

Determination

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

Applicant	Mr David Pisoni MP
Agency	Department for Education & Child Development
Ombudsman reference	2015/01154
Agency reference	FSA90132437/971
Determination	The determination of the agency is confirmed.

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant requested access from the agency to:

A copy of the Families SA Internal Audit Report that was produced by former Police Commissioner Mal Hyde (audit announced on 5 August 2014)

Background

1. For ease of reference, the procedural steps relating to the application are set out in the appendix.

Jurisdiction

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

Provisional determination

3. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 2 December 2015. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.
4. The agency advised that it had no further submissions to make in response to the provisional determination. As at the date of this final determination, the applicant has not provided me with any submissions in response to the provisional determination.

Relevant law

1. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
2. 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. In this matter the agency has claimed that exemption clause 1(1)(a) applies.
3. Clause 1(1)(a) provides:
 - (1) A document is an exempt document -
 - (a) if it is a document that has been specifically prepared for submission to Cabinet (whether or not it has been so submitted)
4. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
5. 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

6. The agency identified one document within the scope of the application. This document is entitled 'Residential Care Workforce Review September 2014' (**the document**) and refers to a review established on 4 August 2014 and led by Mr Mal Hyde (**the Review**).

Issues in this review

7. The issue in this review is whether the document is an exempt document.

Consideration

8. The document is a report of the Review commissioned by the Minister for Education and Child Development (**the Minister**) in response to a concern that had been raised about the standard of care provided to children and young people in State residential care. This concern arose as a result of an employee being charged by police with several criminal sexual offences, including offences alleged to have been committed against children in care.
9. While the Review was instigated by the Minister, the Review itself and its terms of reference were approved by Cabinet which authorised it to commence on 4 August 2014.
10. The applicant queries whether the document was genuinely prepared for submission to Cabinet as claimed by the agency. The applicant has submitted that it was evident from a minute from the agency to the Minister dated 2 October 2014 (released to the applicant in response to a separate application under the FOI Act) that the document was provided to her for her consideration with a Cabinet note being prepared 'for her consideration to submit [the document] to Cabinet'. In the applicant's submission this means that the document was not prepared specifically for Cabinet as it was up to the Minister to consider whether it should be provided to Cabinet.

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

11. The minute dated 2 October 2014, is addressed to the Minister for Education and Child Development from Mr Tony Harrison, the agency's Chief Executive, on the subject of the Review. The minute states that:

The Residential Care Workforce Review was established in 2014 due to concerns about the standard of care provided to children and young people in State residential care.

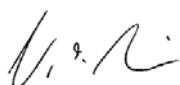
Mr Mal Hyde, former Commissioner of the South Australian Police, was appointed to lead the Review.

A copy of the Report is attached for your consideration and review and a cabinet note is currently being prepared for your consideration in order to submit the Report to Cabinet for their earliest consideration.

12. The agency has submitted to me that when the Review was commissioned by the Minister the intention was to submit the resulting report to Cabinet. A submission to Cabinet attaching a copy of the document was lodged as a locked submission and listed for a Cabinet meeting on 7 October 2014. I have been provided with the confidential draft Cabinet submission which refers to the document as an attachment.
13. The agency further advised that pending the preparation of the Cabinet submission, the document was provided to the Minister in advance on 2 October 2014 and the 'consideration' to be undertaken by the Minister in regard to the submission that was being prepared was as to whether the draft Cabinet submission required amendment, not whether the document was to be submitted to Cabinet.
14. Whether a document has been specifically prepared for submission to Cabinet is to be ascertained by reference to the events at the time the document was created.²
15. In determining whether the document was specifically prepared for Cabinet I have taken account of the following:
- the document resulted from the Review and terms of reference that were approved by the South Australian Government, which means it is likely that Cabinet expected to see the document in due course
 - the agency's advice to me that from the outset of the commissioning of the Review, it was intended that the document be submitted to Cabinet and that the document was submitted for a Cabinet meeting on 7 October 2014
 - the confidential draft Cabinet submission which refers to the document as an attachment.
16. Considering the evidence before me, I am of the opinion that the document was specifically prepared for submission to Cabinet and as such is an exempt document pursuant to clause 1(1)(a).

Determination

17. In light of my views above, I confirm the agency's determination.



Wayne Lines
SA OMBUDSMAN

19 January 2016

² *Re Fisse and Department of Treasury* (2008) 101 ALD 424, 434.

APPENDIX

Procedural steps

Date	Event
8 October 2014	The agency received the FOI application dated 8 October 2014.
7 November 2014	The agency failed to determine the application within the 30 day period required by the FOI Act, ³ and is deemed to have refused access to the documents. ⁴
20 January 2015	The agency received the internal review application dated 19 January 2015.
3 February 2015	The agency confirmed the determination.
19 February 2015	The Ombudsman received the applicant's request for external review.
23 February 2015	The Ombudsman advised the agency of the external review and requested submissions and documentation.
10 March 2015	The agency provided the Ombudsman with its submissions and documentation by covering letter dated 10 March 2015.
23 June 2015	The agency's FOI officer advised the Ombudsman that she would attempt to settle the matter along with a related application by direct negotiation with applicant.
20 August 2015	The applicant advised the Ombudsman that the matter had not settled and the external review needed to proceed. Ombudsman SA requested written submissions from the agency in support of its exemption claim over the document.
2 October 2015	The Ombudsman received the agency's submissions.
2 December 2015	The Ombudsman issued his provisional determination and requested that the parties provide any further submissions to him by no later than 23 December 2015.

³ *Freedom of Information Act 1991*, section 14(2).

⁴ *Freedom of Information Act 1991*, section 19(2).