

Determination

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

Applicant	Mr David Pisoni MP
Agency	Department of Planning, Transport and Infrastructure
Ombudsman reference	2017/00625
Agency reference	2016/18275/01
Determination	The determination of the agency is varied.

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:

All documents that include the terms 'toll road' or 'user charge' from March 2014 to the present.

Background

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

Jurisdiction

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

Provisional determination

4. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 19 October 2017. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
5. The applicant did not provide a response to my provisional determination.
6. By letter dated 23 November 2017 the agency made submissions in response to my provisional determination. The agency submitted:
 - document **15** is in fact properly exempt under clause 1(1)(e) of Schedule 1

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- it agrees with my provisional view that documents **24** and **25** should be partially released to the applicant
 - it now contends that the balance of document **57** is properly exempt under clause 1(1)(e) of Schedule 1; this notwithstanding, it agrees that information within scope of the applicant's request within documents **36** and **57** should be released to the applicant
 - it disagrees with my provisional view that information within document **37** should be released to the applicant.
7. I have considered the submissions of the agency and addressed them where necessary in the body of this determination.
 8. As required by sections 39(10) and 25(2) of the FOI Act, I sought the views of the Commonwealth, State and Territory governments as to whether the pertinent passages of documents **24** and **25** should be released to the applicant.
 9. By letter dated 31 October 2017 the Australian Capital Territory Government submitted that it has no objection to the release of this information.
 10. By email dated 9 November 2017 the Queensland Government submitted that it has no objection to the release of this information.
 11. By email dated 16 November 2017 the Commonwealth Government submitted, *inter alia*:
 - it objects to partial disclosure of document **24** to the applicant on the basis that it is exempt under clause 5(1)(a)(i) of Schedule 1
 - it has no objection to the release of document **25** to the applicant.
 12. By email dated 16 November 2017 the Northern Territory Government submitted, *inter alia*:
 - it objects to partial disclosure of document **24** to the applicant on the basis that it is exempt under clauses 5(1)(a)(i) and 9(1)(a)(ii) of Schedule 1
 - it has no objection to the release of document **25** to the applicant.
 13. The remaining State and Territory governments did not elect to make submissions in response to my provisional views.
 14. Pursuant to section 39(10) of the FOI Act, I also sought the views of the Commonwealth Government and the responsible consultancy firm as to whether document **37** should be released to the applicant.
 15. By its email dated 16 November 2017 the Commonwealth Government objected to the release of this document to the applicant on the basis that it is exempt under clauses 5(1)(a)(i) and 9(1)(a)(i) of Schedule 1.
 16. The consultant author did not elect to make submissions in response to my provisional views.
 17. I have considered the submissions of the interested parties and addressed them where necessary in the body of this determination.

Relevant law

18. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
19. 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.
20. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
21. 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

22. By letter to my Office dated 21 August 2017, the agency identified 57 documents within the scope of the application. The agency submitted that all 57 documents are exempt from release under Schedule 1 of the FOI Act.
23. By email dated 27 September 2017, the applicant agreed to revise the scope of his request for access for the purposes of my external review. The applicant now seeks access to:

All documents that include the terms 'toll road' or 'user charge' from March 2014 onward, other than where such references only concern the proposed national heavy vehicle 'network charge' and/or the existing Commonwealth 'road user charge' on diesel purchases[.]

24. Having reviewed the documents supplied by the agency, I have determined the following documents to be within the scope of the applicant's revised request for access (as described within the schedule of documents supplied by the agency):

Document No.	Description	Author	Exemption clause
14	Cabinet document	DPTI	Clause 1(1)
15	Cabinet document	DPTI	Clause 1(1)
24	IGR document	IGR Committee	Clauses 3 and 5
25	IGR document	IGR Committee	Clauses 3 and 5
26	IGR document	IGR Committee	Clauses 3 and 5
27	Draft report	Australian Government	Clauses 3 and 5
36	Draft report	Consultant	Clause 9
37	Draft report	Consultant	Clauses 3 and 5
40	Draft report	DPTI	Clauses 3 and 5
55	Draft briefing	DPTI	Clause 9
57	Report	DPTI	Section 20(1)(b)

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

Issues in this review

Submissions from the applicant

25. The applicant has requested that I review the agency's refusal to release the documents within the scope of his revised request for access.

Submissions from the agency

26. The agency in its submissions at external review submitted that documents **14** and **15** are exempt by virtue of clause 1(1) of Schedule 1 of the FOI Act. Clause 1 provides:

1–Cabinet documents

- (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); 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 the disclosure of which would disclose information concerning any deliberation or decision of Cabinet; or
 - (f) if it is a briefing paper specifically prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet.
- (2) A document is not an exempt document by virtue of this clause–
- (a) if it merely consists of factual or statistical material (including public opinion polling) that does not–
 - (i) disclose information concerning any deliberation or decision of Cabinet; or
 - (ii) relate directly to a contract or other commercial transaction that is still being negotiated; or
 - (ab) merely because it was attached to a document described in subclause (1); or
 - (b) if 20 years have passed since the end of the calendar year in which the document came into existence.
- (2a) A document is not an exempt document by virtue of this clause if–
- (a) the document has been submitted to Cabinet by a Minister; and
 - (b) a Minister has certified that Cabinet have approved the document as a document to which access may be given under this Act.
- (3) In this clause, a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee of Cabinet.

27. With respect to document **14**, the agency submitted:

[This document is a] draft Cabinet [document] that had been specifically prepared for submission to Cabinet and [is] refused access in accordance with Clause 1(1)(a).

28. With respect to document **15**, the agency submitted:

Document 15 is a draft report that was prepared for COAG, the final version of which was submitted to Cabinet and is refused access in accordance with Clause 1(1)(a).

29. The agency submitted that documents **24, 25, 26, 27, 37** and **40** are exempt by virtue of clauses 3 and 5 of Schedule 1 of the FOI Act. Clause 3 provides:

3—Exempt documents communicated by another government

A document is an exempt document if—

- (a) it contains information from an intergovernmental communication to the Government of South Australia or a council; and
- (b) notice has been received from the relevant Government or council that the information would be protected from disclosure under a corresponding law of the Commonwealth or another State.

30. Clause 5 provides:

5—Documents affecting inter-governmental or local governmental relations

(1) A document is an exempt document if it contains matter—

- (a) the disclosure of which—
 - (i) could reasonably be expected to cause damage to intergovernmental relations; or
 - (ii) would divulge information from a confidential intergovernmental communication; and
- (b) the disclosure of which would, on balance, be contrary to the public interest.

31. With respect to these documents, the agency submitted:

[Documents 24–26] are official papers in relation to intergovernmental meetings. [...] [Documents 27, 37 and 40] are reports (including draft reports) prepared specifically to inform the deliberations of matters considered at intergovernmental meetings. The release of this information would result in a loss of confidence in DPTI in its obligations to maintain confidentiality and would cause damage to its relationship with the Australian Government and other Governments of Australia.

32. The agency submitted that documents **36** and **55** are exempt by virtue of clause 9 of Schedule 1 of the FOI Act. Clause 9 provides:

9—Internal working documents

(1) 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 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.

(2) A document is not an exempt document by virtue of this clause if it merely consists of—

- (a) matter that appears in an agency's policy document; or
- (b) factual or statistical material.

33. With respect to document **36**, the agency submitted:

Document 36 is an early draft of document 57 (available publicly) that contains internal commentary on the contents of the report. These comments were early iterations that

were substantially re-worked and synthesised prior to being put to the consultants who had prepared the report. This document has no formal status within DPTI and further it would cause unnecessary harm and confusion to DPTI's stakeholders if it were released.

34. With respect to document **55**, the agency submitted:

[Document 55], developed within DPTI, [is an] early draft working [document] on proposals for heavy vehicle road pricing models. [It is] exploratory of ideas only and [does] not represent an official view within DPTI. Given the embryonic stage of [this document], [it is] internal to DPTI and [has] no formal status. In addition, [this document] had not been the subject of consultations with stakeholders. There is no public interest basis for the release of [this document] and further it would cause unnecessary harm and confusion to DPTI's stakeholders if [it] were released.

35. The agency submitted that it was entitled to refuse access to document **57** by virtue of section 20(1)(b) of the FOI Act. Section 20(1)(b) provides:

20—Refusal of access

- (1) An agency may refuse access to a document—

[...]

- (b) if it is a document that is available for inspection at that or some other agency (whether as part of a public register or otherwise) in accordance with Part 2, or in accordance with a legislative instrument other than this Act, whether or not inspection of the document is subject to a fee or charge[.]

36. The agency submitted that this document was available to members of the public via the author's website.²
37. The agency in its submissions to my Office also referred to the decision of the District Court in *State of South Australia (Department of Planning, Transport & Infrastructure) v The Honourable Robert Brokenshire MLC*.³ Although raised by the agency in connection with its refusal of three specific documents that no longer fall within scope of the applicant's request for access, I have had regard to this decision in my determination.

Consideration

Document 14

38. The agency has submitted that document **14** is exempt by virtue of clause 1(1)(a) of Schedule 1 of the FOI Act.
39. For a document to be exempt under exemption clause 1(1)(a), it must be a document that has been 'specifically prepared for submission to Cabinet'. For the exemption to be made out, is not necessary to establish that the document was actually submitted to Cabinet.
40. Having reviewed document **14**, I am satisfied that it constitutes a briefing prepared for submission to Cabinet. Owing to notations in the margins of the document, I consider this document is more properly exempt under exemption clause 1(b) of Schedule 1 of the FOI Act (being a 'preliminary draft' of a document that would be exempt under clause 1(1)(a)).

² Specifically, at <www.juturna.com.au/wp-content/uploads/2017/06/A-Better-Future-Doc-final.pdf>.

³ [2015] SADC 68.

41. I am satisfied that this document is exempt from release.

Document 15

42. The agency originally submitted that document **15** is exempt by virtue of clause 1(1)(a) of Schedule 1 of the FOI Act.
43. Document **15** is marked 'Cabinet in Confidence'. The agency has submitted that this document 'is a draft report that was prepared for COAG, the final version of which was submitted to Cabinet'.
44. The fact of a document's submission to Cabinet is not determinative of its exemption under clause 1(1)(a). For a document to be exempt under this exemption clause, it is necessary for it to have been 'specifically prepared' for submission to Cabinet. That purpose may be 'the dominant purpose or one of a number of significantly contributing purposes.'⁴
45. By the agency's submissions, and from my own review of the document, it would appear that document **15** was produced in the course of the agency's preparation of a submission to the Council of Australian Governments (**COAG**).
46. In my provisional determination I opined that I was not satisfied that document **15** was specifically prepared for submission to Cabinet. I indicated that I was therefore not satisfied that this document was exempt under clause 1(1)(a). I opined that the document could be exempt under clause 1(1)(e), however I lacked specific information to identify the extent to which, if at all, the contents of the document shaped the course of, or determined the outcome of, the deliberations of Cabinet.
47. In response to my provisional determination, the agency provided information in support of its revised contention that the document is exempt under clause 1(1)(e):

Document 15 was prepared by the agency for inclusion in the Transport Minister's response to a request from the Premier. The agency understands that this paper was used by the Department of Premier and Cabinet [sic] (DPC) to prepare a shorter set of briefings that went to Cabinet and therefore release would result in disclosing information concerning the deliberations of Cabinet.

48. Clause 1(1)(e) provides:

1—Cabinet documents

- (1) A document is an exempt document—
- [...]
- (e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet[.]

49. The Court of Appeal of the Supreme Court of Victoria considered the operation of a similarly worded provision within the *Freedom of Information Act 1982* (Vic) in *Secretary, Department of Infrastructure v Asher*, where Buchanan JA observed that the question raised by the exemption clause is 'whether the word 'deliberation' [...] includes a topic on which Cabinet deliberates or is limited to the manner in which Cabinet deals with a topic.'⁵ His Honour observed that the term 'deliberation' 'does not ordinarily

⁴ *Secretary to the Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11, per Buchanan JA at [13].

⁵ [2007] VSCA 272 at [5].

connote the subject matter of a debate, but rather the debate itself.⁶ His Honour went on to observe:

I can readily understand that it is necessary for the protection of an essential public interest to prevent the disclosure of documents revealing the views expressed by members of Cabinet as to a matter and the manner in which Cabinet treats and uses information placed before it. I am unable to see, however, that the disclosure of a document placed before Cabinet, without any indication that Cabinet even read the document, let alone how Cabinet dealt with the document, could jeopardise any public interest.

That is not to say that a document supplied to Cabinet for its consideration could never be exempt as disclosing a deliberation of Cabinet. It all depends upon the terms of the document. At one end of the spectrum, a document may reveal no more than that a statistic or description of an event was placed before Cabinet. At the other end, a document on its face may disclose that Cabinet required information of a particular type for the purpose of enabling Cabinet to determine whether a course of action was practicable or feasible or may advance an argument for a particular point of view. The former would say nothing as to Cabinet's deliberations; the latter might say a great deal.⁷

50. Tilmouth DCJ recently considered the various authorities pertaining to the exemption in *Department of State Development v Pisoni*:

[T]he noun 'deliberation' does not capture material presented to Cabinet but not discussed or considered by it as to its merits: *Re Rae and Department of Prime Minister and Cabinet*, or the debate in Cabinet by way of deliberation or formal decision making process: *Re Porter and Department of Community Services and Health*. That is to say, speaking generally the protection is aimed at preventing the disclosure of documents that shed light on the decision making process in Cabinet.

Expressed in other ways 'deliberation' is referable to Cabinet's 'thinking processes': *Re Toomer*, the content of discussions taking place in the Cabinet room: *Re Mildenhall (No 2)*, what Cabinet ministers 'had on their minds': *Re Asher v Department of Premier and Cabinet*, *Smith v Department of Sustainability and Environment*, the content of Cabinet consideration with a view to making a decision: *Birrell v Department of Premier and Cabinet (No 3)*, or 'the disclosure of contents ... concerning the process of deliberation or decision-making': *McGuirke v Director-General, The Cabinet Office*.

It must follow that a 'deliberation' does not encompass material not discussed or considered by Cabinet: *Re Rae and Department of Prime Minister & Cabinet*, or the formal decision made by Cabinet simpliciter: *Re Porter and Department of Community Services and Health*. That is, the protection is aimed at preventing the disclosure of information that sheds light on Cabinet discussions and decision-making processes.⁸

51. In my provisional determination, I inferred that the specific purpose informing the document's creation (that is, in its original form) was its submission to COAG.
52. The document in the form provided to my Office bears a number of annotations, including comments on its contents that appear to have been made by one or more officers of the agency. I understand from the agency's submissions in response to my provisional determination that the document was reduced to this form 'for inclusion in the Transport Minister's response to a request from the Premier.' The document is then said to have been 'used' by the Department of the Premier and Cabinet (DPC) in putting together a 'shorter set of briefings' for submission to Cabinet.
53. It is not possible to infer from the contents of the document what information contained within it (if any) was specifically extracted for inclusion in submissions made to Cabinet.

⁶ Ibid at [6].

⁷ Ibid at [7]-[8] (citation omitted).

⁸ *Department of State Development v Pisoni* [2017] SADC 34 at [25]-[27] (citations omitted).

It is similarly not possible to infer how that information was presented to Cabinet, what Cabinet was specifically tasked with deliberating or the extent to which the subject matter of the document may have informed or shaped those deliberations.

54. Having reviewed the document at length, I am simply unable to ascertain any information pertaining to a deliberation or decision of Cabinet.
55. It is difficult to see how disclosure of this document would otherwise be contrary to the purposes underpinning the doctrine of Cabinet confidentiality, namely, the maintenance of Cabinet solidarity and the prevention of actions pre-empting government decisions.⁹
56. On the information before me, I am not satisfied that this document is exempt under clause 1(1)(a) or 1(1)(e) of Schedule 1 of the FOI Act. I vary the agency's determination with respect to this document.

Documents 24–26

57. The agency has submitted that documents **24–26** are exempt by virtue of clauses 3 and 5 of Schedule 1 of the FOI Act.
58. The agency originally submitted that these documents 'are official papers in relation to intergovernmental meetings', the disclosure of which 'would result in a loss of confidence in DPTI in its obligations to maintain confidentiality and would cause damage to its relationship with the Australian Government and other Governments of Australia.'
59. In response to my provisional determination, the agency revised its position so as to agree to the partial release of documents **24** and **25** to the applicant, as foreshadowed in my provisional determination. The Commonwealth and Northern Territory governments have, however, objected to the partial release of document **24**.
60. Each document has evidently been prepared for use by the Infrastructure Working Group (**IWG**), of which the agency is a member. As I understand it, the IWG provides advice to the Transport Infrastructure Council. The Transport Infrastructure Council reports to COAG and is predominantly comprised of ministers from the Commonwealth, states and territories.
61. Document **24** is a copy of the minutes of the 3 March 2015 meeting of the IWG. Document **25** is a copy of an Agenda Paper presented to that meeting. Document **26** is an Agenda Paper presented to the 10 July 2015 meeting of the IWG, bearing annotations from an unidentified officer of the agency. Each document is identified as being 'for the use of members only and not for publication'. Both Agenda Papers appear to have been prepared and submitted by representatives of the Commonwealth.
62. Large parts of documents **24** and **25** are out of scope of the applicant's revised request for access. With respect to document **24**, I consider the information appearing on page 7, under the headings 'Harper Review' and 'Discussed', to be within scope. With respect to document **25**, I consider the information appearing at paragraph 8 to be within scope.
63. For a document to be exempt under clause 3 of Schedule 1 of the FOI Act, it must contain information from an intergovernmental communication to the Government of South Australia or a council that would be protected from disclosure under a

⁹ *Department of State Development v Pisoni* [2017] SADC 34 at [9] ('The protection is afforded on the basis that disclosure may precede the formal announcement of Cabinet decisions, and may diminish adherence to Cabinet responsibility by revealing the individual opinions of Cabinet members.')

- corresponding law of the Commonwealth or another State. It is necessary that notice be provided by the relevant Government or council that the information would be so protected.
64. The agency has not identified which law, if any, of the Commonwealth or another State would protect these documents from disclosure; nor has it suggested that it has received notice of such protection from the Commonwealth or another State.
 65. On the information before me, I am not satisfied that these documents are exempt under clause 3 of Schedule 1 of the FOI Act.
 66. For a document to be exempt under clause 5 of Schedule 1 of the FOI Act, it must contain matter the disclosure of which 'could reasonably be expected to cause damage to intergovernmental relations' or 'would divulge information from a confidential intergovernmental communication', and would, on balance, be contrary to the public interest.
 67. As I understand it, the IWG exists to provide advice to the Transport and Infrastructure Council. It is attended by transport officials from the Commonwealth and the various states and territories. The Commonwealth Government has submitted that the IWG is not a 'public forum'.
 68. The agency's original submissions with respect to these documents appear targeted towards clause 5(1)(a)(i). That is, the agency submits that disclosure of the documents 'could reasonably be expected to cause damage to intergovernmental relations'.
 69. The majority judgment in *Attorney-General's Department v Cockcroft* observed that the words 'could reasonably be expected to' are to be given their ordinary meaning. That is, 'they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous.'¹⁰
 70. Sheppard J, in a separate concurring opinion, observed:

I do not myself feel able to derive from the presence of the word "reasonably" in the relevant expression a great deal of assistance. The difficulty is to give full weight to the meaning of the word "expected". It is only then that one can turn one's mind to the question of the significance of the qualification of it by the word "reasonably". The words are expressed in the passive voice - "could reasonably be expected". What is required is that the decision-maker act reasonably. For the document to be exempt his conduct must be taken to be that of the reasonable man. But then comes the difficulty. So acting, the decision-maker must expect that disclosure of the document could prejudice the future supply of information. In my opinion he will not be justified in claiming exemption unless, at the time the decision is made, he has real and substantial grounds for thinking that the production of the document could prejudice that supply. But, stringent though that test may be, it does not go so far as to require the decision-maker to be satisfied upon a balance of probabilities that the production of the document will in fact prejudice the future supply of information.¹¹
 71. In *Arnold (on behalf of Australians for Animals) v Queensland & Anor*, Burchett J observed of an equivalent provision in the Commonwealth legislation:

A feature of the drafting of para. (a) of s.33A(1) is that it does not require a finding that disclosure would cause damage to relations between the Commonwealth and a State. It provides the alternative: "or could reasonably be expected to cause (such) damage". It is now established that this does not require a probability, though a possibility which fails to

¹⁰ *Attorney-General's Department v Cockcroft* [1986] FCA 35 at [29] (per the majority).

¹¹ *Attorney-General's Department v Cockcroft* [1986] FCA 35 at [12] (per Sheppard J).

reach the level of probability must be sufficiently tangible to answer to the notion of a reasonable capacity to be expected.¹²

72. Mindful of these observations and of the relatively low threshold imparted by clause 5(1)(a)(i), I am satisfied that the disclosure of documents **24–26** could reasonably be expected to cause damage to the agency’s working relationship with its state and federal counterparts.
73. In my view, it is not unreasonable to expect that the unanticipated release of information concerning the private discussions of an intergovernmental committee or working group could result in a loss in confidence in the agency responsible for that disclosure or otherwise prejudice the dialogue and future flow of information between other governments and that agency. This is not to suggest that disclosure would necessarily result in such an outcome; each government within Australia would presumably be aware of the operation and general requirements of freedom of information legislation.
74. The agency has not directly engaged with the requirement that it demonstrate that disclosure of the documents would, on balance, be contrary to the public interest.
75. The District Court in *Ipex Info Tech v Department of Info Tech Services* relevantly observed:
- [I]t is for the respondent to show on the balance of probabilities that the disclosure in question would be contrary to the public interest. This does not mean merely showing that there is something adverse to the public interest likely to flow from disclosure of the document, but that on balance the factors in the public interest against disclosure outweigh the factors in favour of disclosure.¹³
76. I consider the following factors weigh in favour of disclosure in the present circumstances:
- the public interest in openness and accountability of government agencies and in facilitating the effective participation by the public in administrative processes and decision-making
 - the public interest in the effective management of public infrastructure
 - the public interest in the community being able to meaningfully contribute to debate on matters of general public concern, such as the commercialisation of public assets.
77. I consider the following factors weigh against disclosure in the present circumstances:
- the public interest in the flow of information required for the administration or development of intergovernmental projects, programs and for long-term intergovernmental planning
 - the public interest in ensuring confidence and trust between governments, including through the preservation of confidentiality attaching to private communications.
78. I observe that each of the documents contains information concerning long-term priorities of the IWG and its member agencies. In some cases, reference is made to planned initiatives which have now been implemented or publicly announced. The documents nevertheless place these initiatives within the context of longer-term priorities of the committee, which may not be publicly known.
79. In my provisional determination, I opined that I was not satisfied that disclosure of the pertinent passages within document **24** would be contrary to the public interest.

¹² *Arnold (on behalf of Australians for Animals) v Queensland & Anor* (1987) 73 ALR 607 at [18] (per Burchett J).

¹³ *Ipex Info Tech v Department of Info Tech Services* [1997] SADC 3618.

80. Both the Commonwealth and Northern Territory Governments have objected to the partial release of document **24**. In response to my provisional determination, the Commonwealth Government submitted, *inter alia*:

A key part of the IWG's governance is that [meeting minutes] are agreed to by all the members of the IWG prior to finalisation. We consider that the information on page 7 of document 24 was not agreed by the IWG with the understanding that the information would be released more broadly.

Disclosure without the agreement of all agencies participating in the meeting [...] would detract from confidence and trust between the Commonwealth and the state, territory and local governments. We value the preservation of frank and open discussions between senior governmental representatives about the views of their governments on policies to achieve better value for money in infrastructure investment.

If this document is disclosed it will reduce the likelihood of the governments sharing their governments [sic] views on approaches achieving better infrastructure planning, funding and delivery and their lessons learnt in trialling approaches, thereby diminishing the ability of the IWG to achieve the consensus needed to progress projects that help reduce the cost of infrastructure and achieve better value for money.

For these reasons, the document should be excluded from disclosure under clause 5(a)i [sic] of Schedule 1 of the FOI Act (SA), as it could reasonably be expected to cause damage to intergovernmental relations.

81. The Northern Territory Government has submitted that the pertinent passages are exempt under clauses 5(1)(a)(i) and 9(1)(a)(ii), although it has not elected to make substantive submissions in support of this position.
82. I am satisfied that clause 9(1)(a)(ii) is enlivened by the contents of document **24**. As in the case of clause 5(1)(a)(i), the relevant test is whether disclosure of the pertinent passages of the document would be, on balance, contrary to the public interest. In the circumstances, I consider the public interest factors outlined above are equally relevant to a consideration of clause 9(1)(a)(ii).
83. Although not expressly directed towards the public interest test, the Commonwealth Government has submitted that partial disclosure of document **24** would have a detrimental effect on the 'preservation of frank and open discussions between senior governmental representatives' insofar as it will 'reduce the likelihood of the governments sharing their [...] views [...] thereby diminishing the ability of the IWG to achieve the consensus needed to progress projects'.
84. The submissions of the Commonwealth Government appear largely predicated on the assumption that disclosure of the pertinent passages of document **24** could reasonably be perceived by IWG participants as some sort of 'opening of the floodgates' with respect to documents concerning the inner workings of the IWG. That is, participants would be less likely to engage in frank and robust discussion owing to concerns about the information they communicate being made known to the public through the FOI process.
85. Disclosure of the pertinent passages within document **24** would not of course lead to the routine disclosure of IWG meeting minutes or other documents; the public interest for or against disclosure must be assessed on a case-by-case basis. Freedom of information legislation is common to each jurisdiction and for this reason I consider it unlikely that any determination I make in this matter would be so misunderstood by the IWG's constituent members.
86. It is perhaps of note that, save for the Commonwealth and the Northern Territory governments, none of the other participating jurisdictions have opposed the release of

document **24** in the form foreshadowed by my provisional determination, nor have any of these jurisdictions suggested that disclosure would in some way inhibit their future contributions to the IWG.

87. Notwithstanding the submissions made by the Commonwealth, I remain of the view that the possibility of the release of the pertinent passages negatively impacting upon the free exchange of ideas during intergovernmental discussions is considerably remote, particularly in light of the information that is already publicly available.¹⁴
88. In all the circumstances, I consider the factors in favour of disclosure, particularly the public interest in openness and accountability of government agencies and the promotion of effective participation by the public in administrative decision-making, to be most persuasive in the circumstances.
89. Accordingly, I am not satisfied that the pertinent passages of document **24** are exempt under either clauses 5(1)(a)(i) or 9(1)(a)(ii) and I vary the agency's determination with respect to this document.
90. I note the position of the agency and the various interested parties with respect to the partial release of document **25**. Accordingly, I vary the agency's determination with respect to this document.
91. Document **26** is unique insofar as it appears to have been annotated by an unidentified officer of the agency. These annotations generally indicate agreement, disagreement or points of clarification suggested by the officer. It is unclear whether these comments were prepared for internal purposes or were intended for the consideration of the Commonwealth or the IWG as whole.
92. Having weighed the factors for and against disclosure, I am satisfied that disclosure of this document would be contrary to the public interest. In circumstances where I cannot be satisfied that the annotations to the document were intended for the consideration of external parties, I consider that the risk of disclosure having a negative impact on the relationship between the agency and its state and federal counterparts is significantly more pronounced, so as to outweigh the factors militating in favour of disclosure.

Document 27

93. The agency has submitted that document **27** is exempt by virtue of clauses 3 and 5 of Schedule 1 of the FOI Act.
94. The agency has submitted that this document is a report 'prepared specifically to inform the deliberations of matters considered at intergovernmental meetings', the disclosure of which 'would result in a loss of confidence in DPTI in its obligations to maintain confidentiality and would cause damage to its relationship with the Australian Government and other Governments of Australia.'
95. Document **27** is a draft Background Paper on the subject of land transport market reform prepared for purposes of the April 2017 COAG meeting. The document appears to have been prepared by a Commonwealth agency and directed towards developing a national strategy for the progression of intended transport reforms. The document itself is plainly in a preliminary state. It is unclear to what extent, if at all, the document accurately reflects a submission ultimately made to COAG.

¹⁴ See Australian Government, Competition Policy Review, available at <<http://competitionpolicyreview.gov.au/final-report/>>, last accessed 11 October 2017.

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96. The existence of a coordinated land transport market reform process has been disclosed to the public.¹⁵
97. For the reasons identified with respect to documents **24–26**, above, I am not satisfied that this document is exempt by virtue of clause 3 of Schedule 1 of the FOI Act.
98. For substantially the same reasons as identified with respect to documents **24–26**, above, I am satisfied that the disclosure of document **27** could reasonably be expected to cause damage to the agency's working relationship with its state and Commonwealth counterparts.
99. I consider the following factors weigh in favour of disclosure in the present circumstances:
- the public interest in openness and accountability of government agencies and in facilitating the effective participation by the public in administrative processes and decision-making
 - the public interest in the effective management of public infrastructure
 - the public interest in the community being able to meaningfully contribute to debate on matters of general public concern, such as the commercialisation of public assets.
100. I consider the following factors weigh against disclosure in the present circumstances:
- the public interest in the flow of information required for the administration or development of intergovernmental projects, programs and for long-term intergovernmental planning
 - the public interest in ensuring confidence and trust between governments, including through the preservation of confidentiality attaching to private communications
 - the public interest in encouraging the free exchange of ideas during deliberative processes.
101. Having weighed the factors for and against disclosure, I am satisfied that disclosure of document **27** would be contrary to the public interest. In my view, the factors in favour of disclosure are in this instance outweighed by the interest in encouraging the free flow of ideas during the preliminary development of public policy.

Document 36

102. The agency originally submitted that document **36** is exempt by virtue of clause 9 of Schedule 1 of the FOI Act.
103. The agency submitted:

Document 36 is an early draft of document 57 (available publicly) that contains internal commentary on the contents of the report. These comments were early iterations that were substantially re-worked and synthesised prior to being put to the consultants who had prepared the report. This document has no formal status within DPTI and further it would cause unnecessary harm and confusion to DPTI's stakeholders if it were released.

104. Although the majority of document **36** is largely outside of the scope of the applicant's revised request for access, I consider the following passages to be within scope:
- the summary of Finding 7, appearing on page 9
 - the passages falling under Finding 7, appearing on page 48.

¹⁵ Australian Government, Department of Infrastructure and Regional Development, 'Land Transport Market Reform: Independent Price Regulation of Heavy Vehicle Charges, May 2017, available at <<https://infrastructure.gov.au/roads/heavy/files/IPR-Discussion-Paper.pdf>>, last accessed 12 October 2017.

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105. Although document **36** is undoubtedly a version of document **57** in draft form, the passages falling within scope of the applicant's request are identical to the corresponding passages within the final draft of the document. That is, the relevant passages do not appear to have been subsequently modified by the author of the report.
106. The exception lies in the inclusion of three annotations made to the relevant passages where they appear within document **36**. These annotations appear to provide commentary by an officer (or officers) of the agency on certain claims made by the author of the report. There is nothing to indicate that these views are necessarily reflective of the views of the agency or the State Government as a whole.
107. For clause 9(1) to be made out, I must firstly be satisfied that the document contains matter that relates to (i) any opinion, advice or recommendation that has been obtained, prepared 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.
108. In this instance, I am satisfied that document **36** contains matter that relates to an opinion that has been recorded in the course of the decision-making functions of the agency.
109. It next falls upon me to consider whether disclosure of the information at issue within these documents would, on balance, be contrary to the public interest.
110. As for the manner in which the public interest for or against disclosure is to be weighed under clause 9(1), the Administrative Appeals Tribunal has observed:
- Relevant considerations include matters such as the age of the documents; the importance of the issues discussed; the continuing relevance of those issues in relation to matters still under consideration; the extent to which premature disclosure may reveal sensitive information that may be "misunderstood or misapplied by an ill-informed public"; the extent to which the subject matter of the documents is already within the public knowledge; the status of the persons between whom and the circumstances in which the communications passed; the need to preserve confidentiality having regard to the subject matter of the communication and the circumstances in which it was made. Underlying all these factors is the need to consider the extent to which disclosure of the documents would be likely to impede or have an adverse effect upon the efficient administration of the agency concerned[.]¹⁶
111. In the circumstances, I consider the following factors weigh in favour of disclosure of the annotations to this document:
- the public interest in openness and accountability of government agencies and in facilitating the effective participation by the public in administrative processes and decision-making
 - the public interest in the effective management of public infrastructure
 - the public interest in the community being able to meaningfully contribute to debate on matters of general public concern, such as the commercialisation of public assets.
112. Weighing against disclosure in the circumstances is the public interest in encouraging the free exchange of ideas during deliberative processes, including through the frank and candid assessment of advice supplied to government.

¹⁶ *Re Lianos and Secretary to the Department of Social Security* [1985] AATA 38 at [81].

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113. Also weighing against disclosure of the annotations in the circumstances is the fact that the final report is publicly available.
114. With regard to the annotations, I consider that the factors weighing against disclosure are most persuasive. In my view, there is little public interest in the release of this information in circumstances where the views expressed may not be reflective of the position of the agency, and where those views do not appear to have shaped the final draft of the report. I do not consider that the objects underpinning the FOI Act would be materially advanced by disclosure of this information.
115. In my provisional determination, I indicated that I was not satisfied that disclosure of the substantive passages within this document would be contrary to the public interest. In this regard, I observed that the information within the scope of the applicant's request had already been made publicly available by the author of the report.
116. In response to my provisional determination, the agency submitted that although it has come to agree with my provisional view with respect to this document, 'the agency has now altered its view on the exemptions that apply to document 57 which may impact on the partial release of document 36.'
117. The agency submitted that it now considers document 57 (and, it follows, document 36) to be properly exempt under clause 1(1)(e) on the basis that this document 'informs live discussions currently being undertaken between the State and Commonwealth governments and will be used as a basis for deliberations in both State and Commonwealth Cabinets.'
118. This notwithstanding, the agency has submitted:
- The agency is of the view that the summary of Finding 7 on page 9 and passages falling under Finding 7 on page 48 in document 57 can be released without compromising Cabinet deliberations and is also in the public interest to be disclosed and is therefore proposing partial release of document 57.
119. The agency further submits:
- As a result the agency is of the opinion that partially releasing the information in both documents 36 and 57, specifically the summary of Finding 7 on page 9 and passages falling under Finding 7 on page 48, excluding any annotations to these passages would merely be releasing duplicate information and therefore disclosure from the final version, being document 57, should be the only one released.
120. While this position would not appear on its face unreasonable, it is not founded upon any provision of the FOI Act. If the pertinent passages of the document are not exempt, the agency is in my view obliged to consult with the applicant under section 20(4)(b) of the FOI Act before taking the proposed course.
121. Although my consideration of clause 1(1)(e) with respect to this document is rendered unnecessary by the position adopted by the agency, I simply note that for substantially the same reasons as identified with respect to document 15 above, I am not persuaded of the application of this exemption clause to this document (or, for that matter, document 57).
122. I vary the agency's determination with respect to this document.

Document 37

123. The agency has submitted that document **37** is exempt by virtue of clauses 3 and 5 of Schedule 1 of the FOI Act.
124. The agency has submitted that this document is a report 'prepared specifically to inform the deliberations of matters considered at intergovernmental meetings', the disclosure of which 'would result in a loss of confidence in DPTI in its obligations to maintain confidentiality and would cause damage to its relationship with the Australian Government and other Governments of Australia.'
125. Document **37** appears to be a consultant's report on the subject of national road reform, commissioned by the Commonwealth Department of Infrastructure and Regional Development.
126. From a cursory internet search, it does not appear that this document has been made publicly available.
127. The Executive Summary of the report bears annotations apparently made by an officer or officers of the agency. As in the case of document **36**, these annotations provide commentary on the contents of the report, variously endorsing, criticising or providing additional information with respect to the conclusions expressed. As in the case of document **36**, there is nothing to indicate that these views are necessarily reflective of the views of the agency or the government as a whole.
128. As in the case of the annotations, it is unclear to what extent the conclusions expressed by the report are reflective of the views of the agency or the government as a whole. It is similarly unclear to what extent, if at all, the contents of the report may have shaped decisions made by the agency or an intergovernmental association in which the agency participates.
129. For the reasons identified with respect to documents **24–26**, above, I am not satisfied that this document is exempt by virtue of clause 3 of Schedule 1 of the FOI Act.
130. For substantially the same reasons as identified with respect to documents **24–26**, above, I am satisfied that the disclosure of document **37** could reasonably be expected to cause damage to the agency's working relationship with its Commonwealth counterpart. The application of clause 5(1)(b) therefore requires consideration.
131. I consider the following factors weigh in favour of disclosure in the present circumstances:
 - the public interest in openness and accountability of government agencies and in facilitating the effective participation by the public in administrative processes and decision-making
 - the public interest in the effective management of public infrastructure
 - the public interest in the community being able to meaningfully contribute to debate on matters of general public concern, such as the commercialisation of public assets.
132. I consider the following factors weigh against disclosure in the present circumstances:
 - the public interest in the flow of information required for the administration or development of intergovernmental projects, programs and for long-term intergovernmental planning
 - the public interest in ensuring confidence and trust between governments, including through the preservation of confidentiality attaching to private communications

- the public interest in encouraging the free exchange of ideas during deliberative processes, including through the frank and candid assessment of advice supplied to government.
133. For substantially the same reasons as identified with respect to document **36**, above, I consider disclosure of the annotations to document **37** would be, on balance, contrary to the public interest.
134. The substantive contents of document **37** discuss, very generally, the suggested impetus for and estimated benefits of road reform within Australia. It would appear to constitute a not-insignificant contribution to the dialogue concerning the form and direction that infrastructure management and development might take within Australia.
135. In my provisional determination I indicated that I was not satisfied that disclosure of the balance of document **37** would be contrary to the public interest.
136. The Commonwealth Government has objected to the partial release of document **37** on the basis that it is exempt under clauses 5(1)(a)(i) and 9(1)(a)(i). In response to my provisional determination, the Commonwealth Government submitted, *inter alia*:

[D]ocument 37 was shared with the South Australian government with the understanding that it would not be released more broadly. Disclosure would detract from confidence and trust between the Commonwealth and the South Australian government. We value the preservation of confidentiality of a private communication in this circumstance.

If this document is disclosed it will reduce the likelihood of the Commonwealth sharing information with South Australia in future, thereby diminishing the administration or development of intergovernmental projects, programs and for long-term intergovernmental planning.

[...]

Further, the information in document 37 is sensitive because it was generated to help inform a long-term reform project, which is ongoing. The entire document is deliberative, and consider [sic] that it be exempted in full pursuant to clause 9(1)(a)(i) - Internal Working Documents. The document was commissioned for the purpose of informing Cabinet submissions about road reform in Australia. Accordingly, a number of sections of the document have formed the basis of Cabinet submissions and Cabinet deliberations; the line area expects that it will continue to be used to inform future submissions and deliberations. If the document were to be released, it would damage the integrity of the advice that the department is able to provide to the Cabinet, and undermine the integrity of the Cabinet discussions.

While the Cabinet is considering the findings in the report to determine the future of road reform, the public interest lies strongly in preserving the integrity of this process. If the contents of the document were to be released publicly, it would have serious adverse effects on the future of road reform. Given that we're some way into a 10-15 year journey with road reform, if the project needed to be restarted, this process would come at a significant cost to the taxpayer, in addition to the delays in reform that would also result, impacting everyone who uses roads.

137. I am satisfied that clause 9(1)(a)(i) is enlivened by the contents of this document. As in the case of clause 5(1)(a)(i), the relevant test is whether disclosure of the pertinent passages of the document would be, on balance, contrary to the public interest.
138. The submissions of the Commonwealth Government concerning clause 9(1)(a)(i) largely speak to the manner in which the Commonwealth has or may still use the contents of this document in the course of its own deliberative processes. The specific risks the Commonwealth has averted to are in my view captured by the public interest factors outlined above.

139. In my provisional determination I opined that public participation in the dialogue concerning the form and direction that infrastructure management and development should take within Australia would be furthered by release of this document.
140. Although I remain of this view, the submissions of the Commonwealth Government have persuaded me that the release of this document could deter the Commonwealth from sharing similar information with the agency in the future, both owing to the circumstances in which the document was supplied to the agency (reinforced by the agency's submissions in response to my provisional determination) and the specific risks of disclosure impacting upon the initiatives to which the report relates.
141. In this regard, I am satisfied that the factors weighing against disclosure, as outlined above, are most persuasive in the circumstances. Accordingly, I consider that document **37** is exempt under clauses 5(1)(a)(i) and 9(1)(a)(i).

Document 40

142. The agency has submitted that document **40** is exempt by virtue of clauses 3 and 5 of Schedule 1 of the FOI Act.
143. The agency has submitted that this document is a report 'prepared specifically to inform the deliberations of matters considered at intergovernmental meetings', the disclosure of which 'would result in a loss of confidence in DPTI in its obligations to maintain confidentiality and would cause damage to its relationship with the Australian Government and other Governments of Australia.'
144. Document **40** appears to be a scoping paper prepared by the agency on the longer term possibilities for heavy vehicle road reform within Australia. The document appears to be in early draft form and includes annotations commenting on the contents of the document and suggesting additional or alternative information for inclusion.
145. For the reasons identified with respect to documents **24–26**, above, I am not satisfied that this document is exempt by virtue of clause 3 of Schedule 1 of the FOI Act.
146. Although the intended audience for the document is not clear from its contents, I am satisfied that it discloses information concerning the priorities and strategic direction of the Transport Infrastructure Council and its committees.
147. For substantially the same reasons as identified with respect to documents **24–26**, above, I am satisfied that the disclosure of document **40** could reasonably be expected to cause damage to the agency's working relationship with its state and Commonwealth counterparts.
148. I consider the following factors weigh in favour of disclosure in the present circumstances:
- the public interest in openness and accountability of government agencies and in facilitating the effective participation by the public in administrative processes and decision-making
 - the public interest in the effective management of public infrastructure
 - the public interest in the community being able to meaningfully contribute to debate on matters of general public concern, such as the commercialisation of public assets.
149. I consider the following factors weigh against disclosure in the present circumstances:

- the public interest in the flow of information required for the administration or development of intergovernmental projects, programs and for long-term intergovernmental planning
 - the public interest in ensuring confidence and trust between governments, including through the preservation of confidentiality attaching to private communications
 - the public interest in encouraging the free exchange of ideas during deliberative processes.
150. Given the document appears to amount to one officer's 'brainstorming' of ideas for possible consideration by the Transport Infrastructure Council on the topic of longer term road reform (that is, it in no way purports to settle or otherwise reflect established priorities of the Transport Infrastructure Council or the agency on the issue), I consider that its disclosure would, on balance, be contrary to the public interest. In my view, the public interest in encouraging the free exchange of ideas during deliberative processes is most persuasive in the circumstances.

Document 55

151. The agency has submitted that document 55 is exempt by virtue of clause 9 of Schedule 1 of the FOI Act.
152. The agency has submitted:
- [Document 55], developed within DPTI, [is an] early draft working [document] on proposals for heavy vehicle road pricing models. [It is] exploratory of ideas only and [does] not represent an official view within DPTI. Given the embryonic stage of [this document], [it is] internal to DPTI and [has] no formal status. In addition, [this document] had not been the subject of consultations with stakeholders. There is no public interest basis for the release of [this document] and further it would cause unnecessary harm and confusion to DPTI's stakeholders if [it] were released.
153. As submitted by the agency, document 55 appears to explore one possible proposal for heavy vehicle pricing within South Australia. On the information available to me, it does not appear that this proposal was adopted by the agency.
154. In this instance, I am satisfied that document 55 contains matter that relates to deliberation that has taken place in the course of the decision-making functions of the agency.
155. In the circumstances, I consider the following factors weigh in favour of disclosure:
- the public interest in openness and accountability of government agencies and in facilitating the effective participation by the public in administrative processes and decision-making
 - the public interest in the effective management of public infrastructure
 - the public interest in the community being able to meaningfully contribute to debate on matters of general public concern, such as the commercialisation of public assets.
156. Weighing against disclosure in the circumstances is the public interest in encouraging the free exchange of ideas during deliberative processes.
157. Having weighed the factors for and against disclosure of the document, I am satisfied that disclosure would be contrary to the public interest. Having reviewed the document, I accept the agency's submission that its disclosure would have the potential to cause

confusion and misplaced concern amongst private stakeholders within the transport industry.

Document 57

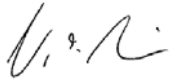
158. Document **57** is ostensibly document **36** in its final form.
159. The agency originally submitted that it was entitled to refuse access to document **57** by virtue of section 20(1)(b) of the FOI Act.
160. Section 20(1)(b) will constitute a basis for refusing access to a document in circumstances where it 'is available for inspection at that or some other agency in accordance with Part 2' of the FOI Act 'or in accordance with a legislative instrument' other than the FOI Act.
161. The agency submitted that document **57** was available on a website maintained by its author, a consultancy firm.
162. In my provisional determination, I indicated that I was not satisfied that the section 20(1)(b) criteria had been met in this instance. I observed that the consultancy firm in question is not an agency for the purposes of the FOI Act and that the publication of the document on the consultant's website did not appear to have been in accordance with a legislative instrument other than the FOI Act.
163. In response to my provisional determination, the agency observed (notwithstanding its own earlier reference to the publication of this document):

Document 57 was available publically due to an administrative error on behalf of the consultant and has subsequently been removed from the consultant's website, The consultant did not obtain permission to make the document publically available and should they have sought permission it would have been denied due to the reasons the report was commissioned.
164. As in the case of document **36**, the agency has now submitted that document **57** is exempt under clause 1(1)(e). This notwithstanding, the agency has agreed to release the passages of this document deemed to be within scope of the applicant's revised request and I therefore do not consider it necessary to consider this document further.
165. Accordingly, I vary the agency's determination with respect to this document.

Determination

166. In light of my views above, I vary the agency's determination so as to release to the applicant:
 - document **15** in full
 - the information on page 7 of document **24**, appearing under the headings 'Harper Review' and 'Discussed'
 - the information in paragraph 8 of document **25**
 - the summary of Finding 7 appearing on page 9, and the passages falling under Finding 7 appearing on page 48 of document **36**, excluding the annotations made to these passages
 - the summary of Finding 7 appearing on page 8, and the passages falling under Finding 7 appearing on page 47 of document **57**.

167. I otherwise confirm the agency's determination with respect to the remaining documents.

A handwritten signature in black ink, appearing to read 'W. Lines'.

Wayne Lines
SA OMBUDSMAN

8 January 2018

APPENDIX

Procedural steps

Date	Event
27 October 2016	The agency received the FOI application dated 24 October 2016.
26 November 2016	The agency failed to determine the application within the 30 day period required by the FOI Act, ¹ and is deemed to have refused access to the documents. ²
6 December 2016	The agency received the internal review application dated 2 December 2016.
20 December 2017	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³
19 January 2017	The Ombudsman received the applicant's request for external review dated 17 January 2017.
1 February 2017	Officers of the Ombudsman advised the agency of the external review and requested that a representative of the agency meet with Ombudsman SA and the applicant to try to effect a settlement between the parties. ⁴
23 March 2017	During a meeting between representatives of the Ombudsman, the agency and the applicant, the agency undertook to process the application and provide a determination to the applicant by 23 May 2017.
8 August 2017	The applicant advised the Ombudsman that he had not received a determination from the agency.
8 August 2017	The Ombudsman advised the agency of his intent to proceed with the external review and requested submissions and documentation.
21 August 2017	The agency provided the Ombudsman with its submissions and documentation.
19 October 2017	The Ombudsman provided his provisional determination to the parties.
31 October 2017	The Australian Capital Territory Government made submissions in response to the Ombudsman's provisional determination.
9 November 2017	The Queensland Government made submissions in response to the Ombudsman's provisional determination.
16 November 2017	The Commonwealth Government made submissions in response to the Ombudsman's provisional determination.

¹ *Freedom of Information Act 1991*, section 14(2).

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

³ *Freedom of Information Act 1991*, section 29(5).

⁴ *Freedom of Information Act 1991*, section 39(5)(c)(i).

16 November 2017	The Northern Territory Government made submissions in response to the Ombudsman's provisional determination.
23 November 2017	The agency made submissions in response to the Ombudsman's provisional determination.