



OmbudsmanSA

Determination

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

Applicant	Hon Mark Parnell MLC
Agency	Environment Protection Authority
Ombudsman reference	2012/08074
Agency reference	EPA/20537
Provisional 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 12 July 2012, the applicant requested access to:

a copy of all correspondence and communications to and from the EPA and the Minister for Environment & Conservation regarding the alleged breach by Nyrstar of Serious Environmental Harm provisions under the Environment Protection Act arising from high emissions of lead in Port Pirie between August 2009 and May 2010
2. The agency failed to make a determination within the 30 day statutory timeframe, and was therefore deemed to have refused access to the requested documents.
3. By application received by the agency on 21 August 2012, the applicant applied for internal review of the agency's 'deemed refusal'.
4. The agency failed to make an internal review determination within the 14 day statutory timeframe, and thus was taken to have confirmed its 'deemed refusal'.
5. Despite this, by letter to the applicant dated 25 September 2012, the agency's accredited FOI officer purported to determine to grant full access to one document, partial access to one document and refuse access to five documents.¹

External review

6. By letter dated 5 October 2012, the applicant requested my external review of the agency's determination under section 39 of the FOI Act. I decided to treat the agency's letter of 25 September 2012 as the 'agency's determination' for the purposes of my review.
7. By letter dated 22 October 2012, I notified the agency of my review and 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.

¹ I note that the agency's purported determination was made outside the statutory timeframe and is therefore, not a 'determination' at law.

Provisional determination

8. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 6 February 2013. 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.
9. By letter dated 30 April 2013, the agency provided submissions in response to my provisional determination.
10. By letter dated 12 July 2013, an interested party (**Nyrstar Port Pirie Pty Ltd**) provided submissions in response to my provisional determination and consultation.²

Relevant provisions of the FOI Act

11. 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'.
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.'³ Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access.
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. 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

18. The agency identified seven documents as falling within the scope of the application. The documents appear to be minutes, emails and 'Parliamentary Briefing Notes' between the agency and the Minister for Environment and Conservation (**the Minister**).

The agency's submissions

Document 1

19. Document 1 is a minute dated 3 July 2010 from the Chief Executive of the agency to the Minister. The agency initially submitted that document is exempt in part (one sentence - **the sentence**); but by letter dated 30 April 2013, the agency advised that it no longer holds this view.
20. By letter dated 3 June 2013, in accordance with my obligations under section 39(10) of the FOI Act, I consulted Nyrstar in relation to the sentence, as it may concern Nyrstar's business affairs. By letter dated 12 July, Nyrstar advised that it had no objection to release of the sentence.

² In accordance with my obligations under section 39(10) of the *Freedom of Information Act 1991*.

³ See *Freedom of Information Act 1991*, sections 4 and 20(1)(a).

Document 2

21. According to the agency's determination, document 2 may be released in full. In light of this, I will not consider document 2 further.

Document 3

22. Document 3 is an urgent minute from the Chief Executive of the agency to the Minister about Nyrstar with an attachment (**the attachment**). By letter dated 9 November 2012, the agency submitted that document 3 is subject to legal professional privilege and therefore exempt under clause 10(1) of Schedule 1 to the FOI Act.

Documents 4 and 5

23. The agency submitted that documents 4 and 5 are exempt under to clause 1(1)(f) of Schedule 1, on the basis that they were specifically prepared the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet.

Documents 6 and 7

24. The agency submitted that documents 6 and 7 are 'Parliamentary Briefing Notes' and therefore exempt under clause 17(c).

Consideration of the submissions and the agency's determination

25. Clause 1(1) of Schedule 1 states:

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); or
 - (c) if it is a document that is a copy of or part of, or contains an extract from, a document referred to in paragraph (a) or (b); or
 - (e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet; or
 - (f) if it is a briefing paper specially prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet.

26. Clause 10(1) states:

10—Documents subject to legal professional privilege

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

27. 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 hypothetical legal proceedings on the grounds of legal professional privilege.
28. In *Esso Australia Resources Limited v The Commissioner of Taxation*, the High Court decided that a document is privileged from production in legal proceedings if it is a confidential communication between a client and their solicitor that was created for the dominant purpose of obtaining or giving legal advice; or if it is a confidential

communication made for the dominant purpose of use, or obtaining material for use in, pending or anticipated legal proceedings.⁴

29. Clause 17(c) states:

17—Documents subject to contempt etc

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.

30. The concept of parliamentary privilege has developed from the *Bill of Rights 1688*, Article 9⁵ 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 legislation in relation to the privilege; and thus, the words in Article 9 are the appropriate guide.

31. The ‘proceedings of Parliament’ are protected by the privilege. Case law in South Australia suggests that the meaning of ‘proceedings in Parliament’ is broad.⁶ Also, in the case of *O’Chee v Rowley*,⁷ ‘proceedings in Parliament’ was considered to include actions, documents, and acts done in preparation for what will be said or done in Parliament. However, in my view, there must be sufficient proximity between a prepared document and the parliamentary proceedings in order to achieve protection.

32. 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’.⁸ 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 authorised...⁹

Document 1

33. Given the agency’s and Nyrstar’s views about the sentence, it can be released to the applicant.

Document 3

34. In my view, parts of document 3 include a summary of privileged communications between the agency and the Crown Solicitor’s Office and they are exempt under clause 10(1).

⁴ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

⁵ This is applicable to South Australia by virtue of section 38 *Constitution Act 1934* (SA).

⁶ See *Australian Broadcasting Corporation v Chatterton* (1986) 46 SASR 1 per Pryor J citing comments by Ayelsworth JA in the Ontario Court of 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.

⁷ *O’Chee v Rowley* (1997) 142 FLR per McPherson JA at pp 18-19.

⁸ The First Report Joint Select Committee on Parliamentary Privilege (UK), First Report March, 1999, paragraph 36.

⁹ *Ainswoth Nominees Pty Ltd and the Criminal Justice Commission* Decision No. 99010 Application S 87/94 paragraph 59.

35. I have attached a copy of document 3 with the matter that I consider to be exempt highlighted. In my view, and in accordance with section 20(4) of the FOI Act, the remainder should be released to the applicant.
36. The attachment is a draft brief to the Minister for Health.
37. By letter dated 28 March 2013, the Crown Solicitor's Office put forward further submissions on behalf of the agency in relation to the attachment.¹⁰
38. Having reconsidered the nature and contents of the attachment, in conjunction with the submissions put forward by the Crown Solicitor's Office, I am satisfied that the attachment (although only a draft) is a brief specially prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet. It is exempt in full under clause 1(1)(f).

Documents 4 and 5

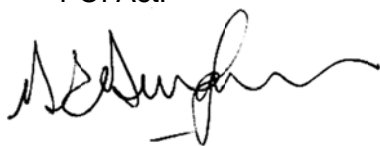
39. Document 4 is made up of several elements. Pages one, two, three and four appear to be a cover page and final version of a Ministerial briefing paper, specially prepared for the use of a Minister in relation to a matter submitted to Cabinet. Pages five, six and seven appear to be a draft Cabinet note attached to the Ministerial briefing paper, containing a list of draft Cabinet recommendations.
40. I am satisfied that pages one through to four are exempt under clause 1(1)(f) and pages five through seven are exempt under clause 1(1)(b) of Schedule 1.
41. Document 5 is also made up of several elements. Pages one and two appear to be a Ministerial briefing paper specially prepared for the use of a Minister in relation to a matter submitted or proposed to be submitted to Cabinet. Pages three, four and five appear to be a draft Cabinet note attached to the Ministerial briefing paper, containing a list of draft Cabinet recommendations.
42. I am satisfied that pages one and two are exempt under clause 1(1)(f) and pages three through five are exempt under clause 1(1)(b).

Documents 6 and 7

43. I am satisfied that documents 6 and 7 are 'Parliamentary Briefing Notes' and therefore are exempt under clause 17(c).

Determination

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



Richard Bingham
SA OMBUDSMAN

9 August 2013

¹⁰ The submissions were put forward in the context of a different external review that considered the same document (my file reference 2012/05775).