

## Determination

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

Applicant	Mr Dan van Holst Pellekaan
Agency	Department of State Development
Ombudsman reference	2017/02620
Agency reference	BRIEFC/16/1580
Applicant reference	DVHP-1719362926-369
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:

All documents received from Alinta Energy between 1 May 2015 and 3 May 2015 including all email attachments.

### 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 7 July 2017. I informed the parties that, subject to my receipt and consideration of submissions from the parties, I proposed to confirm the agency's determination.
5. Neither the agency nor the applicant provided submissions in response to my provisional determination.

## Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.<sup>1</sup>
7. 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.
8. In this matter, the agency has identified two documents within the scope of the application and has determined to refuse access to both documents.
9. In refusing access, the agency relied on clauses 1(1)(e), 7(1)(c), 9(1), 13(1), 14 and 16(1) of Schedule 1 of the FOI Act. These clauses provide:

### **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;

### **7—Documents affecting business affairs**

- (1) 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.

### **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.

### **13—Documents containing confidential material**

- (1) A document is an exempt document—
- (a) if it contains matter the disclosure of which would found an action for breach of confidence; or
  - (b) if it contains matter obtained in confidence the disclosure of which—
    - (i) might reasonably be expected to prejudice the future supply of such information to the Government or to an agency; and
    - (ii) would, on balance, be contrary to the public interest.

<sup>1</sup> *Freedom of Information Act 1991*, section 12.

**14–Documents affecting the economy of the State**

A document is an exempt document if it contains matter the disclosure of which–

- (a) could reasonably be expected–
  - (i) to have a substantial adverse effect on the ability of the Government or an agency to manage the economy, or any aspect of the economy, of the State; or
  - (ii) to expose any person or class of persons to an unfair advantage or disadvantage as a result of the premature disclosure of information concerning any proposed action or inaction of the Parliament, the Government or an agency in the course of, or for the purpose of, managing the economy of the State; and
- (b) would, on balance, be contrary to the public interest.

**16–Documents concerning operations of agencies**

(1) A document is an exempt document if it contains matter the disclosure of which–

- (a) could reasonably be expected–
  - (i) to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency; or
  - (ii) to prejudice on the attainment of the objects of any test, examination or audit conducted by an agency; or
  - (iii) to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or
  - (iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions; or
  - (v) to have a substantial adverse effect on the conduct of industrial relations by an agency; and
- (b) would, on balance, be contrary to the public interest.

10. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
11. 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.

**Issues in this review**

12. It is for me to decide whether the agency is justified in refusing access in full to the documents.

**Submissions - claims of exemption**

13. The agency provided the following reasons in support of its determination to refuse access to the documents:<sup>2</sup>
  - a Cabinet Taskforce was established to manage negotiations with Alinta Energy and provide advice to Cabinet regarding the closure of Alinta Energy's power stations and Leigh Creek Coal Mine
  - all information provided by Alinta Energy was for the purposes of informing the Taskforce and therefore used to inform Cabinet and was subject to a confidentiality agreement
  - the documents contain information concerning the business, commercial and financial affairs of Alinta Energy and were provided on a confidential basis

<sup>2</sup> Letter from the agency to Ombudsman SA dated 10 May 2017 and agency's determination dated 31 March 2017.

- disclosure of the documents could reasonably be expected to have an adverse effect on Alinta Energy's affairs
- disclosure would constitute a breach of confidence and have the potential to prejudice the future supply of information from Alinta Energy and from other companies entering into future negotiations with the Government
- the documents assist the Government with policy decisions relating to management of the economy and the energy market
- the documents assist the agency in its performance and functions related to economic growth and job creation.

## Consideration

14. The documents to which the agency has refused access comprise the following:

- Document 1 is an email chain consisting of two emails. The first email is from Alinta Energy to members of the Taskforce and the second is an email from a member of the Taskforce to Alinta Energy.
- Document 2 is an email chain consisting of two emails. The first email is from Alinta Energy to members of the Taskforce and the second is an email from a member of the Taskforce to Alinta Energy.

15. I note that the scope of the application is a request for "all documents received from Alinta Energy..." The agency has interpreted this to include responses to Alinta Energy. I consider this to be a reasonable position for the agency to take.

### *Clause 13(1)(a)*

16. I will begin by considering whether the two documents are exempt under clause 13(1)(a). I am mindful of my obligation under section 39(15) of the FOI Act to 'avoid disclosing in [my] reasons for a determination any matter that the agency claims is exempt matter'.

17. To succeed in claiming clause 13(1)(a) as a basis for refusing access to a document, it is necessary to demonstrate that the relevant document contains matter 'the disclosure of which would found an action for breach of confidence'. The term 'would' should be read as 'could'.<sup>3</sup>

18. In a decision by the Administrative Appeals Tribunal, Deputy President Forgie considered the interpretation of section 45 of the *Freedom of Information Act 1982* (Commonwealth). The wording of section 45(1) of the Commonwealth Act is substantially the same as clause 13(1)(a) and I consider this decision to be of persuasive value.

19. After consideration of the authorities, the Deputy President determined that an action for breach of confidence can only mean an action for equitable breach of confidence, stating that

Actions in contract, tort, negligence and for breach of statutory duty are not actions for breach of confidence known to general law even though they may be based on disclosure, or threatened disclosure, of information claimed to be confidential.<sup>4</sup>

<sup>3</sup> *Bray and Smith v WorkCover* (1994) 62 SASR 218 at 226.

<sup>4</sup> *Callejo v Department of Immigration and Citizenship* [2010] AATA 244 at [163].

20. An equitable obligation of confidence is a duty not to disclose information because the information was given and received in circumstances which would make it unconscionable for the confidant to disclose the information in a way the confider has not authorised.
21. The Deputy President endorsed the four step test to determine whether there are grounds for an action for breach of confidence, as set out by Gummow J in *Corrs Pavey Whiting and Byrne v Collector of Customs, Victoria*.<sup>5</sup> The following four criteria must be satisfied:
- the information must be capable of being identified with specificity
  - the information must have the necessary quality of confidence
  - the information must have been received in circumstances which import an obligation of confidence
  - there must be actual or threatened misuse of the information.
  -
22. Gummow J also discussed a possible fifth criterion: that disclosure would be to the detriment of the confider.<sup>6</sup> However, I am mindful of Gummow J's later statements in *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health*.<sup>7</sup> Gummow J commented that the question of whether detriment is an essential element "remains an open one" but said that that he held the view that
- ...equity intervenes to uphold an obligation and not necessarily to prevent or recover a loss; see also Gurry, "Breach of Confidence", 1984, pp 407-408...The obligation of conscience is to respect the confidence, not merely to refrain from causing detriment to the plaintiff.
23. This sentiment appears to have been shared by the South Australian Supreme Court in *N P Generations Pty Ltd v Feneley*.<sup>8</sup> I am of the view that on the present authorities, detriment has not been held to be an essential element.
24. I have considered whether each of the four criteria outlined in *Corrs Pavey* have been satisfied with regard to the two documents.
25. The requirement that information must have the necessary quality of confidence has been held to mean that the information must not already be common knowledge,<sup>9</sup> must not already be in the public domain,<sup>10</sup> and the confidential information must have sufficient gravity that it is a proper subject for protection.<sup>11</sup>
26. The requirement that the information must have been received in circumstances which import an obligation of confidence is an objective test and focuses on the question of what the recipient of the information ought to have realised.<sup>12</sup>
27. While my consideration is whether the elements for an equitable breach of confidence would be made out if the documents were to be disclosed by either the agency or Alinta Energy, I have had regard to the fact that the documents are also subject to a confidentiality agreement. I am persuaded that the documents were disclosed by Alinta Energy in circumstances which imported an obligation upon the agency to preserve the confidentiality of the documents. To my knowledge, the content of the documents is not

<sup>5</sup> *Corrs Pavey Whiting and Byrne v Collector of Customs, Victoria* [1987] FCA 266; 13 ALD 254 at [14], endorsed by Deputy President Forgie at [165] and followed in *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150 at [17].

<sup>6</sup> [1987] FCA 266; 14 FCR 434 at 443.

<sup>7</sup> (1990) 22 FCR 73.

<sup>8</sup> [2001] SASC 185 at [21].

<sup>9</sup> *Coco v A N Clark (Engineers) Ltd* (1969) RPC 41 at 47.

<sup>10</sup> *Woodward v Hutchins* [1971] 1 WLR 760.

<sup>11</sup> *Hubbard v Vosper* [1972] 2 QB 84 at 95, cited with approval by Debelle J in *Coulthard v South Australia* (1995) 63 SASR 531 at 547.

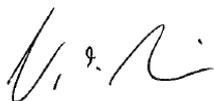
<sup>12</sup> *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150 at [44].

'common knowledge' nor has it entered the public domain. Having regard to the content of the documents and the circumstances in which the matter in the documents was created and disclosed to the agency, I am satisfied that the information in the documents has the necessary quality of confidence.

28. I accept that if the other criteria for founding an action for breach of confidence are satisfied, release of the documents under the FOI Act would constitute their misuse.
29. Based on the information currently before me, my view is that all of the criteria to establish the grounds for a breach of confidence have been satisfied. The documents are therefore exempt under clause 13(1)(a).
30. In my view, it is not practicable to provide partial access to the documents as envisaged by section 20(4) of the FOI Act, having regard to obligations of confidentiality on the agency and third parties.
31. In light of my views regarding exemption clause 13(1)(a), it is unnecessary for me to decide whether any of the other exemptions claimed by the agency are justified.

### **Determination**

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



Wayne Lines  
**SA OMBUDSMAN**

11 August 2017

## APPENDIX

### Procedural steps

Date	Event
26/10/2016	The agency received the FOI application dated 24 October 2016.
	The agency failed to determine the application within the 30 day period required by the FOI Act, <sup>1</sup> and is deemed to have refused access to the documents. <sup>2</sup>
13/02/2017	The agency received the internal review application dated 6 February 2017.
	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. <sup>3</sup>
08/03/2017	The Ombudsman received the applicant's request for external review.
22/03/2017	The Ombudsman advised the agency of the external review and requested submissions and documentation.
31/03/2017	The agency provided a belated notice of determination to the applicant.
10/04/2017	The agency requested an extension of time to provide submissions.
10/05/2017	The agency provided the Ombudsman with its submissions and documentation.
07/07/2017	The Ombudsman provided the applicant and the agency with his provisional determination.

<sup>1</sup> *Freedom of Information Act 1991*, section 14(2).

<sup>2</sup> *Freedom of Information Act 1991*, section 19(2).

<sup>3</sup> *Freedom of Information Act 1991*, section 29(5).