

Determination

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

Applicant	Mr Stephan Knoll MP
Agency	Department of State Development
Ombudsman reference	2017/05319
Agency reference	BRIEFC/17/244
Applicant reference	SK176
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 draft versions of the 'South Australia. Made by small business' 2016 Annual Small Business Statement as released on the 8th of December 2016.

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 3 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 agency advised me it did not intend to provide any submission in response to the provisional determination.
6. To date, I have not received submissions from the applicant.
7. In light of this, I have proceeded to a final determination in the same terms as my provisional determination.

Relevant law

8. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
9. 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.
10. Clauses 1(1)(a), 1(1)(b) and 1(2)(a) of Schedule 1 of the FOI Act are relevant to my external review. They provide:

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

13. The agency identified eight documents within the scope of the application. Access was refused to all documents (**the documents**).

Issues in this review

14. It is for me to consider whether the agency has justified its determination to refuse access to each document on the basis of clause 1(1)(b).

Consideration

Clause 1(1)(b)

15. To claim clause 1(1)(b) it must be established that the documents are preliminary drafts of a document referred to in clause 1(1)(a). In other words, they must be preliminary drafts

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

- of a document specifically prepared for submission to Cabinet (whether or not it has been so submitted).
16. The documents are preliminary drafts of the 'South Australia. Made by small business' 2016 Annual Small Business Statement' (**the Statement**).
 17. I then turn to consider clause 1(1)(a) to determine whether or not the Statement itself is a document specifically prepared for submission to Cabinet.
 18. The agency submits that the 'documents are preliminary drafts of a statement that has been specifically prepared for consideration by Cabinet'. In support of this the agency provided a copy of the Cabinet Note to which the Statement was attached. I observe that the pages of both the Cabinet note and the Statement are marked 'SENSITIVE: SA CABINET'.
 19. The applicant submits that the Statement is 'not in any form a Cabinet Document. It is publicly available, and it is still available online'.
 20. In my view, the public availability of the Statement does not counter the agency's assertion that it was specifically prepared for submission to Cabinet. Therefore, in the absence of evidence to the contrary, I must accept the agency's submission in this regard.
 21. Clause 1(1)(a) is an absolute exemption clause which means that, if the elements of the clause are satisfied, the document must be regarded as exempt and there is no opportunity to consider public interest factors or the reasonableness of disclosure. The public availability of the Statement therefore has no impact in this instance.
 22. However, clause 1(2)(a) provides that a document is not exempt if it merely consists of factual or statistical material which does not disclose information concerning any deliberation or decision of Cabinet, or relate directly to a contract or other commercial transaction that is still being negotiated.
 23. This exception applies only to factual or statistical material which is severable from its context.² In other words, where factual material is referred to as part of a deliberative or policy-forming discussion, and cannot be isolated, the exception will not apply and the material will be exempt. Although, I note Associate Professor Moira Paterson's paraphrasing of *Re Anderson and Australian Federal Police* (1986) 11 ALD 355 in *Freedom of Information and Privacy in Australia: information access 2.0* that:

"A matter may also be purely factual even if its disclosure will give some indication of the subject matter of a document submitted to Cabinet."³ (my emphasis)
 24. In *Simos v Wilkins* the New South Wales District Court highlighted the importance of context when determining whether material is factual. For example, an opinion that is not based on fact is not factual; however, stating that a person holds a particular opinion alters the context and may be factual providing that opinion is so held.⁴ This reliance on context applies equally to other non-factual information such as claims, beliefs or predictions.
 25. In my view, whilst clause 1(1)(b) is applicable to most of the material in the documents, this exemption does not apply to a substantial amount of material because it is merely factual or statistical.

² *Harris v Australian Broadcasting Corporation (No 1)* (1983) 5 ALD 545, 554.

³ (LexisNexis Butterworths, 2nd ed, 2015) 480, citing *Re Anderson and Australian Federal Police* (1986) 11 ALD 355.

⁴ (15 May 1996, unreported); reported in M Paterson, *Freedom of Information and Privacy in Australia: information access 2.0* (LexisNexis Butterworths, 2nd ed, 2015) 479-480.

26. For the agency's benefit, I provide the following examples to indicate the sorts of information I consider to be factual or statistical:
- Document 1-
 - Page 2:
 - Third and fourth paragraph: 'Small [...] workforce. That's [...] pie'
 - Page 4
 - Majority of page: 'Over [...] (53%)⁶.'
 - Page 7
 - Third to last paragraph: 'While [...] mainland.'
 - Second to last paragraph: 'Over [...] years.'
 - Page 8
 - Second paragraph, from '...only [...] businesses.'
 - Third to last paragraph 'Across [...] businesses.'
 - Page 10
 - First dot point: 'Provides [...] Governments.'
 - Fifth dot point: 'Provides [...] requirements.'
 - Page 12
 - Majority of page including: 'In 2015-2016 [...] 238.'
 - Page 21
 - Fourth paragraph: 'Global [...] 2050¹, ...'
27. Accordingly, it is my determination that, excluding merely factual or statistical matter, the documents are exempt on the basis of clause 1(1)(b).

Section 39(12)

28. Section 39(12) of the FOI Act provides that if I am satisfied that a document is an exempt document I do not have the power to make a determination to the effect that access is to be given to the document. I may however, if I think fit, offer reasons why the agency might give access to a document despite its exempt status.
29. In the circumstances, I consider it appropriate to do so. My reasons are set out below.
30. Sections 3 and 3A of the FOI Act provide (my emphasis):

3–Objects

- (1) The objects of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament–
- (a) to promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State; and
 - (b) to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies.
- (2) The means by which it is intended to achieve these objects are as follows:
- ...
- (b) conferring on each member of the public and on Members of Parliament a legally enforceable right to be given access to documents held by government, *subject only to such restrictions as are consistent with the public interest* (including maintenance of the effective conduct of public affairs through the free and frank expression of opinions) and the preservation of personal privacy; (my emphasis)
- ...

- (3) Nothing in this Act is intended to prevent or discourage the publication of information, the giving of access to documents or the amendment of records otherwise than under this Act if it is proper and reasonable to do so or if it is permitted or required by or under any other Act or law.

3A—Principles of administration

- (1) It is the intention of the Parliament—
- (a) that this Act should be interpreted and applied so as to further the objects of this Act;

31. The rationale for restricting access to Cabinet documents stems from an overarching public interest in protecting the confidentiality of Cabinet proceedings which outweighs the FOI Act's general bias in favour of release.
32. Judge Tilmouth addressed this protection in *Department of State Development v Pisoni [2017]* and states:

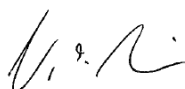
The protection of Cabinet confidentiality is accepted as a necessary feature of the Westminster systems and as 'an important element in our system of government.

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.⁵

33. In my view, the content of the documents, the extent of factual and statistical material contained therein, and the public availability of the final version, suggest there is little risk that disclosure of the preliminary drafts could have any adverse effect on Cabinet confidentiality. Therefore, the public interest which rationalises the inclusion of an exemption for Cabinet documents is inapplicable.
34. In light of this, it is my view that the public interest in access to the documents should prevail and the documents should be released in full.

Determination

35. In light of my views above, I vary the agency's determination.
36. The documents, excluding merely factual or statistical material, are exempt. They should be redacted in accordance with section 20(4) of the FOI Act so that all factual and statistical material can be released in full.
37. Alternatively, the agency may wish to release the documents in full, despite their exempt status, if it agrees with my reasons for why it might do so.



Wayne Lines
SA OMBUDSMAN

6 November 2017

⁵ [2017] SADC 34 (6 April 2017); citing *Commonwealth v Northern Land Council (1993)* 176 CLR 604.

APPENDIX

Procedural steps

Date	Event
22 February 2017	The agency received the FOI application dated 17 February 2017.
20 March 2017	The agency emailed the applicant to negotiate an extension of time within which to provide its determination. An extension was granted to 31 March 2017.
4 April 2017	The agency determined the application.
21 April 2017	The agency received the internal review application dated 13 April 2017.
17 May 2017	The agency confirmed the determination.
24 May 2017	The Ombudsman received the applicant's request for external review dated 22 May 2017.
1 June 2017	The Ombudsman advised the agency of the external review and requested submissions and documentation.
16 June 2017	The agency provided the Ombudsman with its submissions and documentation.
3 October 2017	The Ombudsman provided his provisional determination
19 October 2017	The agency advised that it did not wish to make any submissions in response to the provisional determination