

Determination

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

Applicant	Mr Steven Marshall MP
Agency	Environment Protection Authority
Ombudsman reference	2012/05775
Agency reference	05/20279
Determination	The determination of the agency is varied.

REASONS

Background

1. By application under the *Freedom of Information Act 1991* (**the FOI Act**) received by the agency on 7 May 2012 the applicant requested access to:

All briefs from the Environmental Protection Authority to the Minister for environment and conservation regarding potential legal action on Nyrstar operations, or altered licence conditions on Nyrstar operations, from 1 May 2011 to 27 April 2012.
(05/20279)
2. The agency failed to actively determine the applications within the statutory timeframe and as such was deemed to have determined to refuse access to the documents pursuant to section 19(2) of the FOI Act.
3. The applicant requested internal review of this determination, by application received by the agency on 12 July 2012.
4. Accredited Freedom of Information Officer of the agency Mr Anton Lugna then determined on 23 July 2012 to refuse access to six documents (**the determination**).

External review

5. By application dated 30 July 2012, the applicant requested my external review of the agency's determination under section 39 of the FOI Act.
6. By letter dated 1 August 2012, I notified the agency of my review. I requested all relevant documents, including additional evidence and argument which the agency considered justified its determination, in light of the provisions of section 48 of the FOI Act.

Provisional determination

7. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 16 November 2012. I informed the parties that subject

to my receipt and consideration of submissions from the parties, I proposed to vary the agency's determination pursuant to section 39(11) of the FOI Act.

8. The agency provided submissions in response to my provisional determination, effectively accepting that provisional view. I have considered these submissions in my reasons for my determination.

Relevant provisions of the FOI Act

9. The objects of the FOI Act are set out in section 3, 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 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'.
10. It is further stated in section 3(2) that the means by which these objects are intended to be achieved are:
 - (a) ensuring that information concerning the operations of government (including, in particular, information concerning the rules and practices followed by government in its dealings with members of the public) is readily available to members of the public and to Members of Parliament; and
 - (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; ...
11. Section 3A(1) states that the parliament has intended:
 - (a) that this Act should be interpreted and applied so as to further the objects of this Act; and
 - (b) that a person or body exercising an administrative discretion conferred by this Act exercise the discretion, as far as possible, in a way that favours the disclosure of information of a kind that can be disclosed without infringing the right to privacy of individuals.
12. The FOI Act provides that upon receipt of an application for access to documents, an agency is entitled to make a determination to refuse access where the documents are 'exempt'. The term 'exempt document' is defined as 'a document which is an exempt document by virtue of Schedule 1.'¹ Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access, and it includes clause 12(1).
13. Under section 48 of the FOI Act, the onus is on the agency to justify its determination 'in any proceedings'. In my opinion, this includes the external review process.
14. To justify its determination, the agency must give reasons for its determination and show the findings on any material questions of fact underlying these reasons, together with a reference to the sources of information on which those findings are based. This is a requirement of an agency in the determination process under the FOI Act; and in my opinion, it is equally applicable in an external review.

¹ See section 4 and section 20(1)(a), FOI Act

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

The documents

16. The agency identified six documents within the scope of the application which it has described as follows:
 - i. Brief to Minister for Environment and Conservation dated 2 September 2012
 - ii. Cabinet document dated 5 September 2011
 - iii. Cabinet document dated 5 September 2011
 - iv. Parliamentary briefing note dated 7 October 2011
 - v. Parliamentary briefing note dated 28 October 2011
 - vi. Cabinet document undated
17. Document 1 consists of a brief to the Minister for Environment and Conservation and a draft brief to the Minister for Health and Ageing as an attachment to the first brief.
18. Document 3 consists of a brief to the Minister for Environment and Conservation and a draft Cabinet document as an attachment to the brief.

The agency's submissions

19. The agency determined to refuse access to document 1 on the basis that it was exempt pursuant to both clause 10 (1) and clause 4(2)(a)(i). The agency describes document 1 as a briefing to the Minister from the EPA concerning the agency's progress with investigation of Nyrstar and refers to legal advice received by the EPA from its legal advisers.
20. The agency submits that document 1 contains information that the EPA contends is privileged communications between itself and its legal advisers in relation to that investigation. The agency states it wishes to maintain the legal professional privilege inherent in such communications.
21. The agency also submits that document 1 outlines progress with its investigation into potential legal action against Nyrstar and disclosure of this document could prejudice that investigation. The agency submits the public interest consideration in clause 4(2)(a) is satisfied by the following reasons:

On balance the factors supporting release of this information, that is, access to government held information and the potential benefit to the public of releasing that information are, in this instance, outweighed by the necessity for a regulator to communicate confidential legal advice about an active investigation to its Minister to enable it to effectively discharge its functions and responsibilities. There is significant public interest in the agency being able to carry out its legislative function and particularly to investigate matters that may lead to legal action being taken it, and as, required. The public interest is also benefited by fully informed government, where agencies are able to fully brief their Minister on sensitive matters and forfeit protections that would apply if they had not done so. There is also a public interest in the exemption of the FOI Act working effectively to restrict access to documents that they intend to restrict access to.
22. The agency submits that documents 2, 3 and 6 are exempt pursuant to clause 1(1)(f) of Schedule 1 to the FOI Act as they were specifically prepared for submission to Cabinet of for the use of a Minister in relation to a matter submitted proposed to be submitted to Cabinet. The agency claims documents 2 and 6 were prepared specifically for the

Minister to submit to Cabinet and document 3 was a briefing prepared for the use of the Minister in relation to a matter submitted to Cabinet.

23. The agency submits that documents 4 and 5 are Parliamentary Briefing Notes and are exempt under clause 17(c) of Schedule 1 as documents that contain matter the public disclosure of which would infringe the privilege of Parliament. The agency submits that as Parliamentary Briefing Notes these briefings were specifically prepared for the Minister for the purpose of use in proceedings of Parliament, or in preparation for such proceedings.
24. On 13 December 2012 the agency made further submissions in response to my provisional determination. In relation to document 1, which my provisional view held was only partially exempt, the agency advised that following discussion with the EPA Investigations branch, it had no concerns with the additional information I suggested should be released, with the exception of a minimal amount of additional information which the agency claims is exempt on grounds of legal professional privilege.
25. In relation to documents 2 and 6, the agency's response to my provisional determination submits that these documents are exempt under clause 1(1)(b) of Schedule 1 to the FOI Act. It stated:

Both documents are in the format of cabinet submissions and addressed to the Premier for cabinet to note. Neither document is signed, indicating that they are not the final version actually submitted to Cabinet. They are, however, well advanced preliminary drafts of the kind likely to be submitted to the Minister for approval.

The applicant's submissions

26. The applicant submits that the documents should be released in the public interest.

The relevant exemption provisions in Schedule 1

27. In **Attachment 1**, I have set out the clauses in Schedule 1 to the FOI Act which the agency has claimed in its determination. I have also set out my views about the operation of these clauses, and what needs to be shown to justify claiming these provisions as a basis for refusing access to documents. I have applied those views in my consideration of the agency's determination below.

Consideration of the submissions and the agency's determination

Document 1

28. In my view, parts of document 1 includes a summary of privileged communications between the agency and its legal advisers (the Crown Solicitor's Office) and communications with the Crown Solicitor's Office prepared with the dominant purpose of use in anticipation of legal proceedings. Considering the views of the court in *Trade Practices Commission v Sterling*² and *Esso Australia Resources Limited v The Commissioner of Taxation*³ which are set out in Attachment 1 to this provisional determination, my provisional view is that, in part, document 1 is exempt under clause 10 of Schedule 1 to the FOI Act.
29. However, it does not appear that the entirety of document 1 would meet this description.

² *Trade Practices Commission v Sterling* (1979) 36 FLR 24

³ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49

30. On 16 November 2012, I provided the agency with a copy of document 1 with those parts that I consider may be exempt under clause 10 highlighted. The agency has responded by identifying a minimal amount of additional information which it considers is also exempt under clause 10. Due to the operation of section 39(15), which prevents me from disclosing in my determinations any matter the agency considers is exempt, I am unable to set out the agency's response with specificity. However, I can say that I accept the submissions of the agency in that regard. Accordingly, I have provided the agency with a copy of document 1 with those parts that I now consider may be exempt under clause 10 highlighted.
31. In my view, the remaining parts of document 1 are not exempt pursuant to clause 4(2)(a)(i), as claimed in the agency's determination.
32. Clause 4(2)(a)(i) provides:
- (2) A document is an exempt document if it contains matter the disclosure of which-
- (a) could reasonably be expected -
- (i) to prejudice the investigation of any contravention or possible contravention of the law (including any revenue law) whether generally or in a particular case; ...
- and
- (b) would, on balance be contrary to the public interest.
33. In my provisional determination, I stated:
28. On 5 November 2012, my officers Ms Simpkins and Ms Birch met with Mr Lugna, Ms Dean and Mr Barry from the agency. The agency's officers advised that the investigation into Nyrstar's compliance with the *Environment Protection Act 1993* were ongoing, and that while Nyrstar may be aware of the fact that the agency was investigating its practices, it may not be aware of the extent of that investigation and the evidence relevant to the investigation.
29. While I accept that the investigation may still be on foot, and I note the agency's general comments that disclosure may prejudice that investigation, the agency has not provided me with information which would indicate, with specificity, how the disclosure of document 1 could reasonably be expected to prejudice the investigation of Nyrstar's compliance with the Environment Protection Act.
30. I note that information is circulating in the media which indicates that the agency was considering Nyrstar's licence conditions, and the South Australian Government has utilised the services of Professor Mark Taylor to review lead emission data.⁴ I also note that the agency published a media release on 27 July 2012 relating to variations of Nyrstar's licence conditions.⁵ Given the information already publicly available, it is unclear how the information contained in the document would prejudice the ongoing investigation by the agency into Nyrstar.
31. While I note the agency's comments regarding the public interest in the agency being able to carry out its legislative function, I have not been provided with information that explains how this would be impeded if the document were disclosed. I also note the agency's submission that there is a public interest agencies being able to brief Ministers on sensitive matters.

⁴ See for example, Martin, Sarah., "Urgent Action needed as smelter 'poisons kids'", *The Australian*, 16 July 2012, <<http://www.theaustralian.com.au/national-affairs/state-politics/urgent-action-needed-as-smelter-poisons-kids/story-e6frgczx-1226426658637>> (accessed 15 November 2012)

⁵ EPA, Nyrstar Licence conditions, 27 July 2012

While this is certainly the case, there are countervailing public interest arguments which I consider persuasive in this matter. In this matter, these include:

- the extent to which the information is already in the public domain
- that disclosure may contribute to public debate on an important issue
- that disclosure may enhance scrutiny of the agency's or the government's decision-making processes and improve government accountability and public participation in policy-making.

32. In my view, to establish that disclosure would, on balance, be contrary to the public interest, the agency must provide some substantiating evidence, rather than just 'a vague general assertion.'⁶

34. The agency advised me on 13 December 2012 that having discussed my provisional view with the EPA Investigations Branch, it had no concerns with releasing the remaining information in document 1.
35. Accordingly, apart from the sections of document 1 which may be exempt pursuant to clause 10, as highlighted in the copy of document 1 I have provided to the agency, I am not persuaded that document 1 is exempt.

Documents 2 and 6

36. Documents 2 and 6 do not appear to be Cabinet briefing papers. However, considering their appearance and content, it is my view that they may be draft Cabinet submissions. Both documents are referred to as 'Minutes' and contain a header 'to the Premier for Cabinet to note' and contain a list of recommendations for Cabinet. Both appear to be draft documents as they are unsigned and undated.
37. Accordingly, it is my view that the documents are not exempt under clause 1(1)(f) of Schedule 1 to the FOI Act.
38. In my provisional view I indicated that these documents may be exempt under clause 1(1)(b). In response, the agency submits that these documents are indeed draft Cabinet minutes, noting their form and content.
39. I accept the agency's submission. accordingly, it is my view that documents 2 and 6 are exempt pursuant to clause 1(1)(e) of Schedule 1 to the FOI Act.

Document 3

40. Having considered the agency's submissions and the content and form of document 3, I am satisfied that the first two pages of this document are a briefing paper specifically prepared for the use of a Minister in relation to a matter submitted or proposed to be submitted to Cabinet. The subject line on the document indicates "Cabinet Note ..." and the recommendations refer to an attached Cabinet note. Pages 3-5 of document 3 appear to be a draft Cabinet note. The document contains a header 'to the Premier for Cabinet to note' and contain a list of recommendations for Cabinet.
41. Accordingly, my view is that pages 1-2 are exempt pursuant to clause 1(1)(f) and pages 3-5 are exempt pursuant to clause 1(1)(b).

⁶ *Ipex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, 70.

Documents 4 and 5

42. While Document 4 contains a heading 'Parliamentary Briefing Note' it is clearly in draft form, as some 'track changes' edits are visible. Document 5 appears to be the final version of document 4.

43. Clause 17(c) of Schedule 1 to the FOI Act provides:

A document is an exempt document if it contains matter the public disclosure of which would, but for any immunity of the Crown -

...

(c) infringe the privilege of Parliament.

44. The concept of parliamentary privilege has developed from the *Bill of Rights 1688*, Article 9⁷ which says that 'freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament.' The intention behind the privilege is *inter alia* to allow Parliament to proceed with the business of making legislation without undue interference. In South Australia, there is no statute law specifically defining the privilege (as there is in other jurisdictions in Australia); and thus, the words in Article 9 are the appropriate guide.

45. The 'proceedings of Parliament' are protected by the privilege. Case law in South Australia suggests that the meaning of 'proceedings in Parliament' is broad.⁸ Also, in the case of *O'Chee v Rowley*,⁹ 'proceedings in Parliament' was considered to include actions, documents, and acts done in preparation for what will be said or done in Parliament. However, there must be sufficient proximity between a prepared document and the parliamentary proceedings in order to achieve protection.

46. The protection of Parliament's privilege developed from Article 9 is also a broad protection. It has been suggested that the term 'impeach' can mean 'hinder, challenge or censure'.¹⁰ My counterpart in Queensland, the Information Commissioner, has considered the privilege in the context of the Queensland *Freedom of Information Act 1992* (Qld):

An unauthorised disclosure of 'proceedings in Parliament' will constitute an infringement of the privileges of Parliament, and hence, if the matter in issue can properly be characterised as a 'proceeding in Parliament', it will be exempt matter under s.50(c)(i) [the equivalent of clause 17(c)] of the FOI Act, unless its public disclosure has been authorised¹¹

47. I agree with this view. I consider that disclosure of 'proceedings in Parliament' under the FOI Act may amount to an 'unauthorised disclosure' and thus offend Article 9.

48. While the exemption under clause 17(c) does not explicitly extend to drafts, in this matter I am satisfied that there is sufficient proximity between the draft (document 4) and the final version (document 5) such that the exemption under clause 17(c) is satisfied for both of these documents.

⁷ This is applicable to South Australia by virtue of section 38 *Constitution Act 1934* (SA).

⁸ See *Australian Broadcasting Corporation v Chatterton* (1986) 46 SASR 1 per Pryor J citing comments by Ayelsworth JA in the Ontario Court or Appeal case of *Roman Corp Ltd v Hudsons Bay Oil & Gas Ltd* (1972) 23 DLR (3d) 292 at 298. *Rann v Olsen* (2000) 76 SASR 450 at pp461, 470 per Doyle CJ.

⁹ (1997) 142 FLR per McPherson JA at pp 18-19.

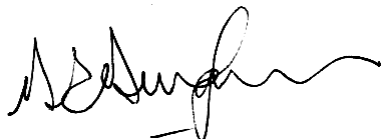
¹⁰ *The First Report Joint Select Committee on Parliamentary Privilege* (UK), First Report March, 1999, paragraph 36.

¹¹ *Ainswoth Nominees Pty Ltd and the Criminal Justice Commission* Decision No. 99010 Application S 87/94 paragraph 59.

49. I acknowledge the applicant's view that the documents should be released in the public interest. However, the agency has claimed that the documents are exempt pursuant to clauses 1(1)(f), 4(2)(a)(i) and 10(1) of Schedule 1 to the FOI Act. However, I note that there is no specific requirement under clause 1(1)(f) or clause 10 to assess whether disclosure would, on balance, be contrary to the public interest, in order for the exemption to be satisfied.

Determination

50. In light of the above, I vary the agency's determination pursuant to section 39(11) of the FOI Act.

A handwritten signature in black ink, appearing to read 'Richard Bingham', with a long horizontal flourish extending to the right.

Richard Bingham
SA OMBUDSMAN

17 December 2012
Att