OmbudsmanSA

Determination

External review - section 39 *Freedom of Information Act 1991*

Applicant	**Seven Network (Operations) Limited**
Agency	**Attorney-General**
Ombudsman reference	**2016/09259**
Agency reference	**CSO:260759**
Determination	**The determination of the agency is reversed.**

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (**the FOI Act**) the applicant requested access from the Attorney-General's Department (**AGD**) to:

> … a copy of the report entitled "Third petition of Henry Vincent Keogh to Her Excellency Marjorie Jackson-Nelson Governor of South Australia".

2. By email sent 26 July 2016, an AGD Accredited Freedom of Information Officer, Ms Chapman, sought to clarify the scope of the application by asking the applicant's FOI Editor, Ms Sandy:

> Are you seeking 'Third Petition of Henry Vincent Keogh to Her Excellency Marjorie Jackson-Nelson Governor of South Australia'
> Or
> Are you seeking a report that you think has been written about the petition? If so, to assist in my search, can you say who may have written this report?

3. On 29 July 2016, Ms Sandy responded that the applicant sought 'access to the report about the petition'.

   In a further email sent 1 August 2016, Ms Sandy wrote:

> I want to ensure you're pursuing the correct document, which is not the petition, but the report on the petition. I believe the report was written by the then Solicitor-General.

4. The initial determination in this matter was made by an AGD Accredited Freedom of Information Officer, Mr Arriola. However, on internal review, the determination was made by the Attorney-General, the Honourable John Rau MP. The application therefore appears to have been transferred to the Attorney-General (**the agency**) for the purpose of the FOI Act sometime between 14 September and 28 October 2016.

5. For the purposes of this determination, I will assume that AGD complied with section 16(3) and (4) of the FOI Act and that the transfer was valid.

Background

6. For ease of reference, procedural steps relating to the application and the external review are set out in the appendix.

Jurisdiction

7. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

8. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 26 June 2017. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to reverse the agency's determination.

9. The applicant, the agency and three interested parties provided submissions in response. I have considered these submissions in this determination.

Relevant law

10. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.[1]

11. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.

12. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.

13. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Documents in issue

14. Both AGD and the agency identified a single document as falling within the scope of the application, namely, an undated report by the former Solicitor-General, Mr Kourakis QC, (now His Honour Chief Justice Kourakis) entitled 'Third Petition of Henry Vincent Keogh to Her Excellency Marjorie Jackson-Nelson Governor of South Australia' (**the document**).

15. In the initial determination. AGD refused access to the document in reliance upon clauses 2(1), 9(1) and 10(1) of Schedule 1 to the FOI Act.

16. On internal review, the agency confirmed the initial determination in reliance on the same clauses but also suggested that clauses 6 and 7 of Schedule 1 might have some application.

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[1] *Freedom of Information Act 1991*, section 12.

Issues in this review

17. The issue in this review is whether the agency has justified its determination to refuse access to the document on the basis that it is exempt under one or more clauses set out in Schedule 1 to the FOI Act.

Consideration

Executive Council documents:

18. Clause 2(1) of Schedule 1 provides:

> A document is an exempt document -
>
> (a) if it is a document that has been specifically prepared for submission to the Executive Council (whether or not it has been so submitted); or
>
> (b) if it is a preliminary draft of a document referred to in paragraph (a); or
>
> (c) if it is a document that is a copy of, or part of, or contains an extract from, a document referred to in paragraph (a) or (b); or
>
> (e) if it contains matter concerning any deliberation or advice of the Executive Council.

19. The Executive Council is the chief executive authority of the South Australian Government, comprising the Ministry with the Governor presiding and formalises the decisions of Cabinet.[2] Meetings of the Executive Council are formal and official and give legal form, where necessary, to decisions of Cabinet. At these meetings, proclamations are issued, appointments to public office are made and regulations approved.[3]

20. The document in issue was written to provide advice to the then South Australian Attorney-General Mr Atkinson about the approach he should take to the petition for mercy. The petition itself was addressed to the then South Australian Governor as the representative of Queen Elizabeth II. In circumstances where Mr Keogh had exhausted all legal avenues for challenging his conviction for murder, by the petition he asked that the Governor consider exercising the royal prerogative of mercy. By convention, the Queen and her representatives act on the advice of their governments. Mr Atkinson sought the legal advice so that he could form a view about the advice that should be given to the Governor.

21. It is plain that the document was not specifically prepared for submission to the Executive Council and cannot be considered exempt pursuant to paragraphs (a), (b) or (c) of clause 2(1). The agency however claims that paragraphs 56 to 95 of the document are exempt pursuant to paragraph (e) because those parts of the document contain matter concerning the deliberations and advice of the Executive Council.

22. The agency draws my attention to a press release that was issued by the then Acting Attorney-General, Mr Foley, on 10 August 2006, which stated:

> Her Excellency the Governor has declined to exercise the prerogative of mercy, on advice, on the third petition of mercy from convicted murderer Henry Keogh, and has today written to his lawyers to advise them.

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[2] http://www.parliament.sa.gov.au/AboutParliament/GlossaryOfTerms/Pages/GlossaryOfTerms.aspx accessed 15 May 2017.
[3] Cossins A, Annotated Freedom of Information Act New South Wales, 1997, The Law Book Co Ltd, Sydney at [102.1].

The agency states that the term 'on advice' is 'accepted shorthand for "on advice of Executive Council".

23. The South Australian Full Court considered the nature of petitions for mercy in *Von Einem v Griffin and Olsen*[4]. In the course of his judgement, Justice Lander set out parts of an affidavit sworn by the Attorney-General at that time, Mr Griffin. In the affidavit Mr Griffin explained the procedure he followed in relation to petitions of mercy. Part of the affidavit read:

> The usual procedure is that where I have formed a view that His Excellency should take no action in respect of a petition for mercy, that advice is conveyed directly to His Excellency through the Premier. That procedure was adopted in this case. On the other hand where it is recommended that the Governor should take some action in respect of a petition, the matter is referred to Cabinet and His Excellency acts upon the advice of Executive Council. That did not occur in this case. Consequently, so far as I am aware, the only Defendants who had any involvement in advising His Excellency in this matter, were the Premier and myself.[5]

24. It appears that the process outlined by Mr Griffin accords with the process adopted in other Australian States. In *Osland v Secretary to the Department of Justice*, the High Court considered the nature of a petition to the Governor of Victoria for the exercise of the royal prerogative of mercy. The plurality endorsed the following statement:

> By convention, the accepted practice is and has been that the Premier seeks the advice of the Attorney-General in relation to whether the prerogative should be exercised. In turn, when the advice of the Attorney-General is sought, it is practice for the Attorney-General to ask his or her department to consider, evaluate and make recommendations in relation to the petition. Sometimes the advice of the Victorian Government Solicitor is sought …
>
> Before tendering his advice to the Premier, the Attorney-General may wish to follow up the advice he or she has received in relation to the matter. Generally the Attorney-General advises the Premier and it is then a matter for the Premier to proffer advice to the Governor. On rare occasions the Attorney-General's advice may be considered by Cabinet before the Premier makes a recommendation to the Governor. However this did not apply in the present case.[6]

25. In the present case, the agency has not provided any evidence to support its claim that the document contains matter concerning any deliberation or advice of the Executive Council. If Mr Foley followed the process described by Mr Griffin, then the document would not have been deliberated upon by Cabinet or the Executive Council. Rather Mr Foley, after having formed a view that the Governor should take no action on the third petition would have conveyed that advice directly to the Governor through the Premier.

26. I conclude that the document does not contain matter concerning any deliberation or advice of the Executive Council and that no part of it is exempt pursuant to clause 2(1)(e) of Schedule 1 to the FOI Act.

<u>Internal working documents</u>:

27. Clause 9(1) of Schedule 1 to the FOI Act provides:

> A document is an exempt document if it contains matter -
>
> (a) that relates to -
>
> (i) any opinion, advice or recommendation that has been obtained, prepared

[4] *Von Einem v Griffin and Olsen* [1998] SASC 6858.
[5] *Von Einem v Griffin and Olsen* per Lander J [35].
[6] *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275.

or recorded; or

(ii) any consultation or deliberation that has taken place,

in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and

(b) the disclosure of which would, on balance, be contrary to the public interest.

28. I think it unarguable that the document contains matter relating to an opinion or advice that was obtained for the purpose of the decision-making functions of a Minister, namely the then Attorney-General. The relevant decision was the effect of the advice the Attorney-General would provide to the Premier. The issue that arises for consideration is whether disclosure of the document would, on balance, be contrary to the public interest.

29. In its submissions to me about where the public interest might lie in the present case, the Crown Solicitor on behalf of the agency relies upon the judgement of Davies J in *Re Howard and the Treasurer of the Commonwealth of Australia*[7]. In that case, the Administrative Appeals Tribunal was considering section 36 of the *Freedom of Information Act 1982* (CW), which was then in substantially similar terms to clause 9(1) of the South Australian Act. Davies J said:

> In considering the public interest element of s 36, the Tribunal may be called upon and in this review is called upon to have regard not only to the incidents of disclosure of the particular documents but also to the effect which availability for disclosure to the public under the FOI Act of like documents would have upon the decision-making processes of the Minister and of his Department … it is possible to postulate that in each case the whole of the circumstances must be examined including any public benefit perceived in the disclosure of the documents sought but that:
>
> (i) the higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed;
>
> (ii) disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;
>
> (iii) disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest;
>
> (iv) disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest;
>
> (v) disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process.
>
> The FOI Act has been in operation since 1 December 1982. As was said in *Re Murtagh and Commissioner of Taxation*, cited above, *Re Chandra and Minister for Immigration and Ethnic Affairs*, cited above, and *Re Lianos and Secretary to the Department of Social Security*, the Tribunal has not yet received evidence that disclosure under the FOI Act has in fact led to a diminishment in appropriate candour and frankness between officers. As time goes by, experience will be gained of the operation of the Act. The extent to which disclosure of internal working documents is in the public interest will more clearly emerge. Presently, there must often be an element of conjecture in a decision as to the public interest. Weight must be given to the object of the FOI Act.[8]

[7] Letter from the Crown Solicitor dated 22 February 2017.
[8] *Re Howard and the Treasurer of the Commonwealth of Australia* [1985] AATA 100 per Davies J [20] - [21].

30. The agency has previously conceded that the second and fifth of the 'Howard factors' are not of assistance in this matter[9]. The advice was not proffered by the then Solicitor-General for the purpose of developing government policy. Nor could it be said that the document does not fairly disclose the reasons for the decision taken by the Acting Attorney-General and ultimately, the Governor.

31. In my provisional determination I queried the applicability of the Howard factors to this matter. I noted that in the former Ombudsman's 2014 FOI audit report[10], he had:

- drawn attention to Justice Davies' comments about the lack of clarity in 1985 about whether disclosure of internal working documents was in the public interest; the element of conjecture involved in his decision; and the need to give weight to the objects of the FOI Act
- noted that following the decision in *Re Howard*, a number of Australian jurisdictions had legislated so as to lessen its impact
- further noted that State Records of South Australia had responded to the Ombudsman's provisional audit report by preparing a guideline 'FOI and the Public Interest', which was endorsed by Senior Management Council[11]. This guideline states:

  > Claiming that disclosure of certain information would not be in the public interest because it would prevent free and frank advice to government must be considered on a case by case basis and supported by factual evidence of the harm and damage it would cause to government.[12]

- stated that while the seniority of persons privy to a communication might increase the likelihood that the public interest will weigh against disclosure, that is only one of the public interest factors to be weighed.

32. In response, the Crown Solicitor submits that the District Court of South Australia recently reaffirmed the applicability of the *Re Howard* factors in *State of South Australia (Department of Planning, Transport and Infrastructure) v Brokenshire*[13]. In that case, Her Honour McIntyre DCJ accepted and adopted the factors outlined in the appellant's written submissions as being 'general indicators of where the public interest may lie'. The factors outlined by the appellant were the *Re Howard* factors.

33. However, after having surveyed other District Court decisions considering clause 9(1), I have been unable to locate any in which the Howard factors are wholeheartedly endorsed. In *Treglown v SA Police*, Herriman DCJ went so far as to characterise as a rebuttable proposition 'that the prospect of disclosure will not ordinarily inhibit candour such as to be contrary to the public interest'[14].

34. It should be noted that for clause 9(1) to apply the agency must establish that disclosure of the document would be contrary to the public interest; the question is not whether disclosure would be in the public interest.

35. In considering whether disclosure of the document would be contrary to the public interest, I am mindful of the fact that, used in the context of the FOI Act, the term 'public interest' does not mean 'that which gratifies curiosity or merely provides information or

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9 Letter from the Crown Solicitor dated 22 February 2017.

10 See 'An audit of state government departments' implementation of the *Freedom of Information Act 1991* (SA), May 2014, Part 6, available at http://www.ombudsman.sa.gov.au/wp-content/uploads/An-audit-of-state-goverment-departments-implementation-of-the-Freedom-of-Information-Act-1991-SA1.pdf.

11 Senior Management Council comprises the chief executives of the major portfolio agencies. See https://publicsector.sa.gov.au/wp/20161209-State-of-the-Sector-Report-2016.pdf accessed 7 September 2017.

12 See 'FOI and the Public Interest', July 2015, available at https://government.archives.sa.gov.au/content/foi-guidelines-and-procedures.

13 *State of South Australia (Department of Planning, Transport and Infrastructure) v Brokenshire* [2015] SADC 68.

14 *Treglown v SA Police* [2011] SADC 139 per Herriman DCJ at [159].

amusement'[15]. In addition, the term means the interest of the public as distinct from the interest of an individual or individuals, including Mr Keogh and the applicant in this matter.

36. The agency submits that consideration of the following factors lead to the conclusion that disclosure of the document would be contrary to the public interest:
    - the document contains legal and highly sensitive advice. This sensitivity arises not only from the nature of the matter being discussed but also the contentiousness of the issues involved. Release to the world at large of legal advice given to government on contentious issues has the potential to prejudice the capacity of the State to defend its interests
    - the document is a report from the second most senior law officer in the State to the acting first law officer, for the purpose of advising the Governor on exercising a Crown prerogative. Communications and deliberations between senior officers of State are part of a class of documents that are entitled to a measure of protection by their nature, not just their content; there is a general prejudice or detriment in their release regardless of content
    - the matters addressed in the document are current and controversial and so are entitled to a high degree of confidentiality
    - decision-makers should be judged on their final decision and the reasons they give for it, rather than on what might have been considered or recommended to them by others
    - it is not necessary for the public to have access to legal advice in order for Ministers to be held politically accountable for their decisions
    - there is a danger in the prospect of people being able to trawl through advice in an effort to identify potential inconsistencies between the advice and the ultimate decision taken
    - release to the world at large of legal advice given to government on contentious issues has the potential to prejudice the capacity of the State to defend its interests. While there are not presently any legal proceedings involving Mr Keogh, it has been reported that he intends to seek compensation for his imprisonment
    - the prerogative of mercy is not part of the criminal justice system. Information about the operation of the criminal justice system can be obtained from sources other than the document so it is not necessary to disclose the document.

37. The purpose of clause 9(1) is to protect the integrity and viability of the governmental decision-making process. It is only if the release of a document would impair this process to a significant or substantial degree, and there is no countervailing benefit to the public which outweighs that impairment, that it would be contrary to the public interest to grant access[16]. In my view the fact that the discussion in the document concerns legal matters - rather than for example economic or security matters - does not necessarily lead to a conclusion that its disclosure would impair the governmental decision-making process.

38. In my provisional determination, I noted that other advices provided by Chief Justice Kourakis to previous Attorneys-General have been made public. In 2004 the then Attorney-General gave details to the House of Assembly of such an advice[17] provided about the prosecution of Paul Habib Nemer by the Director of Public Prosecutions.

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[15] *Director of Public Prosecutions v Smith (1991) 1 VR 63* cited by Kirby J in *Osland v Secretary to the Department of Justice* [2008] HCA 37 at [118].

[16] *Re Murtagh and Commissioner of Taxation* (1984) 6 ALD 112.

[17] See http://netk/net.au/Parliament/Media1.asp and Hansard for 3 May 2004 at p.1926.

39. In addition and according to the applicant's solicitors, when the then Solicitor-General gave advice to the then Attorney-General in about 2002 about the sale of property belonging to the former magistrate, Peter Liddy, copies of that advice were provided to both the present applicant and their solicitors.

40. In its submissions in response to the provisional determination, the Crown states that the fact that governmental legal advice has been publicly provided in different circumstances on different matters has little relevance to the circumstances of the present case. However, I take a different view. It is reasonable to assume that, if it had been anticipated that the release of documents discussing legal matters would have significantly impaired the Attorney-General's decision-making process, such documents would not have been released.

41. I do not agree with the agency's assertion that communications between senior officers of State are entitled to a measure of protection by their very nature and regardless of their content. The FOI Act identifies only limited classes of documents as exempt regardless of their contents such as Cabinet documents[18] and Executive Council documents[19]. Most other classes of documents, including internal working documents, are only exempt if their disclosure would be contrary to the public interest. This was noted by Deputy President Hall in *Re Lianos and Secretary to the Department of Social Security*[20]. Furthermore the FOI Act expressly applies to documents held by Ministers of the Crown[21], many of which could reasonably be expected to contain high level communications.

42. I do not consider that there is a reasonable expectation that disclosure of the document would inhibit the frankness and candour of any future advice provided by a Solicitor-General in similar circumstances. In reaching this conclusion, I have taken into account the duties of the Solicitor-General, which are set out in section 6 of the *Solicitor-General Act 1972*:

> The Solicitor-General -
>
> (a) shall at the request of the Attorney-General -
>
> (i) act as Her Majesty's counsel; and
>
> (ii) perform such other duties as are ordinarily performed by counsel; …

43. The duties of legal practitioners in South Australia were considered by the Full Court in *Legal Practitioners Conduct Board v Lind*[22]. Justice Gray said:

> It is of the utmost importance that public confidence in the legal profession be maintained. Legal practitioners play an integral part in the administration of justice. The obligations which accompany a practitioners' position are commensurate with the responsibility involved. The duties of legal practitioners include a duty to uphold the law, a duty to the Court, a duty to clients and a more general duty to members of the public. The Court and the public demand high standards from practitioners. This is reflected in the legislative processes that regulate the admission of practitioners and govern their conduct.
>
> Personal integrity is an essential attribute for a legal practitioner. Practitioners must act honestly at all times. There is an obligation of frankness and candour in dealings with clients …

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18 Clause 1 of Schedule 1 to the *Freedom of Information Act 1991*.
19 Clause 2 of Schedule 1 to the *Freedom of Information Act 1991*.
20 *Re Tony Lianos and Secretary to the Department of Social Security* [1985] AATA 38.
21 Section 4(1) of the *Freedom of Information Act 1991*.
22 *Legal Practitioners Conduct Board v Lind* [2011] SASCFC 104.

44. It is to be expected that a legal practitioner who is appointed Solicitor-General would be at the peak of their profession and highly and rightly respected for fulfilling their ethical and professional duties. I consider it highly unlikely that a person in that role would provide the Attorney-General with less than frank and candid advice simply because that advice might be disclosed in the future.

45. I am fortified in this view by the fact that previous reports by His Honour Chief Justice Kourakis, have been made publicly available, as discussed in paragraphs 38 and 39 above.

46. The agency states that the matters addressed in the document are current and controversial and this is a factor weighing against disclosure. I agree that there remains controversy surrounding Mr Keogh's prosecution and conviction and the denial of his petitions to the Governor. However, on 19 December 2014 the Court of Criminal Appeal set aside Mr Keogh's conviction. In these circumstances the currency of the views expressed in the document is questionable.

47. While the agency points to the danger of people being able to 'trawl through' the document in an effort to identify potential inconsistencies between its contents and the ultimate decision taken, others might characterise as desirable the enabling of understanding and thoughtful discussion about the advice on which Mr Foley acted and those actions themselves.

48. I acknowledge that in this case, release of the document to the applicant would in effect be release to the world at large. There is no ability to set conditions on the publication of a document released under the FOI Act. The agency submits that release of the document has the potential to prejudice the capacity of the State to defend its interests and that this would be contrary to the public interest.

49. To my mind this argument is a double-edged sword for the agency. While the expenditure of taxpayers' money to meet an order for the payment of damages would be contrary to some facets of the public interest, it could also be argued that should a court determine that a person has been wronged by the State, it is in the public interest that such a person receives redress for that wrong. The submission implies that the document contains information that would hamper the State in its defence if a claim for damages were to be made by Mr Keogh. In my view, if this were to be the case, some facets of the public interest would favour disclosure of the document.

50. The Crown Solicitor's Office has submitted that the ordinary considerations of transparency and accountability do not apply to the exercise of the prerogative powers of the monarch's representative. The exercise of the prerogative of mercy is not a feature of the ordinary administration of government, nor is it a feature of the administration of the criminal justice system. It is not subject to judicial review. This must be borne in mind when considering whether disclosure of the document would be contrary to the public interest.

51. I am not persuaded by this submission. In my view, the ability of a person living in a constitutional monarchy to petition the monarch's representative to exercise the prerogative of mercy <u>is</u> part of the criminal justice system. The existence of the prerogative recognises, among other things, that all institutions, including courts, are capable of error. Except in extreme circumstances other discretionary decisions made within the criminal justice system are similarly not subject to judicial review. For instance, a police officer detecting the commission of an offence might decide to take no action in response to it or might decide to report the offender.

52. The prerogative of mercy is expressly preserved by section 369 of the *Criminal Law Consolidation Act 1935.* This illustrates the place that the prerogative continues to play in the criminal justice system.

53. Taking the foregoing into account, I am not persuaded that the release of the document would impair the integrity and viability of the governmental decision-making process to a significant or substantial degree. In addition, there are countervailing factors which weigh in favour of disclosure, such as:
    - meeting the objects of the FOI Act, which include the promotion of accountability of Ministers of the Crown[23], in this case the Attorney-General upon whose advice the Governor acted. While the view could be taken that the ultimate decision to be made on the petition was that of the Governor, the convention is that the Governor will act on the advice of her Ministers. The impact of this convention is that the Governor's decision on the petition reflects the advice she received from Mr Foley via the Premier
    - disclosure of the document would inform and positively contribute to the ongoing public debate concerning the reliability of important aspects of the evidence that was led to prove that Mr Keogh had murdered Ms Cheney, and the more general reliability of the witness who gave that evidence
    - disclosure of the document would allow the public to scrutinise the quality and even-handedness of the information provided by the Acting Attorney-General in his press release
    - the fact that the agency has not identified any specific detriment that might arise if the document were to be disclosed and that no detriment appears to have arisen from the release of earlier advices provided by the Solicitor-General
    - a significant portion of the document was disclosed by Mr Foley in a press release issued 10 August 2006 and during a press conference he held on the same day. During the press conference, Mr Foley said that neither he nor the Solicitor-General held any doubt in their minds that Mr Keogh was 'guilty of a terrible, terrible murder'. Yet, as noted, on 19 December 2014, the Court of Criminal Appeal set aside Mr Keogh's conviction on the ground that there had been a substantial miscarriage of justice. In reaching this decision, the court took into account an expert opinion that was canvassed in the document but was not mentioned by Mr Foley in his press release or press conference
    - the public interest in the Crown's duty to disclose material in its possession or power which would tend to assist a defendant's case. This duty has been recognised as an important ingredient in a fair trial and is an aspect of the prosecution's duty to ensure that the Crown case is presented with fairness to an accused[24]. While I recognise that at the time his third petition for mercy was rejected Mr Keogh was not facing trial, it might reasonably be expected by members of the public that in circumstances where a convicted person continues to contest his conviction that the Crown would disclose any exculpatory material that might be in its possession.

54. I conclude that the document is not exempt pursuant to clause 9(1) of Schedule 1 to the FOI Act.

<u>Documents subject to legal professional privilege</u>:

55. Clause 10(1) of Schedule 1 to the FOI Act provides:

> A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.

[23] Section 3(1)(a) of the *Freedom of Information Act 1991.*
[24] *Carter v Hayes SM and Another* (1994) 61 SASR 451 per King CJ.

56. In my provisional determination, I stated that it was common ground between the parties that the document, when written, was subject to legal professional privilege and the dispute between the parties was whether that privilege had been impliedly waived. In their submissions in response to the provisional determination, the applicant's solicitors corrected this statement; it is the applicant's primary position that the document would not be privileged from production on the ground of legal professional privilege. It is argued that in providing the advice, the Solicitor-General was acting as the agent of the Attorney-General as 'opposed to providing a legal advice in the ordinary course of government business'.

57. I reject this submission. Legal professional privilege exists to protect the confidentiality of communications between a lawyer and client. For a document to be exempt under clause 10(1), it must contain a communication between a client and their lawyer created for the dominant purpose of obtaining or giving legal advice or for the dominant purpose of use in existing or anticipated legal proceedings[25]. I think it is plain that, at the time the document was created, it attracted legal professional privilege.

58. I also disagree with the applicant's argument that, in providing legal advice, the Solicitor-General was acting as the Attorney-General's agent. The term 'agency' refers to a relationship between two persons, by which the principal gives the agent the authority or capacity to create or affect legal relations between the principal and third parties[26]. In the present case it could not be said that the Attorney-General had given the Solicitor-General authority to create or affect legal relations between the Attorney and another person.

59. I note that in *Osland v Secretary to the Department of Justice* the High Court of Australia considered whether the Victorian Attorney-General had waived legal professional privilege in a joint advice provided to him about the position he should take in respect of the appellant's petition for mercy. There is nothing in the High Court's judgements that suggests that legal professional privilege did not apply to that advice when it was provided[27]. I do not see why similar advice when provided by the Solicitor-General should stand in a different position.

60. The applicant's secondary position is that the privilege has been waived. The applicant's solicitors submit this has occurred as a result of:

    - the release of a significant portion of the Solicitor-General's advice by the Acting Attorney-General in a press release issued and a press conference held on 10 August 2006
    - statements made by His Honour Chief Justice Kourakis during an ABC Radio program aired on 2 April 2012
    - comments made by Chief Justice Kourakis in his judgement in *R v Van Beelen* [2016] SASCFC 32
    - the extensive discussion in *R v Keogh* [2014] SASCFC 20 and *R v Keogh (No.2)* [2014] SASFC 136 of a report provided by the late Professor Vernon-Roberts to the Solicitor-General on 22 November 2014.

61. I reject the argument that anything Chief Justice Kourakis or any other member of the Supreme Court might have said could have waived the legal professional privilege that existed in the document at the time it was written. Legal professional privilege exists to protect the confidentiality of communications between a lawyer and their client. It is the

[25] *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.
[26] *International Harvester Co of Australian Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644.
[27] *Osland v Secretary to the Department of Justice* [2008] HCA 37.

client who is entitled to the benefit of the confidentiality and it is the client, rather than the lawyer, who may relinquish that entitlement[28].

62. Before considering whether in the present case the Acting Attorney-General did relinquish the benefit of the confidentiality attaching to the document, I address the agency's submission that, when considering the application of clause 10(1) of Schedule 1 to the FOI Act, a decision-maker ought not consider whether legal professional privilege has been waived.

63. In support of this submission, the Crown Solicitor cites the decision of McKechnie J of the Western Australian Supreme Court in *Department of Housing and Works v Bowden*[29]. In that case His Honour held that in general, it is only necessary for a decision-maker, including the WA Information Commissioner, to decide whether a document is prima facie privileged from production in legal proceedings. The question of whether privilege has been waived may involve subtle questions of law and is often difficult to resolve. Parliament could not have intended that such questions should be resolved in the context of FOI requests by persons untrained in the law and in a vacuum without the matrix of extant legal proceedings to resolve the question.

64. In *Bowden* McKechnie J acknowledged that his decision was contrary to the decision of Williams J of the Queensland Supreme Court in *Queensland Law Society Inc v Albietz and Anor*[30]. In *Albietz* the court implicitly accepted that the question of waiver was legitimately considered in the context of deciding whether a document was an exempt document under FOI legislation on the ground that it would be privileged from production in legal proceedings. This was also implicitly accepted by the High Court in *Osland v Secretary to the Department of Justice*[31].

65. I note that my Queensland counterpart has recently affirmed that questions of waiver of legal professional privilege can be considered in the Freedom of Information context[32].

66. Given the state of the authorities I am not persuaded that, having accepted that the document attracted legal professional privilege at the time it was prepared, I am unable to consider whether or not that privilege has been waived.

67. In reaching this position, I note that a level of skill is required in order to correctly apply a number of exemption clauses in Schedule 1 to the FOI Act and FOI legislation in other jurisdictions. For instance, in considering whether clause 17 applies to render a document exempt, an FOI officer would need to decide if a document contains matter the public disclosure of which would constitute contempt of court or infringe the privilege of Parliament. Even the arguably more straightforward clauses such as clause 6(1) and 7(1) require a judgement as to what amounts to an unreasonable disclosure or a reasonable expectation. Such concepts, like that of the waiver of a privilege, are also legal concepts. With respect, I decline to follow *Bowden* which appears inconsistent with other authorities such as *Albietz* and *Osland*.

68. A client can waive legal professional privilege over an otherwise protected communication either expressly or by imputation. In the present case, the issue for consideration is whether the Acting Attorney-General did the latter. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of privilege[33]. The law recognises such inconsistency and determines its

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28 *Mann v Carnell* [1999] HCA 66 per Gleeson CJ, Gaudron, Gummow and Callinan JJ at [28].
29 *Department of Housing and Works v Bowden* [2005] WASC 123.
30 *Queensland Law Society Inc v Albietz and Anor* (2001) Qd R 621.
31 *Osland v Secretary to the Department of Justice* [2008] HCA 37.
32 *N Toodyan and Metro South Hospital and Health Service* [2017] QICmr 33 referencing *Ozcare and Department of Justice and Attorney-General* (unreported decision of the Queensland Information Commissioner dated 13 May 2011).
33 *Mann v Carnell* [1999] HCA 66 per Gleeson CJ, Gaudron, Gummow and Callinan JJ at [28].

consequences, even though those consequences may not reflect the subjective intention of the party who has lost the privilege[34].

69. As stated above at paragraph 53, when a person is being prosecuted for the commission of a criminal offence, there is a duty on the Crown to disclose material in its possession or power which would tend to assist a defendant's case. This duty has been recognised as an important ingredient in a fair trial and is an aspect of the prosecution's duty to ensure that the Crown case is presented with fairness to an accused. In *R v Bunting and Others* Martin J held that the DPP's duty to disclose relevant information and produce relevant documents was inconsistent with the maintenance of confidentiality over communications which would otherwise have been privileged[35]. If the duty of the Crown, as a model litigant, continues after a convicted person has exhausted all avenues of appeal, it could be argued in the present case that treating the document as privileged would be inconsistent with such a duty.

70. In his press conference held on 10 August 2006 the Acting Attorney-General stated that the document reminded the public of evidence at Mr Keogh's trial that found that Ms Cheney was found dead in the bath:

> At a time without her knowledge her life was insured for about $1.2 million in five policies that had been fraudulently obtained by Henry Keogh by forging her signature on the policy application.
>
> The very day after she and Mr Keogh had attended on a wedding celebrant to register an intent to solemnise their relationship that Mr Keogh had betrayed by having affairs with two other women.
>
> Within 24 hours of her suffering up to 15 bruises to various parts of her body with two bruises to the top of her head which are difficult to explain innocently. The combined weight of the circumstances are enough to prove Mr Keogh's guilt.
>
> Moreover, the lies told by Mr Keogh to several people including Ms Cheney's father and the police after her death can be seen as an attempt to conceal the value of the insurance he had taken out on her life and therefore the amount he stood to gain from her death.[36]

71. Later at the press conference the Acting Attorney-General addressed particular issues that had apparently been raised by Mr Keogh in his third petition. Mr Foley said:

> Ms Cheney's car was missing on the night of her death suggesting that a person other than Mr Keogh was involved: Police photographs taken on the night show that there was a car in the driveway of Ms Cheney's home. More importantly, Mr Keogh gave evidence in his trial that it was there. This claim was either made without Mr Keogh's instructions or, alternatively, it was raised and supported by Mr Keogh in the knowledge that it was contrary to his evidence.
>
> It was not possible for Ms Cheney to have drowned in the bath: Strong criticisms were advanced of one possible scenario that was advanced at trial by Dr Manock. Indeed, the defence mounted a strong attack on Dr Manock's hypothesis at trial. However, Dr Manock's theory was only ever presented as one possible way in which Mr Keogh might have drowned Ms Cheney. Although the pathologists called by the defence at Mr Keogh's trial strongly disagreed with Dr Manock's theory, they all agreed that another could have deliberately drowned Ms Cheney. Apart from the specious suggestion that there was insufficient water in the bath, no other reason for doubting the possibility was advanced by the petitioner.

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34 *Mann v Carnell.*
35 *R v Bunting and Others* [2002] SASC 412.
36 Transcript of press conference provided by the applicant's solicitors.

There was not enough water in the bath for Ms Cheney to have drowned: Mr Keogh's own evidence was that he found Ms Cheney with her face under water. The preponderance of eyewitness accounts establishes that the bath was one half to three quarters full.

A photograph of Mr Keogh's left hand was reversed when it was developed so that it appeared to be his right hand: The allegation is correct. However, the photograph was never used at either of Mr Keogh's trials. It was an exhibit to a statement tendered at the committal hearing but was never tendered on his trial before a jury. It was in all likelihood a photographic development error that could not possibly have affected Mr Keogh's trial in any way. An interview with Mr Rofe QC about this matter was broadcast on the television current affairs program Today Tonight is reproduced in the petition. The reporter asserted in that interview that the photograph had been admitted into evidence on Mr Keogh's trial. That assertion is patently wrong.

A photograph of Ms Cheney's legs shows an injection mark or insect sting: Neither the police who carefully examined Ms Cheney's body on the night, nor Dr Manock, saw any such mark. If it had caused an allergic reaction it would have been obvious. An independent expert has reported that there is no evidence upon which to conclude that Ms Cheney suffered an anaphylactic reaction.

Ms Cheney may have suffered an allergic reaction to Naprosyn tablets found in the home: The Forensic Science Centre conducted tests of Ms Cheney's blood and no trace of Naprosyn was found.

Some swelling of Ms Cheney's face is apparent in photographs taken of her body on the night of her death: Police officers who closely examined Ms Cheney's body reported no swelling. Importantly, neither did Mr Keogh. Relying on the photographic appearances, it has been insinuated that the appearance of Ms Cheney's face was deliberately altered after her death. The allegation is inherently improbable. No motive for any such conduct is given. Moreover, Mr Keogh was present in the house at all relevant times. He has certainly never suggested that he saw anyone at the house attempt to change Ms Cheney's facial appearance.

72. During the press conference, the Acting Attorney-General also made the following remarks:

> On the advice of the Solicitor-General as I have stated here today that regardless of the hypothesis put forward by Dr Manock at the trial it is the opinion of the Solicitor-General as it has been of the court that overwhelming body and circumstantial evidence points to the guilt of Henry Keogh.
>
> It is for Today Tonight to make their decision of their continued support of, should it be there, of Mr Keogh. The people of South Australia can be comforted in the knowledge of a two and half year exhaustive examination by the Solicitor-General, one of the most senior officers of this State, has concluded that there is no doubt in his mind as to the guilt of Henry Keogh.
>
> The overwhelming issue conclusions (sic) that the Solicitor-General has presented in his report to me is that regardless of the theory put forward by Dr Manock the overwhelming body of evidence can only lead to one conclusion that Henry Keogh is guilty of the murder of Anna Jane Cheney.
>
> … I say to all South Australians on the evidence of the overwhelming body of evidence viewed by the Solicitor-General over two and a half years, one of the State's most senior legal officers, concludes without doubt in his mind, without doubt in my mind, Henry Keogh is guilty of a terrible, terrible murder …

73. In *Osland v Secretary to the Department of Justice*[37] the High Court considered whether the Victorian Attorney-General had impliedly waived legal professional over legal advice he had received from three eminent lawyers. The Attorney had sought that advice in order to form a view about the advice that should be given to the Governor of Victoria in relation to a petition of mercy made by the appellant. In announcing the Governor's decision to deny the petition, the Attorney-General issued a press release, which read:

> On July 5, 1999, Mrs Osland submitted a petition for mercy to the then Attorney-General Jan Wade. That petition set out six grounds on which the petition should be granted.
>
> Following consultation with the State Opposition, I appointed a panel of three senior counsel, Susan Crennan QC, Jack Rush QC and Paul Holdenson QC, to consider Mrs Osland's petition.
> This week I received a memorandum of joint advice from the panel in relation to the petition. The joint advice recommends on every ground that the petition should be denied.
>
> After carefully considering the joint advice, I have recommended to the Premier that the Governor be advised to deny the petition.
>
> The Governor has accepted this advice and denied the petition.

74. In concluding that, by making those statements, the Attorney-General had not waived legal professional privilege the plurality of the High Court said:

> The evident purpose of what was said in the press release was to satisfy the public that due process had been followed in the consideration of the petition, and that the decision was not based on political considerations. The three eminent lawyers who gave the advice were appointed following consultation with the State Opposition. They were external to the Department. Their advice covered all the grounds upon which the petition was based. They recommended denial of the petition. Their advice was carefully considered and the petition was denied. The Attorney-General was seeking to give the fullest information as to the process that had been followed, no doubt in order to deflect any criticism, while at the same time following the long-standing practice of not giving the reasons for the decision. This did not involve inconsistency; and it involved no unfairness to the appellant …
>
> Whether, in a given context, a limited disclosure of the existence, and the effect, of legal advice is inconsistent with maintaining confidentiality in the terms of advice will depend upon the circumstances of the case. As Tamberlin J said in *Nine Films and Television Pty Ltd v Ninox Television Ltd*, questions of waiver are matters of fact and degree …[38]

75. In *Nine Films* Tamberlin J said:

> While I accept that, in some circumstances, a clear disclosure of the 'bottom line' of the advice, and the course of conduct taken thereafter, may be sufficient to amount to waiver of legal professional privilege, I do not think these matters have been established in the present case. On a fair and reasonable reading, the statement to the effect that senior counsel had been engaged and that he had reviewed matters in detail and that steps were being taken based on his recommendations is not sufficient to amount to a waiver of the legal advice. The substance or content of the advice is not disclosed with specificity or clarity. Questions of waiver are matters of fact and degree and, in this instance, I am not

[37] *Osland v Secretary to the Department of Justice* [2008] HCA 37.
[38] *Osland v Secretary to the Department of Justice* [2008] HCA 37 per Gleeson CJ, Gummow, Heydon and Kiefel JJ at [48-49].

> persuaded that the conduct, assertions or admissible evidence are sufficient to warrant the necessary implication that legal professional privilege has been waived[39].

76. In my view the facts of the present case are distinguishable from those in *Osland*. Unlike the Victorian Attorney-General, Mr Foley did not follow the 'long-standing practice of not giving reasons' for the Governor's decision. While he referred briefly to the process that had been followed in rejecting the petition for mercy, the evident intention of most of the statements made in the press release and during the press conference appears to have been to assure the public of Mr Keogh's guilt of the offence. Not only did Mr Foley have no doubt in his mind that Mr Keogh was guilty of a 'terrible, terrible murder', neither did the Solicitor-General.

77. In the present case, the document refers to the existence of an expert report provided to the Solicitor-General for the purposes of preparing his advice. The report was from the late Professor Vernon-Roberts. In his judgement in *R v Van Beelen*, Kourakis CJ referred to this report, saying:

> In support of his application that I recuse myself, Mr Borick QC relied on the fact that the press release [issued by Mr Foley] did not refer at all to a pathologist's report which I, as Solicitor-General, had sought and received from Professor Vernon-Roberts. Professor Vernon-Roberts' report was subsequently disclosed to Mr Keogh in 2013. Professor Vernon-Roberts criticised several aspects of the way in which Mr Manock had undertaken pathology tests on the autopsy and in particular the lack of histology testing of sections of tissue taken from sites of apparent bruising on the body of Ms Cheney.
>
> In particular, Professor Vernon-Roberts formed the opinion that:
>
> 'The sampling of only one of several "bruises" on the right leg and only one of three on the left leg is, in my opinion, seriously inadequate as, taking account of Dr Manock's subsequent conclusions as to the mode of death of Ms Cheney by assisted drowning and the importance of confirming the presence of bruising and assessing their age to sustain those conclusions each "bruise" on both legs should have been adequately sampled. The tissues between each bruise should also have been sampled to ascertain whether there were separate bruises, possibly of different ages, or a single extensive bruise on one or both legs with variable discolouration of the skin.'
>
> Professor Vernon-Roberts also opined that:
>
> '[T]he application of staining for the presence of iron in the cells should be undertaken on tissues from Miss Cheney's medial left leg as confirmation of the presence of iron pigment would indicate bruising having occurred some days or longer prior to death.'
>
> After the report of Professor Vernon-Roberts was released to Mr Keogh's legal representatives, the analysis he recommended was undertaken. It showed the presence of iron, haemosiderin, in a bruise on the medial aspect of Ms Cheney's leg. That result showed therefore that at least one of the bruises was older than opined by Dr Manock and inconsistent with the prosecution case that it was caused at about the time of death. The report of Professor Vernon-Roberts and the subsequent discovery of haemosiderin in the section of the left leg medial bruise was a central consideration in Mr Keogh's subsequent appeal brought pursuant to s 353A of the [*Criminal Law Consolidation Act 1935*] to this Court.

78. It is noteworthy that at the time the Acting Attorney-General gave his advice that the petition for mercy should be denied, Dr Manock, who had given evidence at Mr Keogh's trial that the mark on the medial aspect of Ms Cheney's left leg was a bruise, had recanted on that evidence during a hearing by the Medical Board[40]. In addition, in 1995 the South Australian Coroner made searing criticisms of conclusions reached by Dr

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[39] *Nine Films and Television Pty Ltd v Ninox Television Ltd* [2005] FCA 356 at [26].
[40] *R v Keogh (No 2)* [2014] SASCFC 136 at [219].

Manock after conducting autopsies on the bodies of three babies[41], who, he wrongly concluded, had each died from bronchopneumonia. These matters brought the reliability of Dr Manock's evidence during Mr Keogh's trial into stark relief. Evidence contrary to that given by Dr Manock was available to the Acting Attorney-General on 10 August 2006.

79. In determining whether there has been inconsistency between a disclosure of legal advice and the maintenance of confidentiality over that advice, one of the factors to be considered is the legal and practical consequences of limited rather than complete disclosure[42]. In the present case, one of the consequences of the limited disclosure by the Acting Attorney-General was that Mr Keogh was not aware of criticisms of important aspects of Dr Manock's evidence. Had he been so aware, he may well have pursued fruitful forensic lines of enquiry casting doubt on the reliability of that evidence and presented them in a subsequent petition for mercy. It is reasonable to expect that he would have done so at a much earlier date than 5 December 2013 when Professor Vernon-Roberts' report was released to Mr Keogh's solicitors[43].

80. In its submissions, the agency refers to statements made by the High Court in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*: In that case, the court said:

> According to its strict legal connotation, waiver is an intentional act done with knowledge whereby a person abandons a right (or privilege) by acting in a manner inconsistent with that right (or privilege). It may be express or implied … In some cases waiver will be imputed by the law with the consequence that a privilege is lost, even though that consequence was not intended by the party losing the privilege. The courts will impute an intention where the acts of a party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect.
>
> … In *Mann v Carnell*, it was said that it is considerations of fairness which inform the court's view about an inconsistency which be seen between the conduct of a party and the maintenance of confidentiality, though "not some overriding principle of fairness operating at large".[44]

81. The agency observes that the principle that the issue of fairness does not operate at large but is to be considered in the context of particular curial proceedings creates difficulties when considering the operation of clause 10(1) of Schedule 1. It is argued that in order to consider whether there has been waiver of legal professional privilege over the document, it is necessary to postulate the existence of legal proceedings and to determine who the parties would be to those proceedings and what the issues would be. In *Osland* the High Court approached the issue on the basis that the appellant was the other party in hypothetical proceedings but in the present case the applicant is in a fundamentally different situation. Its rights have not been affected, nor has it suffered any forensic disadvantage by virtue of Mr Foley's statements.

82. In *Osland* the High Court considered the issue of imputed waiver in circumstances where litigation was neither on foot nor anticipated. As stated by the agency, the High Court appears to have approached the issue on the basis that the appellant in that case was involved in litigation with the Victorian Attorney-General.

83. In the present matter, I have not approached the issue of waiver as if the applicant is the other party to legal proceedings involving Mr Foley. Rather, my primary approach

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41 See http://netk.net.au/soi/SOI12.asp accessed 12 September 2017.
42 *Osland v Secretary to the Department of Justice* [2008] HCA 37 per Gleeson CJ, Gummow, Heydon and Kiefel JJ at [46].
43 *R v Keogh (No 2)* [2014] SASCFC 136 at [189].
44 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46 at [30] [31].

has been to consider whether Mr Foley by his statements made on 10 August 2006 acted in a manner that was inconsistent with the maintenance of privilege over the document. In doing so I have taken account of the considerations of fairness that arose in a context where:

- a convicted person, who had exhausted all avenues of appeal then available to him, had petitioned the Governor to exercise the prerogative of mercy
- it was the duty of the then Attorney-General to advise the Premier about whether the prerogative should be exercised
- for the purpose of so advising the Premier, the Attorney-General sought the advice of the Solicitor-General
- in the course of formulating his advice, the Solicitor-General sought and received a report of an expert who cast doubt on an important aspect of the evidence given at Mr Keogh's trial by the prosecution witness Dr Manock
- the fact that this expert cast this doubt on an important aspect of Dr Manock's evidence was communicated in the document[45] and can be taken to have been known by the Acting Attorney-General
- after receiving the document, the Acting Attorney-General advised the Premier that he should advise the Governor to deny the petition for mercy
- in announcing the Governor's decision to deny the petition, the Acting Attorney-General made statements the evident purpose of which was to assure the public that there was no reason to doubt Mr Keogh's guilt
- the Acting Attorney-General did not refer to that part of the document in which the Solicitor-General referred to the fact that the expert had told him he doubted the accuracy of an important aspect of Dr Manock's evidence
- by disclosing some parts of the document and failing to reveal other parts of it, the Acting Attorney put Mr Keogh at a forensic disadvantage in that he deprived him of the opportunity to pursue a fruitful line of enquiry before presenting any further petitions for mercy.

84. I conclude that by issuing the press release and making the statements he did during the press conference held on 10 August 2006 the Acting Attorney-General should be imputed to have waived the legal professional privilege that otherwise protected the document. The Acting Attorney-General's conduct was inconsistent with maintenance of the privilege.

Severance

85. The Crown Solicitor has submitted that even if the Acting Attorney-General did impliedly waive legal professional privilege (a proposition with which he does not agree), the content of paragraphs 56-95 of the document was not referred to in the press release or conference. The Crown Solicitor submits that those paragraphs constitute a self-contained discussion of a discrete issue and are not necessary for an understanding of the balance of the report. They should therefore be severed from any material disclosed to the applicant.

86. In *Great Atlantic Insurance Co v Home Insurance Co* Templeman LJ said that 'the simplest, safest and most straightforward rule' is that if a document is subject to legal professional privilege the privilege must be asserted as to the whole document unless the document deals with separate subject matters so that it can be divided into two separate and distinct documents, each of which is complete[46]. This statement of principle was endorsed by Gibbs CJ in *Attorney-General for the Northern Territory v Maurice*[47].

[45] Paragraph 251.
[46] *Great Atlantic Insurance Co v Home Insurance Co* (1981) 2 All ER 485.
[47] *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475.

87. It was observed by His Honour Justice Bleby of the South Australian Supreme Court in *Alstom Power v Yokogawa Australia Pty Ltd (No.5)* that, in reaching this conclusion, the English Court of Appeal did not refer to the principles of inconsistency set out by the High Court of Australia in *Mann v Carnell*[48]. Bleby J held that waiver of privilege in respect of the whole of a document can only be imputed when there is inconsistency or unfairness in waiving privilege as to only part of the document. It is not only a matter of ascertaining whether the contentious document deals with separate subject matters[49].

88. On the other hand, I note that the test set out by Templeman LJ in *Great Atlantic* was applied by the Federal Court in *Bristol-Myers Squibb Company v Apotex Pty Ltd (No 3)*[50] and *Schutz Australia Pty Ltd v VIP Plastic Packaging Pty Ltd (No 18)*[51]. The judgements in both of these cases were handed down after the judgement in *Alstom Power*.

89. Given the state of the authorities and, in particular, the Chief Justice's statement in *Maurice* I have decided to apply the principle that privilege relating to a document which deals with one subject matter cannot be waived as to part and asserted as to the remainder. The question is therefore whether the document in issue deals with one - or more - subject matters.

90. It is my view that the document deals with a single subject-matter namely the approach that the Attorney-General should take to Mr Keogh's third petition for mercy. While most of the advice contained in paragraphs 56-95 of the document comprises a neutral discussion of various options open to the Attorney and the ways in which courts have approached various issues, at both paragraphs 75 and 92, the Solicitor-General connects this discussion to matters raised by Mr Keogh in the petition. Further, the content of paragraph 96 demonstrates the link between the material in paragraphs 56-95 and the remainder of the document.

91. I conclude that the Acting Attorney-General should be taken as having impliedly waived legal processional privilege over the entire document.

Documents affecting personal affairs:

92. Clause 6(1) of Schedule 1 to the FOI Act provides:

> A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

93. As stated in paragraph 12, under section 48 of the FOI Act, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process. In the present case, the agency has not made submissions to me in relation to whether the document - or parts of it - is exempt on the basis that release of it would involve the unreasonable disclosure of any persons' personal affairs.

94. An examination of the document shows that parts of it contain information concerning the personal affairs of three persons: IP14, IP15 and IP16.

95. In accordance with my obligation under section 39(10) of the FOI Act, I sought the views of IP16 as to whether the document was exempt under clause 6(1) of Schedule 1. During a telephone call with my Senior Legal Officer, IP16 advised that they had no

[48] *Mann v Carnell* [1999] HCA 66.
[49] *Alstom Power v Yokogawa Australia Pty Ltd (No 5)* [2010] SASC 267.
[50] *Bristol-Myers Squibb Co v Apotex Pty Ltd (No 3)* [2012] FCA 1310.
[51] *Schutz Australia Pty Ltd v VIP Plastic Packaging Pty Ltd (No 18)* [2013] FCA 407.

reservations or issues about the provision of the document to the applicant[52]. I conclude that disclosure of the document would not involve the unreasonable disclosure of IP16's personal affairs.

96. IP14 and IP15 are deceased. I did not consider it appropriate to consult with either of their personal representatives or close relatives in relation to disclosure of the document. Insofar as the document contains information concerning IP14 and IP15's personal affairs it canvasses information that has been the subject of evidence given during Mr Keogh's trials and consideration on the hearing of his appeals. It has also been the subject of extensive media coverage. In the circumstances I do not consider that disclosure of the document would involve the unreasonable disclosure of IP14 or IP15's personal affairs.

97. I conclude that no parts of the document are exempt pursuant to clause 6(1).

Documents affecting professional affairs:

98. Clause 7(1) of Schedule 1 to the FOI Act relevantly provides:

> A document is an exempt document -
>
> …
>
> (c) if it contains matter -
>
> (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
>
> (ii) the disclosure of which -
>
> (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
>
> (B) would, on balance, be contrary to the public interest.

99. In the present case, the agency has not made submissions to me in relation to whether the document - or parts of it - is exempt on the basis that release of it could reasonably be expected to have an adverse effect on any person's professional affairs. It has not been suggested by the agency that disclosure could reasonably be expected to prejudice the future supply of similar information to the Government or an agency.

100. On examining the document, I identified 15 persons whose professional affairs were disclosed by it. I managed to contact two of those persons: IP17 and IP18. Neither of those persons expressed any concern about the document being disclosed under the FOI Act.

101. In considering the phrase 'could reasonably be expected to have an adverse effect' as it appears in clause 7(1)(c), the District Court has commented:

> We are in the field of predictive opinion. The question is whether there is a reasonable expectation of adverse effects … that is not fanciful, imaginary or contrived, but rather is

[52] Telephone call on 12 July 2017.

> reasonable, that is to say based on reason, namely 'agreeable to reason: not irrational, absurd or ridiculous …[53]

102. It is sufficient:

> if any adverse effect is established … However, it must be something which can be properly characterised as an adverse effect and not something so de minibus that it would be properly regarded as inconsequential … It will be sufficient if the adverse effect is produced by that document in combination with other evidence which is before the Court on the appeal.[54]

103. IP9 is deceased. Disclosure of the document could not have an adverse effect on that person's professional affairs.

104. Given the way in which the document treats the material concerning the professional affairs of IP1-IP12, my view is that it could not reasonably be expected that disclosure of the document would have an adverse effect on those persons' professional affairs.

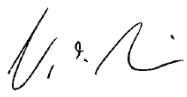
105. It might be argued that IP13 stands in a different position. However, in view of IP13's present age and the fact that he no longer practises his former profession, I favour the view that disclosure of the document could not reasonably be expected to have an adverse effect on his professional affairs. My view is reinforced by the fact that other damaging information concerning IP13's professional affairs is in the public domain. In any event, I take the view that disclosure of the material concerning IP13's professional affairs would not be contrary to the public interest.

106. It might also be argued that IP17 and IP18 stand in a different position than IP1-IP12. However, given that both IP17 and 18 have expressed no concern about the disclosure of the document, I do not hold any concerns about the disclosure of their professional affairs, which are discussed in the document.

107. I conclude that no parts of the document are exempt pursuant to clause 7(1)(c) of Schedule 1.

Determination

108. In light of my views above, I reverse the agency's determination.



Wayne Lines
SA OMBUDSMAN

25 September 2017

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[53] *Ipex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54, applying *Re Actors Equity Association of Australia (No 2)* (1985) 7 ALD 584 at 590.

[54] *Ipex Info Tech v Dept of Info Tech Services* at 65.

APPENDIX

Procedural steps

Date	Event
26 July 2016	AGD received the FOI application dated 19 July 2016.
14 September 2016	AGD determined the application.
14 October 2016	AGD received the internal review application dated 14 October 2016.
28 October 2016	The agency confirmed AGD's determination.
24 November 2016	The Ombudsman received the applicant's request for external review dated 24 November 2016.
1 December 2016	The Ombudsman advised the agency of the external review and requested submissions and documentation.
24 February 2017	The Crown Solicitor provided the Ombudsman with the agency's submissions and documentation.
26 June 2017	The Ombudsman issued his provisional determination.
12 July 2017	IP16 provided the Ombudsman with his submissions.
17 July 2017	The applicant's solicitors provided the Ombudsman with submissions.
18 July 2017	IP17 provided the Ombudsman with his submissions.
19 July 2017	IP18 provided the Ombudsman with his submissions.
26 July 2017	The Crown Solicitor provided the Ombudsman with the agency's submissions.