pursuant to the Commercial Arbitration Act 2011 (Vic). Given that the arbitration has concluded, I have determined that disclosure of the Identified Information at this stage would not result in any relevant prejudice to specifically the arbitration process, this being the relevant matter contemplated s.30(1) of the Act.

(e) Thirdly, I have considered the findings of the Ombudsman in Clive Stott and Hydro Tasmania, Case Reference O1702-115 dated 18 February 2021 (the Decision), specifically the determination at paragraphs 127-131 that disclosure of information that will, or is reasonably likely to, place the disclosing party in a position where they would be acting in breach of a common law contract falls within the scope of the exemption provided in s.30(1)(a)(ii) of the Act.

(f) In the Decision, the Ombudsman held that certain obligations of confidentiality set out in a contract between Hydro and Basslink Pty Ltd would be breached if Hydro were directed to disclose certain information (which for present purposes includes all of the Identified Information), therefore such disclosure would, or would be reasonably likely to, prejudice the proper administration of the law (i.e. the law of contract) thus the exemption in s.30(1)(a)(ii) of the Act applied under the circumstances.

⁴ Commercial Arbitration Act 2011, s.27E

⁵ Per the definition in s.27F(10) includes “*a law of another State or Territory*”.

(g) I consider the Ombudsman's conclusions on this point to be problematic. The relevant confidentiality obligation is subject to exceptions, which the Ombudsman's decision doesn't clearly confirm as considered, and may not have been drawn to the Ombudsman's attention. The decision does not explicitly consider the protection afforded by section 51 of the Act. Whilst I must take into account the Ombudsman's decision, I am not bound to follow it in circumstances where, in my opinion, a critical factor, which would have most likely influenced the outcome, was not considered.

With respect, I do not accept the Ombudsman's conclusions regarding the application of s.30, and I do not consider any of the Identified Information to be exempt from disclosure on that basis.

(h) Fourthly, I have considered whether disclosure of the Identified Information will "prejudice... the enforcement or proper administration of the law in a particular instance". This is due to ongoing matters of disagreement between Hydro Tasmania and BPL and a legitimate prospect that these matters may be the subject of future formal dispute resolution processes (for example arbitration or court proceedings). Accordingly, I have determined that disclosure of the Identified Information (except for certain photographs) would, or would be reasonably likely to, prejudice the proper administration of the law (i.e. the disclosure of information not yet in evidence or in the public domain which may be relevant to a future dispute has the potential to prejudice such process) thus the exemption in s.30(1)(a)(ii) of the Act applies under the circumstances to the Identified Information (except for certain photographs).

Section 36 (Personal information of a person)

(i) Information is exempt information if its disclosure will involve the disclosure of the personal information of a person other than the person making the relevant application.

(j) The term 'personal information' is defined in section 4 of the Act as any information or opinion in any recorded *format about an individual* –

- i. whose identity is apparent or is reasonably ascertainable from the information or opinion; and
- ii. who is alive, or has not been dead for more than 25 years.

(k) I have determined that:

- i. the Identified Information contain personal information in the form of the names and contact details of various individuals; and
- ii. the exemption set out in section 36(1) of the Act applies to that specific information.

That being said, this determination does not turn upon the release of the

relevant personal information.

Section 37 (Information relating to business affairs of third party)

- (l) S.37(1)(b) of the Act provides that information is exempt information for the purposes of the Act if its disclosure under the Act would disclose information related to business affairs acquired by a public authority (in this case, acquired by Hydro) from a person or organisation and the disclosure of the information under the Act would be likely to expose the third party to competitive disadvantage.
- (m) The meaning of 'competitive disadvantage' in the context of s.37 of the Act has been read narrowly as meaning "a disadvantage which relates to or is characterised by competition" and being concerned with the likelihood of impacts upon an entity "as a competitor in the market".⁶ The result is that absent a relevant market, s.37 is unlikely to apply.
- (n) Further, the term 'likely' means that it is unnecessary to prove that competitive disadvantage will in fact result from disclosure, only that such a result is "a real or not a remote chance or possibility, rather than more probable than not".⁷
- (o) For the purposes of this determination, I am proceeding on the basis that the exemption in s.37 is not intended to protect against commercial disadvantage in a general sense, i.e. the protection is concerned with the likely creation of commercial disadvantage in the context of market competition.
- (p) Third parties consulted regarding the Application submitted that the Identified Information:
 - i. is related to the business affairs of those entities;
 - ii. includes certain trade secrets; and/or
 - iii. if disclosed, would be likely to expose those parties to competitive disadvantage in their relevant markets.
- (q) As noted earlier, the Identified Information is comprised of technical reports investigating the reasons why the Basslink cable failed in December of 2015 and related matters and photographs. It is claimed that these reports contain specialist and commercially sensitive proprietary methodologies (i.e. not otherwise available to market competitors) regarding:
 - i. the operation of high voltage direct current (**HVDC**) cables;

⁶ *Forestry Tasmania v Ombudsman* [2010] TASSC 39 at [52]; Graeme Gilmour and TT-Line, Ref 0 1603-079 dated 23 January 2020.

⁷ Note 3 at [59]

- ii. designing or modelling HVDC cables; and
- iii. marine recovery and repair operations for HVDC cables.

On their face, these claims hold considerable merit.

No specific feedback from third parties was directed towards the photographs.

(r) I accept that the technical reports forming part of the Identified Information relates to business affairs, and that there is a relevant competitive market for the operation, design, modelling, marine recovery and repair of HVDC cables. I also accept that disclosure of the technical reports comprising the Identified Information will be of interest to other operators in that market, will facilitate access to commercially sensitive information that would not otherwise be available, and such information could likely be used to establish a competitive advantage in the relevant marketplace over the relevant third parties.

(s) On balance, I have determined that disclosure of any of the technical reports comprising the Identified Information is likely to result in competitive disadvantage for these third parties. For the sake of completeness, I do not consider that disclosing certain photographs that form part of the Identified Information will result in any such disadvantage, nor am I satisfied that any of the Identified Information necessarily amounts to 'trade secrets' for the purposes of s.37(1)(a) of the Act, but I cannot completely discount this.

(t) In summary, I determine that:

- i. disclosure of certain photographs that form part of the Identified Information is unlikely to expose relevant third parties to competitive disadvantage in the manner contemplated by s.37(1)(b) of the Act;
- ii. disclosure of the technical reports comprising the Identified Information is likely to expose relevant third parties to competitive disadvantage in the manner contemplated by s.37(1)(b) of the Act; therefore
- iii. the exemption set out in section 37(1)(b) of the Act applies to all of the Identified Information with the exception of certain photographs.

Section 39 (Information obtained in confidence)

(u) *Information is exempt pursuant to s.39(1)(b) of the Act if its disclosure will divulge information communicated in confidence by or on behalf of a person to a public authority, and disclosure of the information will be reasonably likely to impair the ability of a public authority to obtain similar information in the future. This exemption is subject to the qualification in s.39(2) of the Act, however under the circumstances that qualification does not apply.*

(v) *The following scenarios arise when considering the application of s.39(1)(b) to the Identified Information:*

- i. ongoing confidentiality obligations imposed by the *Commercial Arbitration Act 2011* (Vic), which apply to most of the Identified Information; and
- ii. confidentiality obligations imposed by the recently terminated contract between Hydro and Basslink Pty Ltd.

(w) In both scenarios, where the Identified Information is communicated in confidence by or on behalf of a person to a public authority; the question is whether or not disclosure is reasonably likely to impair Hydro's ability to obtain similar information in the future.

(x) Turning to the first scenario, the majority of the Identified Information was supplied to Hydro (i.e. not by Hydro) in the context of a commercial arbitration conducted pursuant to the Commercial Arbitration Act 2011 (Vic), and is therefore subject to confidentiality obligations imposed by that legislation.⁸ These confidentiality obligations are subject to certain exemptions, including disclosure "authorised or required by a relevant law", which includes the Act. The Identified Information was prepared and supplied by on a voluntary basis under the protections afforded by the arbitration. For the purposes of s.39(1)(b) of the Act, I consider that disclosure of those parts of the Identified Information supplied by Basslink Pty Limited or the State of Tasmania will be reasonably likely to impair Hydro's ability to secure information of a similar nature in any future commercial arbitration Hydro may engage in; indeed, it may hinder Hydro's ability to require commercial arbitration as a means of dispute resolution. Turning to those parts of the Identified Information prepared and supplied by Hydro in the context of commercial arbitration, I have determined that s.39(1)(b) of the Act only applies to that information to the extent that it is incorporating or responding to information supplied to Hydro in the arbitration.

(y) Turning to the second scenario, I have determined that the obligations of confidentiality set out in the recently terminated contract between Hydro and Basslink Pty Limited may have survived termination (thus the information was communicated to Hydro in confidence and that confidentiality persists). Disclosure of that information is reasonably likely to impair Hydro's ability to obtain similar information in the future, as commercial entities will be reluctant to rely upon confidentiality provisions that can be defeated by an application for assessed disclosure, and are therefore likely to withhold information they may otherwise supply, but for that ability.

(z) Accordingly, I have determined that s.39(1)(b) of the Act applies to:

⁸ *Commercial Arbitration Act 2011*, s.27E

- i. those parts of the Identified Information prepared and supplied by Basslink Pty Limited and the State of Tasmania; and
- ii. those parts of the Identified Information prepared by Hydro that respond to refer to the information prepared and supplied by Basslink Pty Limited,

which represents the vast majority (i.e. in excess of 80%) of the Identified Information. It does not include certain photographs.

7. EXEMPTION NOT SUBJECT TO PUBLIC INTEREST TEST

The exemption set out in section 30 of the Act is not subject to the public interest test set out in section 33 of the Act. Accordingly, my determination with respect to section 30 is sufficient to exempt all of the Identified Information from disclosure in response to the Application with the exception of certain photographs.

Noting the potential error made by the Ombudsman in their findings regarding the application of s.30(1)(a)(ii). I have assessed the Identified Information against relevant exemptions which are subject to the public interest test.

8. PUBLIC INTEREST ASSESSMENT

As previously noted, the exemptions in sections 36, 37 and 39 of the Act are subject to the public interest test. The test is whether publicly releasing the relevant information, in whole or in part, would be contrary to the public interest.

In accordance with section 33 of the Act I have considered all relevant matters, including the matters set out in Schedule 1 of the Act.

Each of the public interest matters set out in Schedule 1 of the Act is considered below (where relevant).

(a) the general public need for government information to be accessible;

I accept that, in accordance with the objects of the Act, there is a general need for government information to be publicly accessible, particularly as it relates to matters of public interest such as the failure of the Basslink cable.

I also accept that certain members of the public may wish to have access to the Identified Information, however given the highly technical nature of the Identified Information I consider that group of people to be small.

To the extent that the Identified Information includes personal information, I do not consider there to be a general public need to access such information but consistent with previous decisions of the Ombudsman I accept that personal information of Hydro staff (as opposed to third parties) is not ordinarily exempted from release.

Accordingly, on balance I have determined that this factor mitigates in favour of disclosing the Identified Information.

(b) whether the disclosure would contribute to or hinder debate on a matter of public interest:

The Identified Information concerns the failure of the Basslink cable in 2015, an event that occurred over six years ago. Accordingly, I do not consider the event to be a current matter of public debate.

Further, in light of the information already in the public domain concerning the reasons for the failure of the cable, and the highly technical nature of the Identified Information, I don't consider that disclosure of some or all of the Identified Information will meaningfully contribute to or hinder debate on any matter of public interest.

To the extent that the Identified Information includes personal information, I do not consider that disclosure of that information will contribute to or hinder debate on any matter of public interest.

Accordingly, I have determined that this factor mitigates against disclosure of the Identified Information.

(c) whether the disclosure would inform a person about the reasons for a decision:

To the extent that this is a relevant factor, I repeat what I have said with regard to paragraphs (a) and (b) above.

To the extent that the Identified Information includes personal information, I do not consider that disclosure of that information will contribute to or hinder debate on any matter of public interest.

Accordingly, on balance I have determined that this factor mitigates against disclosure of the Identified Information.

(d) whether the disclosure would provide the contextual information to aid in the understanding of government decisions:

To the extent that this is a relevant factor, I repeat what I have said with regard to paragraphs (a) and (b) above.

Accordingly, on balance I have determined that this factor mitigates against disclosure of the Identified Information.

(e) whether the disclosure would inform the public about the rules and practices of government in dealing with the public:

This factor is not considered relevant.

(f) whether the disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation:

This factor is not considered relevant.

(g) whether the disclosure would enhance scrutiny of government administrative processes;

This factor is not considered relevant.

(h) whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government;

This factor is relevant because the Identified Information:

- i. is subject to numerous ongoing obligations of confidentiality as previously set out in this determination; and
- ii. incorporates commercially sensitive information that I have determined is likely to, if disclosed, result in competitive disadvantage to third parties.

I have determined that disclosure of the Identified Information (with the exception of certain photographs) will hinder (rather than promote) equity and fair treatment of the third parties involved in that they have a legitimate interest in protecting the confidentiality attaching to the Identified Information. In that sense, I consider that disclosure of the Identified Information (other than certain photographs) will be contrary to the public interest in that the public will have an expectation that such information supplied by third parties (i.e. in the context of commercial arbitration) will remain confidential.

Further, I consider that it would hinder (rather than promote) equity and fair treatment of the third parties involved to disclosure information likely to cause them to suffer competitive disadvantage in their relevant markets.

Accordingly, I have determined that this factor mitigates against disclosure of the Identified Information.

(i) whether the disclosure would promote or harm public health or safety or both public health and safety;

This factor is not considered relevant.

(j) whether the disclosure would promote or harm the administration of justice, including affording procedural fairness and the enforcement of the law;

There are two matters relevant to this public interest factor, namely:

- i. the ongoing covenant of confidentiality attaching to most of the Identified Information as a result of its use in the commercial arbitration; and
- ii. the application of an implied *Harman* undertaking with respect to most of the Identified Information resulting from its production in the commercial arbitration.

The question is whether it will promote or harm the administration of justice to disclose information prepared and supplied in the context of commercial

arbitration..

I consider that disclosure of the relevant Identified Information will be contrary to the public interest in that the public will have an expectation that such information supplied by third parties (i.e. in the context of commercial arbitration and subject to an implied Harman undertaking) will remain confidential.

Accordingly, I determine that this factor mitigates against disclosure of the relevant Identified Information.

(k) whether the disclosure would promote or harm the economic development of the State;

It is reasonable to conclude that disclosure of the Identified Information (with the exception of certain photographs) may deter other commercial entities from engaging in significant projects with Hydro or other Government entities. That is, on the basis that they risk disclosure of their confidential, commercially sensitive information via an application made under the Act. Such a result will at best fail to promote economic development of the State, and at worst harm such development.

Accordingly, I determine that this factor mitigates against disclosure of the Identified Information.

(l) whether the disclosure would promote or harm the environment and or ecology of the State;

This factor is not considered relevant.

(m) whether the disclosure would promote or harm the interests of an individual or group of individuals;

This factor is relevant to the extent that the Identified Information contains personal information. I consider that disclosing the names and address details of individuals has the potential to harm the individual interests of those people. I acknowledge that personal information of Hydro staff (as opposed to third parties) will not ordinarily be exempt from disclosure.

Accordingly, I have determine that this factor mitigates against disclosure of personal information pertaining to persons other than Hydro employees.

(n) whether the disclosure would prejudice the ability to obtain similar information in the future;

It is reasonable to conclude that disclosure of the Identified Information may result in other commercial entities being unwilling to agree to engage in arbitration with Hydro or other Government entities. That is, on the basis that they risk disclosure of their confidential, commercially sensitive information. A practical example of this, includes entities refusing to agree to enter into

agreements with Hydro, that compel commercial arbitration of disputes. I consider such an outcome to be contrary to the public interest in that it will deprive Government entities of commercial arbitration as a means of dispute resolution, and thereby likely increase the time and cost associated with resolving commercial disputes.

Accordingly, I determine that this factor mitigates against disclosure of the Identified Information.

(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;

This factor is not considered relevant.

(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;

This factor is not considered relevant.

(q) whether the disclosure would have a substantial adverse effect on the industrial relations of a public authority;

This factor is not considered relevant.

(r) whether the disclosure would be contrary to the security or good order of a prison or detention facility;

This factor is not considered relevant.

(s) whether the disclosure would harm the business or financial interests of a public authority or any other person or organisation;

With the exception of certain photographs, given the commercially sensitive nature of the Identified Information, , I am satisfied that disclosure will likely harm the business or financial interests of the third parties that supplied the information.

Accordingly, I determine that this factor mitigates against disclosure of the Identified Information with the exception of certain photographs

(t) whether the applicant is resident in Australia;

This factor is not considered relevant.

(u) whether the information is wrong or inaccurate;

This factor is not considered relevant.

(v) whether the information is extraneous or additional information provided by an external party that was not required to be provided;

This factor is not considered relevant.

(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;

For the reasons I have already set out, I am satisfied that disclosure of the Identified Information is likely to result in competitive disadvantage for the third parties that supplied the relevant information to Hydro. I consider such an outcome to be contrary to the public interest because it results in anti-competitive practices in an important public market – i.e. the energy supply industry.

Accordingly, I determine that this factor mitigates against disclosure of the Identified Information.

(x) whether the information is information related to the business affairs of a person which is generally available to the competitors of that person;

I repeat what I have said regarding paragraph (w) above, noting that the Identified Information is not readily available to the competitors of the affected third parties.

Accordingly, I have determined that this factor mitigates against disclosure of the Identified Information.

(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.

This factor is not considered relevant.

9. FINAL DETERMINATION

In light of the assessment set out above, I determine that:

(a) with the exception of certain photographs, all of the Identified Information is exempt from disclosure by application of section 30(1)(a)(ii) of the Act on the basis that disclosure would, or would be reasonably likely to, prejudice the proper administration of the law (i.e. the disclosure of information not yet in evidence or in the public domain which may be relevant to a future dispute has the potential to prejudice such process) thus the exemption in section 30(1)(a)(ii) of the Act applies under the circumstances to the Identified Information (except for certain photographs); and

(b) on balance, with the exception of certain photographs all of the Identified

Information is exempt from disclosure pursuant to the combined application of section 37(1)(b) and/or 39(1)(b) of the Act and, having considered all relevant factors applicable to the public interest test, I consider it contrary to the public interest to disclose that Identified Information in response to the Application. For completeness, I consider the personal information of any person who is not an employee of Hydro to also be exempt from disclosure.

10. NEXT STEPS

37. Information relating to the business affairs of third party

Section 37(3) of the Act, states that;

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

Hydro will provide representatives of Basslink Pty Ltd with a copy of this Determination and certain photographs. We shall await a response in accordance with subsection (5)⁹.

⁹ A public authority or Minister must not provide the information referred to in a notice given to a third party under subsection (3) –

- (a) until 10 working days have elapsed after the date of notification of the third party; or
- (b) if during those 10 working days the third party applies for a review of the decision under section 43 , 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 workdays 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 third party applies for a review of the decision under section 45(1A) – until that review determines the information should be provided

EXTERNAL REVIEW

Pursuant to section 44 of the Act you have the right to apply to the Tasmanian Ombudsman to seek an external review of my decision.

You may write to the Ombudsman at:

Ombudsman Tasmania
GPO Box 960
HOBART TAS 7001

If you wish to request an external review of my decision your application must be made within 20 working days of the date that you received this letter.

Yours sincerely,



Sharlene Brown
Special Counsel
Hydro Tasmania