

## Determination

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

Applicant	Mr Mark Parnell MLC
Agency	Environment Protection Authority
Ombudsman reference	2012/07146
Agency reference	05/20370
Determination	The determination of the agency is confirmed.

## REASONS

### Background

1. By application under the *Freedom of Information Act 1991 (the FOI Act)* received by the agency on 30 May 2012, Mr Mark Parnell MLC (**the applicant**) requested access to:  
  
...A Copy of the Technical report for Professor Mike Taylor commissioned by the EPA as part of the investigation into the alleged breach by Nyrstar of Serious Environmental Harm provisions under the EPA Act.
2. Accredited FOI officer of the agency, Mr Anton Lugna made a determination on 4 July 2012 to refuse access to the one document which was identified as being within the scope of the application.
3. The applicant requested an internal review of this determination, by application received by the agency on 3 August 2012.
4. The Deputy Chief Executive of the agency, Mr Tony Circelli, then confirmed the determination (**the agency's determination**).

### External review

5. By application dated 11 September 2012, the applicant requested my external review of the agency's determination under section 39 of the FOI Act.
6. By letter dated 12 September 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 26 November 2012. I informed the parties that subject to my receipt and consideration of submissions from the parties, I proposed to confirm the agency's determination pursuant to section 39(11) of the FOI Act.

8. I have not received any submissions from the agency or the applicant in response to my provisional 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.'<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).
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.
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.

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

## The documents

16. The agency has identified one document as within the scope of the application, a report titled:

Report for the Environment Protection Authority, South Australia: Examination of the relationship between Nyrstar Port Pirie Pty Ltd smelter airborne lead emissions and environmental health impacts.

## The agency's submissions

17. In a letter dated 5 October 2012, Mr Circelli of the agency submits that the document is exempt under clause 10(1) of Schedule 1 of the FOI Act. The agency states:

It was commissioned on a confidential basis for the purpose of investigating alleged contraventions [of environmental protection legislation]...The report records communications between the expert witness and the Crown Solicitor's Office for this investigation, which is ongoing.

18. Further, the agency claims that the document is also exempt under clause 4(2)(a)(i) of the FOI Act. The agency submits that:

... the document ... is central to a current investigation the EPA is undertaking into potential legal action against Nyrstar. Disclosure of this document could therefore prejudice that investigation.

19. The agency also submits that there is a public interest in refusing access to the document and states:

While the public interest is served by providing access to government held information and the public benefit of releasing that information, in this instance, this is outweighed by the significant public interest in a regulator being able to carry out its legislative functions (and particularly its ability to investigate matters that may lead to legal action being taken if, and as, required).

## The applicant's submissions

20. The applicant has made no submissions.

## The relevant exemption provisions in Schedule 1

21. 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

### *Clause 4(2)(a)(i)*

22. On 5 November 2012, my officers Ms Justine Simpkins and Ms Kara Birch viewed a copy of the document at the agency's premises and met with officers from the agency. At this meeting the agency officer's confirmed, as stated in the letter of 5 October 2012, that the document concerns information and evidence being considered as part of an investigation by the agency into whether there has been any breach of provisions of the *Environmental Protection Act 1993*.

23. The agency has claimed that the document is exempt under clause 4(2)(a)(i) of Schedule 1 of the FOI Act. Under clause 4(2)(a)(i) a document is exempt if it contains matter the disclosure of which could reasonably be expected to prejudice the investigation of any contravention or possible contravention of the law. I note that while the agency has submitted that the document is 'central' to its investigation it has not provided any submissions in support of its claim that release of the document under FOI would prejudice the investigation. Accordingly, I am not persuaded that the document would be exempt under clause 4(2)(a) of Schedule 1 to the FOI Act.

*Clause 10(1)*

24. Under clause 10(1) of Schedule 1 to the FOI Act a document is exempt if it 'contains matter that would be privileged from production in legal proceedings on the grounds of legal professional privilege'.
25. In the case of the *Trade Practices Commission v Sterling*<sup>2</sup>, Lockhart J held that information may attract legal professional privilege where it is:

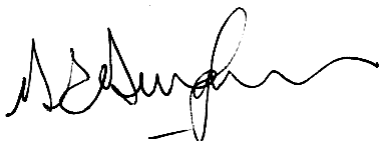
Communications passing between the party and a third person if they are made with reference to the litigation either anticipated or commenced.

Having considered the document, I note that there are a number of references which make it clear that the report has been prepared for tendering to the court as evidence of Professor Taylor's expert opinion. I am satisfied that the document in its entirety is the evidence of an expert witness and accordingly would attract legal professional privilege.

26. It is my view that the document is a communication between Professor Taylor and the agency which was made for the dominant purpose of use in existing or anticipated legal proceedings<sup>3</sup> and as such it is exempt under clause 10(1) of Schedule 1 of the FOI Act.

**Determination**

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



Richard Bingham  
**SA OMBUDSMAN**

12 December 2012

Att

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

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

## ATTACHMENT 1

### Legal Professional Privilege - clause 10(1)

#### Clause 10(1) says

A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the grounds of legal professional privilege.

#### Documents that may be exempt under clause 10

Legal professional privilege exists to protect the confidentiality of communications between a lawyer and client. Clause 10(1) allows an agency to refuse an applicant access to a document where the document would be able to be withheld from disclosure in any legal proceedings on the grounds of legal professional privilege. The information must be:

- confidential
- communication between a client and their lawyer
- created for the *dominant* purpose of obtaining or giving legal advice or made for the dominant purpose of use in existing or anticipated legal proceedings.<sup>4</sup>

Dominant has been held to mean a 'ruling, prevailing or most influential' purpose.<sup>5</sup>

The following information may attract legal professional privilege:<sup>6</sup>

- a document that satisfies the above test but is made by an agent of either party
- a document prepared with the view to being a communication described above but was not in fact used
- communications between legal advisers of the client with the view to the client obtaining legal advice or assistance
- notes, memoranda, minutes or other documents made by the client, officers of the client or legal adviser of the client about privileged communications
- communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of litigation, with a view to obtaining advice as to the litigation or the evidence to be used in it or information which may result in obtaining such evidence
- communications passing between the party and a third person if they are made with reference to the litigation either anticipated or commenced
- knowledge, information, or belief of the client derived from privileged communications made to the client by their solicitor or agent.

#### Documents that will not be exempt under clause 10

- communications between a solicitor and client containing confidential information that were not made for the *dominant* purpose of giving legal advice<sup>7</sup>
- a document is not an exempt document by virtue of this clause merely because it contains matter that appears in an agency's policy document.<sup>8</sup>

<sup>4</sup> *Eso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

<sup>5</sup> *Ibid*, 64-65.

<sup>6</sup> *Trade Practices Commission v Sterling* (1979) 36 FLR 244 (Lockhart J).

<sup>7</sup> *Eso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

<sup>8</sup> *Freedom of Information Act 1991* (SA), Schedule 1, clause 10(2).

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## Waiver of Privilege

Waiver of privilege may be express or implied. Inconsistency between the conduct of the client and maintenance of the confidentiality gives rise to a waiver of the privilege.<sup>9</sup>

For example, if the client discloses the substance of the advice to a third party, the client may have waived privilege.<sup>10</sup> However, the question of whether privilege is waived depends on the circumstances in each case and the purpose of the disclosure, and considerations of fairness arising from that context or those circumstances.<sup>11</sup> Disclosure of the existence or conclusions of privileged communication may not waive the privilege if there is no inconsistency between what is disclosed and the matter that needs to remain confidential.<sup>12</sup>

### Is part or the entire document exempt?

While an entire document may be exempt from release if it contains any exempt matter under Schedule 1 to the FOI Act, the exemption is limited by section 20(4) of the FOI Act. That section provides that if it is practicable to give access to a document from which the exempt matter has been deleted, and it appears that the applicant would wish to receive such a copy, the agency must not refuse to give access to the document to that limited extent.<sup>13</sup>

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<sup>9</sup> *Mann v Carnell* [1999] 201 CLR 1, [28].

<sup>10</sup> *Bennett v Chief Executive Officer of the Australian Customs Service* [2004] FCAFC 237.

<sup>11</sup> *Secretary, Department of Justice v Osland* (2008) 234 CLR 275, 45.

<sup>12</sup> *Ibid.*

<sup>13</sup> This was recently emphasised in *Treglown v SA Police* [2011] SADC 139 (20 December 2011), [175].