

## Determination

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

Applicant	Mr Steven Marshall MP
Agency	Environment Protection Authority
Ombudsman reference	2012/05833
Agency reference	05/20278
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 correspondence, including emails, between the EPA and the office of 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. (05/20278)
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 grant full access to one document, partial access to one document and to refuse access to four 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.
9. Accordingly, I am finalising this determination on the same grounds as foreshadowed in my provisional view.

### Relevant provisions of the FOI Act

10. 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'.
11. 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; ...
12. 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.
13. 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.'<sup>1</sup> 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).
14. 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.
15. 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

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<sup>1</sup> See section 4 and section 20(1)(a), FOI Act

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.

16. 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

17. The agency identified six documents within the scope of the application which it has described as follows:
  - i. Correspondence to Minister for Environment and Conservation dated 2 September 2012
  - ii. Legal document dated 6 October 2011
  - iii. Legal document dated 9 November 2011
  - iv. Cabinet document dated 18 November 2011
  - v. Correspondence to Minister for Environment and Conservation dated 1 February 2012
  - vi. Legal document undated
18. Document 1 was released to the applicant in the agency's internal review determination, and accordingly I need not address it further.
19. Document 4 consists of a chain of seven emails and an attachment which is a draft minute to the Minister for Health and Ageing.
20. Document 5 was partially released to the applicant in the agency's internal review determination. The agency redacted the material in document 5 it had determined was exempt pursuant to clause 10 of Schedule 1 to the FOI Act. Accordingly I need only address the redacted material.

### The agency's submissions

21. The agency determined to refuse access to documents 2, 3, and 6 on the basis that the documents were exempt pursuant to both clause 10(1) and 4(2)(a)(i) of Schedule 1 to the FOI Act.
22. The agency submits that:

These communications were for the purpose of seeking, receiving or clarifying legal advice to enable the EPA to consider whether to pursue specific enforcement action and as such were intended to be confidential between the EPA and its legal advisers. The communications were directly between the EPA and its legal advisers.

The communications contained in documents 2, 3 and 6 were part of an investigation that the EPA was undertaking into potential legal action against Nyrstar. Disclosure of these documents could therefore prejudice that investigation. On balance the public interest factors supporting the release of that information are, in this instance, outweighed by the necessity for a regulator to receive confidential legal advice regarding an investigation to enable it to effectively discharge its functions and responsibilities. There is significant public interest in the EPA being able to carry out its legislative functions and particularly to investigate matters that may lead to legal action being taken if, and as, required. There is also a public interest in the schedule 1 exemptions of the FOI Act working effectively to restrict access to documents that they intend to restrict access to. Here the documents in question satisfy the elements of section 4(2)(a)(i) of the FOI Act, in that they concern information and evidence being considered as part of an investigation and their release could prejudice that investigation.

23. The agency determined that document 4 was exempt pursuant to clause 1(1)(f) of Schedule 1 to the FOI Act as a briefing paper specifically prepared for the use of a Minister in relation to a matter submitted or proposed to be submitted to Cabinet.
24. Document 4 is a draft brief and an email trail of discussion regarding the draft brief. The agency submits that the draft brief attached to the emails was prepared as a briefing for a Cabinet subcommittee as indicated by the subject heading of the email trail. The agency submits that clause 1(3) provides that a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of Cabinet. The agency had submitted that release of document 4 would disclose the substance of a briefing specifically prepared for the use of a Minister in relation to a matter submitted to a Cabinet subcommittee. However, on 13 December 2012, the agency advised that it withdraws its claim for exemption and will provide a full copy of that document to the applicant.
25. Partial access was granted to document 5 with one sentence at the top of page two being removed. The agency claims legal professional privilege over that sentence as it discloses information provided to the EPA by its legal advisers. On 13 December 2012 the agency advised that it accepted my provisional view with regard to document 5, which was that that sentence was not exempt in its entirety.

### **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**

#### Documents 2, 3 and 6

28. Documents 2, 3 and 6 contain correspondence between officers of the agency and the agency's legal advisors.
29. From the face of the documents, it is not apparent that documents 2, 3 and 6 are 'correspondence between the EPA and the office of the Minister for Environment and Conservation'. In addition, the agency states in its submissions that documents 2, 3 and 6 were communications 'directly between the EPA and its legal advisors'.
30. My office sought clarification of this matter with the agency on 26 October 2012.
31. On 5 November 2012, Mr Anton Lugna, Manager Risk and Business Support in the Office of the Deputy Chief Executive for the agency advised my office that after further consideration, 'there is no obvious reference or attachment I can find that would bring [documents 2, 3 and 6] within the scope of this FOI request (ie they do not appear to have been sent to the Minister's office at any point, or attached to anything that went to this office). I can only conclude that they have been included as a result of administrative error.' Mr Lugna surmised that this error may have been due to the fact that the applicant lodged three similar requests for documents relating to Nyrstar, and another applicant had sought similar documents at a similar time.

32. My view is that documents 2, 3 and 6 are outside of the scope of the application. In any case, I am satisfied that the documents are communications or draft communications between the agency and its legal advisors (the Crown Solicitor's Office), and accordingly would be exempt pursuant to clause 10 of Schedule 1 to the FOI Act.

#### Document 4

33. Document 4 consists of an email chain between various agencies and an email attachment. The attachment is a minute to the Minister of Health and Ageing and the email chain consists of discussion about the brief and its contents.
34. My provisional view set out my reasons for finding that this document was not exempt under clause 1(1)(f) of Schedule 1 to the FOI Act as previously claimed by the agency. I stated:

33. For clause 1(1)(f) to apply, the document must be a 'briefing paper'. In its submission, the agency describes document 4 as containing 'a draft brief and an email trail of discussion and text that fed directly into that brief'. The agency does not submit that document 4 contains a briefing paper, but submits that the release of document 4 'would disclose the substance of a briefing'.

34. While clause 1(1)(b) specifically extends the exemption of Cabinet documents in clause 1(1)(a) to draft Cabinet documents, clause 1 does not contain any specific extension of clause 1(1)(f) to draft briefing papers. I also note that clause 1(1)(f) is concerned with whether the document is a briefing paper; not whether the document discloses the substance of a briefing paper. With this in mind, my provisional view is that document 4 is not exempt pursuant clause 1(1)(f).

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37. The agency submits that the release of document 4 'would disclose the substance of a briefing specifically prepared for the use of a Minister in relation to a matter submitted to a Cabinet subcommittee.' The only evidence offered by the agency that the matter concerns a deliberation or decision of a Cabinet committee or subcommittee of a Cabinet committee is the subject heading of the email chain which labels the email chain and the attachment '... - Cabinet subcommittee.'

35. Having examined the substance of both the email chain and attachment it appears the material in document 4 concerns a meeting between the Premier, various Ministers and representatives from Nyrstar. As indicated in my provisional determination, it is not clear that the matters contained in document 4 concerns any deliberation or decision of a Cabinet committee or subcommittee of a Cabinet committee.
36. The agency advised, on 13 December 2012, that following consultation with the Department of Health, it ascertained that a final signed version of the 'brief' had been released by that agency under a recent FOI determination. Accordingly the agency withdrew its exemption of the document. On the basis of the above, and the agency's withdrawal, my view is that the entirety of document 4 should be released to the applicant, as it is not an exempt document.

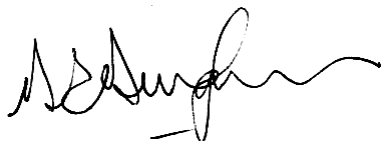
#### Document 5

37. The material redacted from document 5 first describes the status of legal proceedings and then provides a summary of legal advice.

38. In *Trade Practices Commission v Sterling*,<sup>2</sup> the Federal Court described the classes of information that may attract legal professional privilege as including 'notes, memoranda, minutes or other documents made by the... officers of the client...contain a record of [privileged] communications.' In so far as the redacted material provides a summary of legal advice, I accept the agency's submission that the material is subject to legal professional privilege.
39. The classes of information described in *Trade Practices Commission v Sterling*,<sup>3</sup> are concerned with information relating to the seeking, preparing and giving of legal advice. The status of legal proceedings is in general publically available and does not appear to be legal advice. In so far as the redacted material describes the status of legal proceedings, I reject the agency's submission that the material is subject to legal professional privilege.
40. In my view, the material redacted from document 5 is exempt only to the extent it contains a summary of legal advice pursuant to clause 10 of Schedule 1 to the FOI Act. On 16 November 2012, I provided the agency with a copy of document 5 which highlights that part of the material that I consider may be exempt under clause 10 of Schedule 1 to the FOI Act. The agency advises that it accepts that view.
41. 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

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



Richard Bingham  
SA OMBUDSMAN

17 December 2012

Att

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<sup>2</sup> *Trade Practices Commission v Sterling* (1979) 36 FLR 244 (Lockhart J).

<sup>3</sup> *Ibid.*