

Determination

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

Applicant	Hon Mark Parnell MLC
Agency	Environment Protection Authority
Ombudsman reference	2012/08076
Agency reference	EPA/20538
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 16 July 2012, the applicant requested access to:

... a copy of all correspondence and communication to and from the EPA and Nystar [sic] regarding the alleged breach by Nystar [sic] 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. 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.

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 applicant and agency by my provisional determination dated 6 February 2013. I provided my provisional determination to an interested party (**Nyrstar Port Pirie Pty Ltd**) by consultation dated 3 June 2013. I informed the parties that subject to my receipt and consideration of submissions from the parties, I proposed to reverse 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, Nyrstar, through its representatives, 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

15. The agency identified 97 documents as falling within the scope of the application. All are either letters or emails, including attachments, between the agency and Nyrstar and have been numbered as follows:

1	1a	2	2a	3	3a	3b	3c	3d	3e
3f	3g	3h	3i	3j	3k	3l	3m	3n	3o
4	4a	5	6	6a	7	7a	8	8a	9
9a	9b	9c	9d	9e	9f	9g	9h	9i	9j
10	11	11a	11b	11c	11d	12	12a	13	13a
14	15	16	16a	17	17a	17b	17c	17d	17e
17f	18	18a	18b	18c	18d	18e	18f	18g	18h
18i	18j	19	20	20a	20b	20c	20d	20e	20f
20g	20h	20i	20j	20k	20l	21	22	23	23a
24	25	26	27	27a	28	28a			

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).

The agency's submissions

16. The agency determined to refuse access to all 97 of the documents on the basis that they are exempt under clause 10(1) and clause 4(2)(a)(i) and (b) of Schedule 1 to the FOI Act. The agency submitted that the documents contain 'communications by and to the EPA concerning the sourcing of evidence to progress legal action' by the EPA against Nyrstar and that disclosure of these documents could prejudice that investigation. The agency noted that the investigation is ongoing.
17. Further, in relation to the 'public interest' consideration in clause 4(2)(b), the agency submitted:

On balance the EPA considers that the public interest factors supporting release of this information are outweighed by the public interest factors of not releasing it. 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).

18. In relation to its exemption claim under clause 10(1), the agency submitted that:
 - the documents were prepared for the purpose of potential legal action against Nyrstar
 - the documents concern the collection of evidence to 'inform, and be included in, the EPA's brief of evidence to its legal representative on this matter'
 - the purpose of the documents is 'to elicit information and evidence to be used in legal action against Nyrstar'
 - 'All documents involve members of the EPA's Investigations Unit asking questions and seeking information from Nyrstar around obtaining expert reports or related evidence to be used in this matter'
 - the dominant purpose of the communications recorded in the documents was the preparation of a 'brief of evidence to progress legal action' in this matter
 - '...many of these documents or the outcomes of these documents also formed part of the EPA's brief of evidence to its legal representative on this matter'
 - the documents contain 'communications by and to the EPA concerning the sourcing of evidence to progress legal action' by the EPA against Nyrstar and that disclosure of these documents could prejudice that investigation.

The interested party's submissions

19. By letter dated 12 July 2013, Nyrstar, through its representatives, provided submissions in response to my consultation and provisional determination. Nyrstar claims that the documents are exempt from release under clauses 4(1)(b), 4(2)(a)(i) and (b), 6(1), 7(1)(b), 9(1) and 12(1) of Schedule 1 to the FOI Act.
20. I find Nyrstar's submissions in relation to clause 12(1) to be the most convincing.

Consideration of the submissions and the agency's determination

21. In my view, clause 12(1) is relevant by virtue of the confidentiality provisions in the *Environment Protection Act 1993 (the EP Act)*.
22. Clause 12(1) of Schedule 1 to the FOI Act states:

12–Documents the subject of secrecy provisions

- (1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act.

23. Clause 12(1) enables an agency to refuse access to documents which are the subject of secrecy provisions in other legislation.

24. Section 121 of the EP Act states:

121 - Confidentiality

A person must not divulge any information relating to trade processes or financial information obtained (whether by that person or some other person) in the administration or enforcement of this Act except–

- (a) as authorised by or under this Act; or
- (b) with the consent of the person from whom the information was obtained or to whom the information relates; or
- (c) in connection with the administration or enforcement of this Act; or
- (d) for the purpose of any legal proceedings arising out of the administration or enforcement of this Act.

Penalty: Division 5 fine.

25. Further, section 87(1)(e) of the EP Act states:

87 - Powers of authorised officers

- (1) Subject to this Division, an authorised officer may–
- (e) require any person to produce any documents, including a written record that reproduces in an understandable form information stored by computer, microfilm or other process, as reasonably required in connection with the administration or enforcement of this Act;

26. In light of the nature of the documents, the powers of an authorised officer under section 87(1)(e) of the EP Act and the submissions provided by Nyrstar, I am satisfied that the following documents contain information obtained by the agency in the administration or enforcement of the EP Act:

2a	3	3a	3b	3c	3d	3e	3f	3g	3h
3i	3j	3k	3l	3m	3n	3o	4	4a	6
6a	7	7a	8	8a	9	9a	9b	9c	9d
9e	9f	9g	9h	9i	9j	11	11a	11b	11c
11d	12	12a	13	13a	14	15	16	16a	17
17a	17b	17c	17d	17e	17f	18	18a	18b	18c
18d	18e	18f	18g	18h	18i	18j	19	20	20a
20b	20c	20d	20e	20f	20g	20h	20i	20j	20k
20l	23	23a	27	27a	28	28a			

27. The next question is whether these documents satisfy the other element of confidentiality under section 121, namely that the information relates to trade processes or financial information of Nyrstar. The EP Act does not define ‘trade processes’.

28. In relation to this point, Nyrstar submitted:

“Trade processes is not defined in the EP Act but “trade” has been defined broadly by courts in Australia, as well as in other Acts. “Processes”, when used as a noun, is defined

by the Macquarie Dictionary to mean “systematic series of actions directed to some end or a continuous action, operation, or series of changes taking place in a definite manner”.

In light of these definitions, we think that the phrase “trade processes” should be interpreted to mean all of the actions or operations that make up the business undertaking performed by Nyrstar at its Port Pirie smelter. Information “relating to” these trade processes is a broad concept, and in our submission must encompass all information that in any way relates to Nyrstar’s operation, including emissions data, reports on the performance of aspects of the Port Pirie smelter, data and graphs that describe the environmental impacts of the smelter, information about work arrangements, rosters and all of the various other matters that form part of the Graphs and Documents.

We think that this literal interpretation of section 121 is supported by its policy context and principles of statutory interpretation. That is, we think that it is appropriate to give a broad interpretation to a statutory provision designed to protect the confidentiality of information relating to a business undertaking where that information has been obtained by an Agency with investigatory powers and relates to highly sensitive matters.

29. I do not agree with the broad interpretation of ‘trade processes’ as outlined in Nyrstar’s submissions above; in particular that information relating to trade processes ‘must encompass all information that in any way relates to Nyrstar’s operation’. However, having considered the contents of the documents, I am satisfied that many contain information relating to the ‘trade processes’ of Nyrstar, within the meaning of section 121 of the EP Act.
30. In my view, the following documents are exempt under clause 12(1), by virtue of section 121 of the EP Act:

2a	3	3a	3b	3c	3d	3e	3f	3g	3h
3i	3j	3k	3l	3m	3n	3o	4	4a	6
6a	7	7a	8	8a	9	9a	9b	9c	9d
9e	9f	9g	9h	9i	9j	11	11a	11b	11c
11d	12	12a	13	13a	14	15	16	16a	17
17a	17b	17c	17d	17e	17f	18	18a	18b	18c
18d	18e	18f	18g	18h	18i	18j	19	20	20a
20b	20c	20d	20e	20f	20g	20h	20i	20j	20k
20l	23	23a	27	27a	28	28a			

31. The remainder of the documents do not contain information obtained by the agency in the administration or enforcement of the EP Act. These are documents:

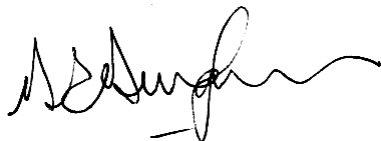
1	1a	2	5	10	21	22	24	25	26
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32. Document 1 is an email dated 29 June 2010 between the agency and Nyrstar with a letter attached advising Nyrstar of the agency’s investigation.
33. Document 1a is the letter referred to above. The letter sets out the legislative requirement of Nyrstar to cooperate with the agency’s investigation and requests certain information.
34. Document 2 is an email dated 2 July 2010 from Nyrstar to the agency in response to document 1. Document 2a (which I have determined to be exempt under clause 12(1)) is attached to document 2.
35. Document 5 is an email dated 6 July 2010 from the agency to Nyrstar and appears to be of a purely administrative nature.

36. Document 10 is a letter dated 15 July 2010 from the agency to Nyrstar requesting copies of certain documents under section 87(1) of the EP Act.
37. Documents 21 and 22 are email chains dated 22 and 26 December 2010 between the agency and Nyrstar. In my view, document 22 contains information concerning the personal affairs of a Nyrstar staff member.
38. In order for a document to be considered exempt under clause 6(1), the following elements must be established:
- a. the document contains information concerning the personal affairs of someone other than merely the applicant's (the term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act); and
 - b. it would be unreasonable to release it
39. I am satisfied that certain information in document 22 concerns the personal affairs of a Nyrstar staff member, and that it would be unreasonable to release it. I have provided the agency with a copy of document 22 with the information I consider to be exempt highlighted. In my view, this information should be deleted before the remainder of document 22 is released to the applicant, in accordance with section 20(4) of the FOI Act.
40. Document 24, 25 and 26 are email chains dated 6, 10 and 11 January 2011 between the agency and Nyrstar organising a site visit for agency staff.
41. With the exception of the 'personal affairs' information in document 22, I am not satisfied that the remainder of the documents contain any exempt information under Schedule 1 to the FOI Act.
42. In my view, the following documents should be released to the applicant in full:
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|---|----|---|---|----|----|----|----|----|
| 1 | 1a | 2 | 5 | 10 | 21 | 24 | 25 | 26 |
|---|----|---|---|----|----|----|----|----|
43. Further, document 22 should be released to the applicant in part.

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