

Determination

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

Applicant	Ms Vickie Chapman MP
Agency	TAFE SA
Ombudsman reference	2016/07951
Agency reference	BRTAFE16/526
Determination	The determination of the agency is varied

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant requested access from the agency to:

All minutes and agendas of board meetings from November 2012 to date plus any correspondence or reports to Treasury pursuant to TAFE SA's Ministerial Charter tabled 26 February 2015.

Background

2. For ease of reference, the procedural steps relating to the application are set out in the appendix.

Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 21 February 2017. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
5. The agency provided submissions in response, which I have considered in my final report.

Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
7. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access. Clauses 1(1)(e), 2(1)(e), 4(2)(a)(vi), 5(1), 6(1), 6(2), 7(1)(c), 10(1), 16(1)(iv) - (v) are relevant to my review, which I set out in full below:

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 specifically prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet.
- (2) A document is not an exempt document by virtue of this clause—
 - (a) if it merely consists of factual or statistical material (including public opinion polling) that does not—
 - (i) disclose information concerning any deliberation or decision of Cabinet; or
 - (ii) relate directly to a contract or other commercial transaction that is still being negotiated; or
 - (ab) merely because it was attached to a document described in subclause (1); or
 - (b) if 20 years have passed since the end of the calendar year in which the document came into existence.
- (2a) A document is not an exempt document by virtue of this clause if—
 - (a) the document has been submitted to Cabinet by a Minister; and
 - (b) a Minister has certified that Cabinet have approved the document as a document to which access may be given under this Act.
- (3) In this clause, a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee of Cabinet.

2—Executive Council documents

- (1) A document is an exempt document—
 - (a) if it is a document that has been specifically prepared for submission to the Executive Council (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 concerning any deliberation or advice of the Executive Council.

¹ *Freedom of Information Act 1991*, section 12.

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- (2) A document is not an exempt document by virtue of this clause—
- (a) if it merely consists of—
 - (i) matter that appears in an instrument that has been made or approved by the Governor and that has been officially published (either in the Gazette or elsewhere); or
 - (ii) factual or statistical material that does not disclose information concerning any deliberation or advice of the Executive Council; or
 - (ab) merely because it was attached to a document described in subclause (1); or
 - (b) if 20 years have passed since the end of the calendar year in which the document came into existence.

- (3) A document is not an exempt document by virtue of this clause if—
- (a) the document has been submitted to Executive Council by a Minister; and
 - (b) a Minister has certified that Executive Council have approved the document as a document to which access may be given under this Act.

5—Documents affecting inter-governmental or local governmental relations

- (1) A document is an exempt document if it contains matter—
- (a) the disclosure of which—
 - (i) could reasonably be expected to cause damage to intergovernmental relations; or
 - (ii) would divulge information from a confidential intergovernmental communication; and
 - (b) the disclosure of which would, on balance, be contrary to the public interest.

6—Documents affecting personal affairs

- (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).
- (2) A document is an exempt document if it contains allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead) the truth of which has not been established by judicial process and the disclosure of which would be unreasonable.
- (3) A document is not an exempt document by virtue of subclause (1) or (2) merely because it contains information concerning the person by or on whose behalf an application for access to the document is made.
- (3a) A document is an exempt document if it contains matter—
- (a) consisting of information concerning a person who is presently under the age of 18 years or suffering from mental illness, impairment or infirmity or concerning such a person's family or circumstances, or information of any kind furnished by a person who was under that age or suffering from mental illness, impairment or infirmity when the information was furnished; and
 - (b) the disclosure of which would be unreasonable having regard to the need to protect that person's welfare.

7—Documents affecting business affairs

- (1) A document is an exempt document—
- (a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person; or

- (b) if it contains matter—
 - (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
 - (B) would, on balance, be contrary to the public interest; or
- (c) if it contains matter—
 - (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
 - (B) would, on balance, be contrary to the public interest.
- (2) A document is not an exempt document by virtue of this clause merely because it contains matter concerning the business, professional, commercial or financial affairs of the agency or other person by or on whose behalf an application for access to the document is made.
- (3) A document is not an exempt document by virtue of this clause if it is a contract entered into by the Crown or an agency after the commencement of this subclause.

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.
- (2) 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.

16—Documents concerning operations of agencies

- (1) A document is an exempt document if it contains matter the disclosure of which—
 - (a) could reasonably be expected—
 - (i) to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency; or
 - (ii) to prejudice on the attainment of the objects of any test, examination or audit conducted by an agency; or
 - (iii) to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or
 - (iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions; or
 - (v) to have a substantial adverse effect on the conduct of industrial relations by an agency; and
 - (b) would, on balance, be contrary to the public interest.
- (2) A document is an exempt document if—
 - (a) it relates to an agency engaged in commercial activities; and
 - (b) it contains matter the disclosure of which could prejudice the competitiveness of the agency in carrying on those commercial activities.

8. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
9. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Documents in issue

10. The agency originally identified 66 documents consisting of Board agendas and minutes within the scope of the application, and determined to refuse access to all documents in full.
11. This Office provided its tentative views about the agency's determination to refuse access to the documents in full, and as a result, the agency agreed to provide a supplementary determination pursuant to section 19(2a) of the FOI Act to partially release documents.²
12. Of the 66 documents within the scope of the application that were released in part, the following documents and paragraphs are relevant to my review:

Table A

Clause	Document & paragraph number
1(1)(e)	<ul style="list-style-type: none"> • Document 2 - 3.1 • Document 4 - 3 • Document 8 - 5.1 • Document 10 - 3 • Document 12 - 4 • Document 14 - 4 • Document 20 - 6.1 • Document 22 - 6.1 • Document 24 - 4.2 • Document 26 - 5.2 • Document 34 - 5 (sub-paragraph 2.1) • Document 40 - 7.1 • Document 44 - 6.2 • Document 46 - 6.1, 6.3, 6.5 • Document 48 - 6.2 • Document 50 - 6.4 • Document 54 - 4, 6.1, 6.2 • Document 56 - 5, 6.3, 6.4, 9.2 • Document 58 - 4 • Document 60 - 7.2 • Document 62 - 8.2, 4 • Document 64 - 5, 6.2 • Document 66 - 4, 5, 6.5, 7.2
2(1)(e)	<ul style="list-style-type: none"> • Document 2 - 6.2 • Document 6 - 2.4 • Document 10 - 3 • Document 54 - 4
6(1)	<ul style="list-style-type: none"> • Document 4 - 4.3 • Document 6 - 5.3 • Document 16 - 1, 4 • Document 18 - 1

² This Office was advised of the decision to release further documents by email dated 9 December 2016.

	<ul style="list-style-type: none"> • Document 20 - 1, 4, 7.1 • Document 22 - 1, 3.1 • Document 24 - 4.1, 6 • Document 26 - 5.4 • Document 28 - 3.1 • Document 30 - 8 • Document 32 - 6.2 • Document 34 - 3.1, 5 • Document 36 - 3.1, 6.8 • Document 40 - 3.1 • Document 44 - 3.1 • Document 46 - 3.1 • Document 52 - 3.1, 3.2 • Document 56 - 3.1, 5 • Document 58 - 3.1, 4 • Document 60 - 3.2
6(2)	<ul style="list-style-type: none"> • Document 12 - 4
7(1)(c)	<ul style="list-style-type: none"> • Document 2 - 3.2, 3.3 • Document 4 - 5.1.2, 5.1.3 • Document 6 - 4.1, 5.1, 5.3 • Document 8 - 3, 4, 5.2, 6.2 • Document 10 - 3, 4, 5.1, 5.2, 5.3.1, 5.3.2, 5.4, 5.6, 7.1 • Document 12 - 3, 5.3, 5.5, 6.1 • Document 14 - 4, 8.1, 8.4.1, 8.4 • Document 16 - 1, 6.1, 6.2, 6.5 • Document 18 - 1, 3, 4, 6.1, 8.3, 9.1, 10.2, 10.3, 10 • Document 20 - 5, 6.1, 7.3, 9.3 • Document 22 - 3.2, 5 • Document 24 - 4.1, 4.3 • Document 26 - 4, 5.2, 5.3 • Document 28 - 4, 5.1, 7.3, 7.4 • Document 30 - 5, 6.3, 7.3, 7.4 • Document 32 - 4, 5, 6.1, 6.2, 6.3, 7.2, 7.3, 7.4, 9 • Document 34 - 3.2, 3.3, 6.1, 6.2 • Document 36 - 6.1, 6.3, 6.4, 6.5, 6.8, 7.1, 7.2, 8.3 • Document 38 - 7.1, 7.2, 8.1, 9.1, 9.3 • Document 40 - 5, 7.2, 7.3, 6.4, 6.5, 6.7, 8.1 • Document 42 - 4, 6.1, 6.3, 6.4, 6.5, 7.1 • Document 44 - 4, 6.3, 6.4, 6.5, 7.2, 7.3, 8.3 • Document 46 - 5, 6.1, 6.3, 6.4, 6.5, 6.6, 8.2, 8.4 • Document 48 - 4, 5, 6.3, 6.4, 6.5, 7.2, 8.3, 8.4 • Document 50 - 4, 6.1, 6.2, 6.3, 6.6, 7.2, 8.3, 8.4 • Document 52 - 5, 6.1, 6.2, 6.3, 6.4, 6.5, 7.1, 8.3 • Document 54 - 3.3, 5, 8.3 • Document 56 - 6.1, 6.4 • Document 58 - 4, 6.1, 6.2, 7.1, 8, 9.3 • Document 60 - 5, 7.1, 7.4, 7.6, 8.1, 8.2, 9.1, 9.3 • Document 62 - 4, 6, 7.1, 7.2, 7.5, 8.1, 8.3, 8.4, 8.5 • Document 64 - 5, 6.1, 6.6, 8.1 • Document 66 - 6.1, 6.2, 7.1, 8.1, 9
10(1) - Legal Professional Privilege	<ul style="list-style-type: none"> • Document 2 - 5 • Document 12 - 5.4 • Document 40 - 9.3 • Document 46 - 5, 6.2 • Document 50 - 7.1 • Document 60 - 5, 8.2 • Document 64 - 4, 6.4
16(1)(a)(iv)	<ul style="list-style-type: none"> • Document 12 - 3, 5.3

	<ul style="list-style-type: none"> • Document 21 - 5 • Document 36 - 6.8 • Document 40 - 6.4, 6.5 • Document 42 - 6.4, 6.5 • Document 44 - 4 • Document 46 - 5, 6.3, 6.5 • Document 50 - 4, 7.2 • Document 54 - 5 • Document 60 - 7.1, 7.6 • Document 62 - 4 • Document 64 - 5, 6.1, 6.6 • Document 66 - 6.1, 6.2, 8.2
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13. It is necessary to note that the document numbers listed above refer to the handwritten numbers used in the 'August/September 2016 Working draft' document provided by the agency.
14. During the process of finalising my external review, there was confusion in regard to the numbering of documents as a second set of unmarked documents had been provided with an alternative numbering.
15. As it was assumed the working draft numbering had been the one referred to by both my Office and the agency, my legal officer sought to confirm this with the agency's FOI officer on 6 April 2017.³ The FOI officer confirmed this had been the case, and therefore I have continued to refer to the document numbering as per my provisional determination.

Issues in this review

16. The issues for me to consider in this review are:
 - a) whether the agency has justified its determination to partially refuse access to 66 documents; and
 - b) whether the agency satisfied the terms of the scope of the application in its determination; and
 - c) whether it conducted sufficient searches.

Consideration

The agency

17. The agency's FOI officer provided his tentative views in regard to the documents to the Principal Officer in a draft letter dated 30 September 2016. The draft letter proposed the release of 27 documents in full, and 39 documents in part in accordance with section 20(4) of the FOI Act.
18. The Principal Officer then made an independent determination on 30 September 2016 to refuse all access to documents in full, claiming exemption under clause 7(1)(c) and 16(1)(a)(iv) of the FOI Act.

³ Telephone call on 6 April 2017.

19. In support of his determination to refuse access under those clauses, the Principal Officer made the following comments:

The documents contain information concerning the business/commercial affairs of TAFE SA.

TAFE SA must consider that any release of information is deemed to be release (sic) to a wider public audience.

As a Statutory Corporation, TAFE SA is tasked with operation in an increasingly competitive and commercial environment which culminated in a situation where, by July 2019, it will be required to operate competitively with private providers in a commercial market segments.

I believe the release of business related material (such as TAFE SA Board documents) to the wider community, is highly likely to lead to its use in the political arena, with potential inappropriate and adverse impact on the TAFE SA brand and TAFE SA's requirement to provide stability to the SA vocational education and training market.

In addition, I believe that release of such documentation may restrict future full and frank discussion, if Board members believe that a record of their discussions may be released to the outside world.

In my view, disclosure of these documents could impair the integrity and/or viability of the decision making processes of TAFE SA.

In coming to this conclusion, I have also considered a recent TAFE SA Board resolution advising me that it is the Board's unanimous view that the provision of Board minutes and agenda would compromise the workings of the Board and TAFE SA, because matters contained therein would compromise business/commercial operations in the highly competitive VET training market.

I acknowledge that public interest factors favouring the disclosure of these documents include the meeting of objective of the FOI Act (openness and transparency); and enhancing staff and public participation in government process.

However, I believe that disclosure of these documents is not in the public interest given the exemption clause criteria identified above have been met; and the consequential effect on the conduct of business by the TAFE SA Board, on behalf of TAFE SA.

20. Upon receipt of the application for external review, my Office highlighted to the agency that under section 20(4) of the FOI Act, it must not refuse to give access to a document where it is practicable to give partial access to a document with the necessary redaction of exempt material.
21. With a preliminary view that many of the documents would not likely be considered to be exempt, my Office also requested that the agency consider making a determination pursuant to section 19(2a) of the FOI Act to release further documents to the applicant in an attempt to settle the matter. As a result, the agency agreed to partially release most of the documents by way of a supplementary determination dated 3 February 2017.
22. In relation to the material that was not disclosed to the applicant, the agency stated the following:

Information has been redacted from these documents that is confidential to Cabinet, has commercial value to TAFE SA or is of legal or personal nature.

Sufficiency of search

23. In relation to the applicant's request for, 'correspondence or reports to Treasury pursuant to TAFE SA's Ministerial Charter tabled 26 February 2015,' the Principal Officer advised the applicant that:

Clause 9.3 of the TAFE SA Ministerial Charter, operational from 29 January 2015 (as tabled on 26 February 2015) requires the TAFE SA Board to provide "to the Treasurer, any reports and information as requested by the Department of Treasury and Finance". (sic)

My document discovery process has confirmed the existence of numerous communications between TAFE SA and Department of Treasury and Finance (DTF) staff, in relation to operational budgetary matters.

However, pursuant to section 23(1)(b) of the FOI Act, I advise that following this search process, I was not able to identify any documents where DTF has specifically requested the TAFE SA Board to provide reports or information to the Treasurer, in accordance with the TAFE SA Ministerial Charter.

24. As the absence of documents had the potential to raise sufficiency of search issues, which the applicant confirmed she wished this Office to consider, my legal officer requested the agency provide an overview of the searches conducted in relation to the application. The FOI officer provided the following submissions in response:

The CFO signed off on a TAFE SA Document Discovery Request Form on 18 August 2016, confirming that he had searched through electronic records (including emails, HPRM ([TAFE SA's Records Management System]), personal computers (e.g. desktop, laptop and/or Shared Drives, personal mobility devices (e.g. i-products and/or tablets), audio and/or visual recordings); hard copies (retained onsite); that a search of hard copies (retained offsite or in archives) was not applicable; and that all documents relevant to the application, including documents from relevant workgroups/individual staff members under his control, had been provided. This Form was provided as Document Number 105 in the documents submitted to you by the Chief Executive, TAFE SA on 2 November 2016.

The general process for providing me with large quantities of documents for FOI matters is for the individual documents to be saved into a Shared Drive from which I access and consider for relevance to the FOI request. Once I've checked through the documents, they are saved onto an external hard drive in my possession.

112 emails (a significant number with emails and documents attached) were saved into the S:\ folder in relation to the Document Discovery Request. Document Number 105 was signed and returned following this exercise.

The CFO's Personal Assistant (who has recently left TAFE SA's employ) advised that the search terms used by the Chief Financial Officer, herself and senior Financial Reporting Unit managers and staff, in conducting the above searches included 'Treasury', 'Treasurer' and 'DTF' and 'TAFE SA Board'.

In addition, in my review of the TAFE SA Board minutes provided to me as part of the first component of the FOI request, I noted a document (letter to the Treasurer) referenced in the TAFE SA Board minutes of 26 June 2015. I subsequently requested access to this document (and to any other letters from the Board to the Treasurer since February 2015), from the Acting TAFE SA Board Secretariat, which I subsequently viewed and determined that it was outside of the scope of the FOI application. This is Document Number 109 in the documents provided to you on 2 November.

I did not identify any other relevant references (i.e. to documents that may have been in scope) in the TAFE SA Board agendas and minutes, nor were any further documents identified and provided by the Acting TAFE SA Board Secretariat.

All of these details were passed onto the Chief Executive to enable him to make his determination of the application.

Overall, it is conservatively estimated that approximately 4 hours was taken by these staff in searching for and providing documents as a result of my request. In addition, I estimate my FOI officer took about 3 hours to print and relocate the documents received into the external hard drive and I spent several more hours checking through each document and any related attachments.

The applicant

25. Upon application for external review, the applicant stated that:

The determination has exempt (sic) minutes and agenda documents from the request as they are "affecting business affairs" however, please be aware we have received minutes and agendas from other Statutory Organisations, including SA Water and Renewal SA, without any issue.

26. Upon receipt of the agency's supplementary determination dated 3 February 2017, the applicant again reiterated that other statutory corporations such as Renewal SA and SA Water had 'no difficulty in providing comprehensive records of their board meetings.' The applicant also made the following comment:

To illustrate the extend (sic) of redaction, I note on two occasions TAFE SA redacted the name of the person who was an apology to a meeting - as if that was no (sic) obvious when viewing the minutes of the following meeting.

27. Whilst the applicant's comparison of the handling of FOI applications by other agencies is noted, I advise that the assessment of every FOI application is nuanced, and that each determination will always turn on the independent circumstances and matter that is contained in any relevant documents.
28. Therefore, whilst I note the applicant may have had an expectation that the agency would release more information, this does not influence my determination.

Apologies

29. The names of apologies have been redacted in all the documents in which they appear, and I note the FOI officer's reasoning for this was that the names of apologies were considered exempt in a previous FOI determination by me.
30. The facts in that determination were considerably different to those considered in this external review. In that matter, the names of apologies were not considered in scope of the application as only specific content within the relevant documents was requested.
31. However, in the current circumstances, the documents have been requested by the applicant in their entirety, and therefore, the names of apologies are in scope.
32. As such, I do not consider the names of apologies are exempt and I remind the agency that my decisions will always be determined on the facts of each individual application.

Clause 1(1)(e) - Cabinet documents

33. Under clause 1(1)(e), a document may be considered exempt if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet.

34. Whether the release of a document would disclose information concerning any deliberation or decision of Cabinet is a question of fact.⁴
35. The FOI Act also sets out a number of circumstances where such documents would not be considered exempt:
- (2) A document is not an exempt document by virtue of this clause—
 - (a) if it merely consists of factual or statistical material (including public opinion polling) that does not—
 - (i) disclose information concerning any deliberation or decision of Cabinet; or
 - (ii) relate directly to a contract or other commercial transaction that is still being negotiated; or
 - (ab) merely because it was attached to a document described in subclause (1); or
 - (b) if 20 years have passed since the end of the calendar year in which the document came into existence.
 - (2a) A document is not an exempt document by virtue of this clause if—
 - (a) the document has been submitted to Cabinet by a Minister; and
 - (b) a Minister has certified that Cabinet have approved the document as a document to which access may be given under this Act.
 - (3) In this clause, a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee of Cabinet.
36. Clause 1(1)(e) has been considered in a number of cases, and it is clear from these cases that it is not intended to apply to all documents considered by Cabinet.
37. In *National Parks Association of New South Wales Inc v Department of Lands and anor*,⁵ Deputy President Hennessey considered the mirror provision in the NSW *Freedom of Information Act 1989*:

[In] my view the mere fact that a document, or part of a document, went before Cabinet or was considered by Cabinet when deliberating or reaching a decision, does not make the information in that document, information “concerning” any deliberation or decision of Cabinet.

38. Deputy President Hennessey’s comments were repeated in the more recent NSW Administrative Decisions Tribunal decision of *McGuirk v Director General, The Cabinet Office*.⁶ In affirming the original decision to grant an exemption for the release of certain documents pursuant to the mirror clause 1(1)(e), the Judicial Member Montgomery commented that:

Clause 1(1)(e) is not merely concerned with ‘disclosing Cabinet deliberations’. It also concerns ‘information concerning any deliberation or decision of Cabinet’... To the extent that any document is so central to a Cabinet meeting that it shapes the course of, or outcome of, any deliberations of Cabinet, the disclosure of its contents could reveal information concerning the process of deliberation or decision-making.

His Honour also added that:

...it is possible that a document that pre-dates a Cabinet meeting could still contain information that is “relevant to” or “about” the deliberative or decision-making process. I agree with the Cabinet Office’s submission that documents created before a Cabinet

⁴ *Rann v SA Water & Baker* (No2)(Unreported, District Court of South Australia, Chief Judge, 9 August 1996).

⁵ [2005] NSWADT 124, [37].

⁶ [2007] NSWADT 9 at 37.

meeting which are deliberated upon during that Cabinet meeting may profoundly influence the course of any debate or discussion that takes place during that meeting and hence, any deliberations made during that meeting. For example, a Cabinet Minute that contains a series of recommendations upon which Cabinet deliberates logically contains subject matter that is “relevant” to or “about” these deliberations. At the very least, such a document “concerns” these deliberations because it helped to shape the course of these deliberations. To the extent that any document is so central to a Cabinet meeting that it shapes the course of, or outcome of, any deliberations of Cabinet.⁷

39. Having regard to the reasoning of Vincent JA in the Victorian Supreme Court of Appeal decision in *Secretary, Department of Infrastructure v Asher*, the agency must be able to provide evidence to support its claim that ‘access to the [document] would involve the disclosure of Cabinet deliberations or some decision made by them.’⁸
40. Prior to my provisional determination, the agency had not pointed to any specific paragraphs it considered were exempt under clause 1(1)(e), nor did it provide any supporting submissions as to why it considered the exemption applied. Therefore, I could only rely upon comments on a marked-up copy associated with the FOI officer’s draft determination. I also turned my mind to whether the exemption would apply to any other matter within the documents that the agency may not have considered.
41. However, the agency has since provided detailed submissions which have been considered in this report.
42. In regard to document 2, paragraph 3.1, I note that the entire section of that table was redacted, as was common throughout many of the documents. However, most of the content in that table relates to conditions of an agreement that have come to fruition, and have since been superseded by a new agreement. Further, it does not appear that the contents were at any time put forward to Cabinet for approval or consideration.
43. However, there are three sentences which clearly refer to Cabinet’s decision on a matter. I consider that these references clearly do contain ‘matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet.’
44. As the decision has been disclosed to the agency, I considered whether such disclosure would somehow lessen the intrinsic quality of confidence associated with the Cabinet exemptions. However, I do not consider that releasing the documents to the agency alone would impact on whether the document is or is not exempt.
45. Therefore, I am satisfied these three sentences are exempt under clause 1(1)(e).
46. In regard to document 4, paragraph 3, I do not consider that the redacted material contains ‘matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet,’ as the matter refers to a proposed submission to Cabinet by an external party, rather than an actual submission.
47. Whilst I note Judicial Member Montgomery’s comment above that ‘...it is possible that a document that pre-dates a Cabinet meeting could still contain information that is “relevant to” or “about” the deliberative or decision-making process,’ I do not consider this consideration is relevant to the present facts, as the reference to the document in the minutes is a reference to a document that did not yet exist.
48. As such, I am not satisfied that the mere reference to a submission being proposed to be made to Cabinet would satisfy the standard in *McGuirk* that the matter ‘... is so central to a Cabinet meeting that it shapes the course of, or outcome of, any

⁷ *McGuirk v Director General, The Cabinet Office* [2007] NSWADT 9 at 35 -37.

⁸ [2007] VSCA 272 (4 December 2007) [51].

deliberations of Cabinet, the disclosure of its contents could reveal information concerning the process of deliberation or decision-making.’ One cannot be influenced by a submission that does not exist.

49. Therefore, I am not satisfied that document 4, paragraph 3, is exempt under clause 1(1)(e).
50. In regard to document 8, paragraph 5.1, and document 10, paragraph 3, the agency submitted that the redacted material was noted by Cabinet, and that this was reflected in an associated, undated draft submission to Cabinet that was provided to my Office.⁹ Upon consideration of the matter in document 8, and the corresponding draft Cabinet document, I am not satisfied the matter would satisfy the standard in *McGuirk*. The fact that Cabinet may have noted a submission does not demonstrate that the submission was deliberated on in any substantial way, and I refer to the comments made by Deputy President Todd in *Re Porter*¹⁰, which confirm my view:

Deliberation’ of Cabinet seems to me to connote what was actively discussed in Cabinet. It is not the agenda for a meeting of Cabinet, nor is it what Cabinet formally decided. What the words “deliberation or decision” of Cabinet cover is debate in Cabinet (deliberation), and formal decisions made in Cabinet. It is not to be concluded that there was deliberation in respect of matter contained in a document merely because a document was before Cabinet at a meeting thereof.

51. In regard to document 12, paragraph 4, I am not satisfied the redacted material reveals the deliberations or decision-making of Cabinet. The matter refers to a proposed submission to Cabinet and a briefing to a Minister on the same subject, in addition to another submission that was noted by Cabinet. However, from viewing the redacted matter, little can be drawn as to what was put to Cabinet, whether it was deliberated on, and whether a decision by Cabinet was made as a result of anything that was submitted. Therefore, I am not satisfied that disclosure of this matter would reveal the deliberations or decisions of Cabinet.
52. In regard to document 14, paragraph 4, I am not satisfied the redacted material reveals the deliberations or decision-making of Cabinet. One section of the redacted material refers to pricing information that was to be put to Cabinet for approval, as would regularly be done by agencies, however, the details of the pricing information is not mentioned. Therefore, for similar reasons as above, I am not satisfied that disclosure of this matter would reveal the deliberations or decisions of Cabinet.
53. The second part of the redacted material in document 14, paragraph 4 refers to a decision of Cabinet that was reported to a community advisory committee. Whilst I am satisfied this matter reveals a decision of Cabinet, I note that the decision was not only reported to members of the community, it was also reported in the media.¹¹ As such, I do not consider that withholding this information is consistent with the purpose of the exemption:

Exemptions for Cabinet documents are a universal feature of freedom of information laws emanating from countries with Westminster-style systems of government. They generally reflect two distinct policy rationales.

The first is directed at the protection of the convention of collective responsibility and requires that information which reveals the views expressed by ministers during the course of Cabinet deliberations should be kept secret...

⁹ These documents were hand delivered to this Office on 12 January 2017.

¹⁰ *Re Porter and Department of Community Services and Health* (1988) 14 ALD 403 at 407.

¹¹ The Advertiser, ‘Parents ramp up their fight to save the O’Halloran Hill Childcare Centre,’ <<http://www.adelaidenow.com.au/news/south-australia/parents-ramp-up-their-fight-to-save-the-ohalloran-hill-childcare-centre/news-story/df838b8a1884b17479eb1bc628b301b4>>, last viewed 20 February 2017.

...Protection of the so-called 'Cabinet oyster' is necessary because of the expectation that the Cabinet will present a collective front and that the making of collective decisions should be preceded by full and frank expressions of opinion by individual ministers.

...The second rationale is directed at the protection of information which reveals what was deliberated on and decided by the Cabinet. This may require the protection of material that was generated for the purpose of Cabinet discussion and documents which outline or refer to what was decided. Such material is protected on the basis that its disclosure may result in some harm (for example, by allowing people to take steps to avoid the consequences of new measures) if it precedes the formal announcement of the Cabinet's decision.¹²

54. Therefore, I am not satisfied the matter in document 14, paragraph four is exempt under clause 1(1)(e).
55. In regard to document 20, paragraph 6.1, I am not satisfied the redacted material reveals the deliberations or decision-making of Cabinet. The matter refers to a proposed submission to the Sustainable Budget Cabinet Committee (SBCC), as agencies would regularly be required to do, however, the details of the submission are not set out.
56. In response to my provisional report, the agency directed me to the corresponding, unsigned, draft submission to Cabinet, which contains further reference to what was put to Cabinet. Whilst it is useful to view the supporting Cabinet documents, it is necessary to note that those documents are not the subject of the current review. Therefore, although they elucidate what was put to Cabinet in further detail, I remain of the view that document 20 in isolation does not reveal, in detail, what was put to, and subsequently considered by Cabinet. As such, I do not consider the matter meets the profound influence test in *McGuirk*.¹³
57. Therefore, I am not satisfied the matter in document 20, paragraph 6.1 is exempt under clause 1(1)(e).
58. I also note that the agency referred to a supporting document in relation to document 62, paragraph 4, which it claimed supported its view that the matter referred to in this document is exempt. However, as similarly noted above, such supporting documents are not subject to the current review.
59. Therefore, I am of the view that the matter in document 62, paragraph 4, in isolation does not reveal the deliberations or decisions of Cabinet. Further, there is no reference in paragraph 4 to a submission being made to Cabinet, and even if a submission was made in relation to the contents of paragraph 4, I do not consider the contents is detailed enough to warrant exemption under clause 1(1)(e).
60. I also consider that the matter in the following documents, is not exempt under clause 1(1)(e) for the same reasons provided in relation to document 20, paragraph 6.1:
 - document 22, paragraph 6.1
 - document 26, paragraph 5.2
61. In regard to document 24, paragraph 4.2, I am satisfied there is a sentence that makes reference to a Cabinet decision. Therefore, I am of opinion that sentence is exempt and should not be released to the applicant.

¹² Moira Paterson, *Freedom of Information and Privacy in Australia - Government and Information Access in the Modern State* (LexisNexis, Butterworths, 2005) [8.35].

¹³ *McGuirk v Director General, The Cabinet Office* [2007] NSWADT 9 at 35 -37.

62. In regard to document 34, paragraph five, sub-paragraph 2.1, I am not satisfied the redacted material reveals the deliberations or decision-making of Cabinet. The matter refers to a submission to Cabinet, and whilst it does reveal a vague reference to what was put to Cabinet, I am not satisfied that disclosure would meet the profound influence test in *McGuirk*.¹⁴ Therefore, I do not consider the matter is exempt under clause 1(1)(e).

63. In regard to the following documents:

- document 40, paragraph 7.1
- document 44, paragraph 6.2
- document 46, paragraph 6.1, 6.3, 6.5
- document 54, paragraph 4, 6.1, 6.2

I am not satisfied the redacted material reveals the deliberations or decision-making of Cabinet.

64. Whilst the matter in document 40, paragraph 7.1, document 44, paragraph 6.2 and document 54, paragraph 6.2 refer to a draft submission prepared by both TAFE SA and another agency that was to be tabled to a Cabinet committee, the details of that draft submission is only referred to in vague terms. Therefore, I am not satisfied that disclosure would meet the profound influence test in *McGuirk*,¹⁵ and am not satisfied that the matter in these paragraphs is exempt under clause 1(1)(e).

65. In regard to document 48, paragraph 6.2, I am not satisfied the redacted material reveals the deliberations or decision-making of Cabinet. The matter refers to a submission that was made to Cabinet, however, there is no reference to the details of that submission. I am not satisfied that disclosure would meet the profound influence test in *McGuirk*,¹⁶ and do not consider the matter is exempt under clause 1(1)(e).

66. In regard to document 50, paragraph 6.4, I am not satisfied the redacted material reveals the deliberations or decision-making of Cabinet. The matter refers to a previous state budget, and how that budget relates to submissions that had been made to Cabinet on budgetary issues.

67. I am not satisfied that the disclosure of this information would reveal the decisions or deliberations of Cabinet in any significant way, as the details of the submissions that were made to Cabinet are not referred to in any significant detail. Further, a number of factors are likely to influence the outcomes of a state budget and it is doubtful that any submission of the agency alone is likely to have had a profound influence on that outcome.

68. Therefore, I am not satisfied that document 50, paragraph 6.4 is exempt under clause 1(1)(e).

69. In regard to the following documents:

- document 56, paragraph 5, 6.3, 6.4 and 9.2
- document 62, paragraph 8.2

I am not satisfied the redacted material reveals the deliberations or decision-making of Cabinet. The redacted material does not reveal the details of any Cabinet decision or deliberations, and any references to Cabinet submissions are so vague that I am not

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

satisfied that disclosure would meet the profound influence test in *McGuirk*.¹⁷ Therefore, I do not consider the matter is exempt under clause 1(1)(e).

70. I note that the agency submitted, in response to my provisional report, that I had erroneously concluded that a submission to the Budget Review Cabinet Committee, as is referred to in document 56, paragraph 9.2, was not a submission to Cabinet.
71. Whilst I accept that a submission to committee or a subcommittee of a committee of Cabinet is a submission to Cabinet for the purpose of the FOI Act,¹⁸ I remain of the view that the matter in document 56, paragraph 9.2 is too vague to be considered exempt under clause 1(1)(e).
72. In regard to document 58, paragraph 4, the matter refers to a proposed submission to Cabinet in 2016 and I am not satisfied the redacted material reveals the deliberations or decision-making of Cabinet.
73. The matter refers to a proposed Cabinet submission, however, the details of that submission is not referred to in detail. Further, the redacted material in document 64, paragraph 5, reveals that the proposed submission was abandoned. Therefore, as the matter was not considered by Cabinet, I do not consider the matter is exempt under clause 1(1)(e).
74. In regard to document 60, paragraph 7.2, I am not satisfied the redacted material refers to matter that has or will be deliberated or decided by Cabinet. Therefore, I do not consider the matter is exempt under clause 1(1)(e).
75. In regard to document 64, paragraphs 5 and 6.2, I am not satisfied the redacted material reveals the deliberations or decision-making of Cabinet. Paragraph 6.2 refers to a submission made to Cabinet, and whilst one particular of the submission is referred to, I am not satisfied that disclosure would meet the profound influence test in *McGuirk*.¹⁹ Therefore, I do not consider the matter is exempt under clause 1(1)(e).
76. In regard to document 66, paragraphs 4 and 5, I note that this matter refers to the abandoned Cabinet submission in document 58, paragraph 4 and document 64, paragraph 5. Whilst the agency has claimed this matter is exempt under clause 1(1)(e), the matter does not make any reference to the proposal being submitted to Cabinet. Rather, it refers only to the proposal being made directly to the relevant Minister.
77. Therefore, I am not satisfied the redacted material reveals the deliberations or decision-making of Cabinet and I do not consider the matter is exempt under clause 1(1)(e).
78. In regard to document 66, paragraph 6.5, I am not satisfied the redacted material reveals the deliberations or decision-making of Cabinet. Whilst the matter refers to a submission that was made to Cabinet, it is not apparent what the details of that submission is. Further, I note that the information within paragraph 6.5 is also publicly available.²⁰
79. Therefore, I am not satisfied that disclosure would meet the profound influence test in *McGuirk*,²¹ and I do not consider the matter is exempt under clause 1(1)(e).
80. In regard to document 66, paragraph 7.2, I am not satisfied the redacted material reveals the deliberations or decision-making of Cabinet. Whilst the matter refers to a

¹⁷ *McGuirk v Director General, The Cabinet Office* [2007] NSWADT 9 at 35 -37.

¹⁸ *Freedom of Information Act 1991*, clause 1(3).

¹⁹ *McGuirk v Director General, The Cabinet Office* [2007] NSWADT 9 at 35 -37.

²⁰ <https://www.tenders.sa.gov.au/tenders/contract/view.do?id=11950>.

²¹ *McGuirk v Director General, The Cabinet Office* [2007] NSWADT 9 at 35 -37.

proposed Cabinet briefing with some specificity, I am not satisfied that disclosure would meet the profound influence test in *McGuirk*,²² and I do not consider the matter is exempt under clause 1(1)(e).

81. In light of my reasoning above, I consider that the relevant matter in document 2, paragraph 3.1, and document 24, paragraph 6.1, is exempt under clause 1(1)(e). However, I do not consider that clause 1(1)(e) applies to any other documents.

Clause 2(1)(e) - Executive Council documents

82. I have considered whether clause 2(1)(e) applies to the following documents:
- Document 2, paragraph 6.2
 - Document 6, paragraph 2.4
 - Document 10, paragraph 3
 - Document 54, paragraph 4
83. In order for a document to be considered exempt under clause 2(1)(e), it must contain matter concerning any deliberation or advice of the Executive Council.
84. In regard to Document 2, paragraph 6.2, I am not satisfied the matter concerns any deliberation or advice of the Executive Council. The matter refers only to a decision by a Minister, who alone does not constitute the 'Executive Council'.
85. The Executive Council consists of the same membership as Cabinet, in addition to the Governor who presides over the Council. A decision by a Minister is not a decision of the Executive Council, and the agency has not provided any submission to the contrary. Consequently, I am not persuaded the decision reflects the deliberation or advice of the Executive Council.
86. Therefore, I do not consider the matter is exempt under clause 2(1)(e).
87. For similar reasons, I also consider that the following documents are not exempt under clause 2(1)(e)
- Document 6, paragraph 2.4
 - Document 10, paragraph 3
 - Document 54, paragraph 4
88. In my provisional determination, I noted that the agency had claimed exemption over a reference in document 54, paragraph 4, to a submission being made to the Executive Committee, and I questioned whether the agency has confused a separate body (Executive Committee) with the Executive Council.
89. The agency confirmed there had been an error in the recording of the Minutes, and that the relevant sentence should have referred to Executive Council. Regardless, I do not consider that this reference to the submission is sufficiently detailed so that one can determine what might have been put to the Executive Council.
90. Therefore, my view remains that none of the documents contain matter that is exempt under clause 2(1)(e).

²² *McGuirk v Director General, The Cabinet Office* [2007] NSWADT 9 at 35 -37.

Clause 6(1) - Documents affecting personal affairs

91. For information to be exempt pursuant to clause 6(1) the information must concern the personal affairs of someone other than merely the applicant, and it must be unreasonable to release it.
92. The term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act. The definition specifically refers to 'personal qualities or attributes'. The term has also been held to involve 'matters of private concern to an individual'²³ and the 'composite collection of activities personal to the individual concerned.'²⁴ This is relevant to clause 6(1).
93. The information redacted by the agency in the following documents mentions the names of several persons other than the applicant:
- Document 4, paragraph 4.3
 - Document 6, paragraph 5.3
 - Document 12, paragraph 4
 - Document 14, paragraph 4
 - Document 16, paragraph 1, 2, 4
 - Document 18, paragraph 1
 - Document 20, paragraph 1, 4, 7.1
 - Document 22, paragraph 1, 3.1
 - Document 24, paragraph 4.1, 6
 - Document 26, paragraph 5.4
 - Document 28, paragraph 3.1
 - Document 30, paragraph 8
 - Document 32, paragraph 6.2
 - Document 34, paragraph 3.1, 5
 - Document 36, paragraph 3.1, 6.8
 - Document 40, paragraph 3.1
 - Document 44, paragraph 3.1
 - Document 46, paragraph 3.1
 - Document 52, paragraph 3.1, 3.2
 - Document 56, paragraph 3.1, 5
 - Document 58, paragraph 3.1, 4
 - Document 60, paragraph 3.2
94. I am not satisfied that most of the information disclosed by these documents about the persons named is of a personal nature.
95. For example, on many occasions the minutes reflect that the Board had congratulated an individual for their appointment to a new position of employment. As that information is likely to be known to a substantial segment of the public, I do not consider it constitutes 'matters of private concern to an individual.'²⁵
96. In some instances, the agency also appears to have claimed an exemption under 6(1) on the grounds that an individual had merely appeared at the Board meeting, or excused themselves during the meeting. As this information does not have the necessary quality of being personal to that individual, I am not satisfied it is personal information within the meaning of clause 6(1).

²³ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625, citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1986) 13 FCR 85 at 88-89.

²⁴ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

²⁵ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625, citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1986) 13 FCR 85 at 88-89.

97. It is not enough to claim exemption over information under clause 6(1) merely because it refers to the name of an individual. The agency must also satisfy all elements of the exemption, including unreasonableness.
98. Whilst I consider that most of the information is not exempt under clause 6(1), I do consider that the following information contains personal information, which would be unreasonable to disclose:
- document 6, paragraph 5.3
 - document 12, paragraph 4
 - document 14, paragraph 4
 - document 16, paragraph 2
 - document 56, paragraph 5
99. In response to my provisional report, the agency also made specific submissions in regard to the following documents, highlighting that it considered they were exempt on the grounds that they include individual declarations of personal interests:
- document 24, paragraph 6
 - document 30, paragraph 8
 - document 40, paragraph 3.1
 - document 44, paragraph 3.1
 - document 46, paragraph 3.1
100. In regard to document 44, paragraph 3.1, I do not consider that the reference highlighted by the agency contains the personal individual as it relates to the interests of an unidentified family member of a large organisation. I consider it is highly unlikely that person could be identified by that reference, therefore, I am not of the view that their personal or private affairs would be disclosed by the release of that information.
101. However, out of an abundance of caution, I am of the view that all other documents referred to in paragraph 93 above may contain personal information. Therefore, I must now consider whether it would be unreasonable to release this information.
102. In *Treglown v SA Police* the South Australian District Court said that when interpreting 'unreasonable' in clause 6, a decision maker needs:
- ... to consider not merely the content of the information which is sought to be disclosed, although in some circumstances that may be sufficient, but, as well, its relationship with other material known to the applicant, its level of sensitivity, the attitude of the person affected by the disclosure, the circumstances in which the information was originally obtained, whether it was already known to the applicant, the nature of the applicant's interest in it and any disclosed intentions with respect to its use.²⁶
103. In addition, unreasonableness has 'as its core, public interest considerations',²⁷ such as the protection of personal privacy (the FOI Act generally does not restrict the use of information once it is released), the objects of the legislation being satisfied and ensuring transparency and accountability within representative government.
104. I consider that the following documents contain matter that would be unreasonable to disclose:
- document 6, paragraph 5.3
 - document 12, paragraph 4

²⁶ *Treglown v SA Police* [2011] SADC 139 (Unreported, South Australian District Court, Judge Herriman, 20 December 2011), [133], considering *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALD N257, 259 and *Victoria Police v Marke* (2008) 23 VR 223, [18] and [106]-[103].

²⁷ *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429 per Lockhart J at 438.

- document 16, paragraph 2
 - document 56, paragraph 5
105. In response to my provisional determination, the agency provided context to these documents which made it apparent that the information was quite sensitive. Further, whilst the references to the sensitive information within these documents are not overly detailed, I consider that a number of inferences could be drawn from them.
106. I also do not consider there are public interest considerations in favour of releasing the information in those documents, therefore I consider it is exempt under clause 6(1).
107. In regard to the declaration of interests, I do not consider it would be unreasonable to disclose this information.
108. Although the agency submitted that:
- ...there is no public interest test attached to the Personal Affairs exemption clause
- I refer to the reference to *Colakovski* above, which notes that unreasonableness has 'as its core, public interest considerations.'²⁸
109. As such, I consider there are public interest factors in favour of disclosing this information. I consider that in the interest of transparency and accountability, it is appropriate that the potential conflicts of interests of public officers be disclosed.
110. Further, I do not consider there is anything inherently sensitive about the information and it is likely that those interests would be, to some extent, be publicly available. .
111. In accordance with section 39(1) of the FOI Act, I have taken reasonably practicable steps to obtain the views of the individuals referred to in those documents in order to ascertain whether or not they consider the documents are exempt.
112. It was not practicable to contact all those individuals, as many have since left the public sector or retired. However, the views of those who were able to be contacted were considered in my reasoning.²⁹

Clause 7(1)(c) - Documents affecting business affairs

113. For a document to be exempt pursuant to clause 7(1)(c), three criteria must be satisfied:
- the document must contain matter (other than trade secrets or information of commercial value) concerning the business, professional, commercial or financial affairs of the agency or any other person; and
 - the disclosure of that matter could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
 - disclosure of that matter would, on balance, be contrary to public interest.

²⁸ *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429 per Lockhart J at 438.

²⁹ These individuals were contacted by telephone or responded by email on 20 March 2017. None of these individuals objected to the release of the information, however, some context to the information was provided.

Does the document consist of information concerning the business, professional, commercial or financial affairs of any agency or any other person? (clause 7(1)(c)(i))

114. Business affairs are those relating to the conduct of a business; 'business' being an operation carried on in an organised way with the purpose of obtaining profits or gains, whether or not they are actually obtained.³⁰
115. I am satisfied the following documents could be considered to contain information relating to the business affairs of the agency:
- Document 2 - 3.2, 3.3
 - Document 4 - 5.1.2, 5.1.3
 - Document 6 - 4.1, 5.1, 5.3
 - Document 8 - 3, 4, 5.2, 6.2
 - Document 10 - 3, 4, 5.1, 5.2, 5.3.1, 5.3.2, 5.4, 5.6, 7.1
 - Document 12 - 3, 5.3, 5.5, 6.1
 - Document 14 - 4, 8.1, 8.4.1, 8.4
 - Document 16 - 1, 6.1, 6.2, 6.5
 - Document 18 - 1, 3, 4, 6.1, 8.3, 9.1, 10.2, 10.3, 10
 - Document 20 - 5, 6.1, 7.3, 9.3
 - Document 22 - 3.2, 5
 - Document 24 - 4.1, 4.3
 - Document 26 - 4, 5.2, 5.3
 - Document 28 - 4, 5.1, 7.3, 7.4
 - Document 30 - 5, 6.3, 7.3, 7.4
 - Document 32 - 4, 5, 6.1, 6.2, 6.3, 7.2, 7.3, 7.4, 9
 - Document 34 - 3.2, 3.3, 6.1, 6.2
 - Document 36 - 6.1, 6.3, 6.4, 6.5, 6.8, 7.1, 7.2, 8.3
 - Document 38 - 7.1, 7.2, 8.1, 9.1, 9.3
 - Document 40 - 5, 7.2, 7.3, 6.4, 6.5, 6.7, 8.1
 - Document 42 - 4, 6.1, 6.3, 6.4, 6.5, 7.1
 - Document 44 - 4, 6.3, 6.4, 6.5, 7.2, 7.3, 8.3
 - Document 46 - 5, 6.1, 6.3, 6.4, 6.5, 6.6, 8.2, 8.4
 - Document 48 - 4, 5, 6.3, 6.4, 6.5, 7.2, 8.3, 8.4
 - Document 50 - 4, 6.1, 6.2, 6.3, 6.6, 7.2, 8.3, 8.4
 - Document 52 - 5, 6.1, 6.2, 6.3, 6.4, 6.5, 7.1, 8.3
 - Document 54 - 3.3, 5, 8.3
 - Document 56 - 6.1, 6.4
 - Document 58 - 4, 6.1, 6.2, 7.1, 8, 9.3
 - Document 60 - 5, 7.1, 7.4, 7.6, 8.1, 8.2, 9.1, 9.3
 - Document 62 - 4, 6, 7.1, 7.2, 7.5, 8.1, 8.3, 8.4, 8.5
 - Document 64 - 5, 6.1, 6.6, 8.1
 - Document 66 - 6.1, 6.2, 7.1, 8.1, 9

Could it reasonably be expected that disclosure of the documents would have an adverse effect on those affairs (clause 7(1)(c)(ii)(A))

116. For there to be a reasonable expectation that an adverse effect could result from disclosure, there must be real or substantial grounds for the expectation, rather than grounds which are speculative, imaginable or theoretically possible.³¹ It is sufficient if the adverse effect is slight and if it is produced by the document in connection with other information.³²

³⁰ *Re Stewart and Department of Transport* (1993) 1 QAR 227; *Re Cannon and Australian Quality Egg Farms Ltd* (1984) 1 QAR 491.

³¹ *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180; *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163.

³² *Ipex Tech v Department of Information Technology Services* (1997) SA District Court 3618 (16 June 1997) Lunn J.

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117. I have considered the agency's submissions in the original determination dated 30 September 2016 in regard to its view that the release of the information would have an adverse effect on its business affairs.
 118. The agency made reference to the fact that it operated in a commercial environment, and that releasing information could potentially lead to misuse in the political arena, causing an adverse effect.
 119. The agency also submitted that the release of information would impact on the Board's ability to have full and frank discussions in the future, which would impact on the agency's business affairs.
 120. I am not satisfied that the agency has established there is a risk that the release of the information would have an adverse effect that is not more than speculative or theoretically possible.
 121. Whilst I accept that some of the information could result in negative attention towards the agency, that in itself is not a ground for exemption under the FOI Act.
 122. Further, I do not accept the agency's submissions that if the information were to be released, the Board would be prevented from having full and frank discussions in the future out of concern that those discussions could be made public.
 123. The mere expectation that material should not be disclosed through the FOI process out of concern it may prevent future communications could be applied to all FOI requests, which would defeat the entire purpose of the FOI Act. Further, as a government agency, the agency, which includes the Board, should expect a high level of scrutiny from the public.
 124. I am also of the view that the agency would unlikely to be able to make out the adverse effect limb of clause 7(1)(c) because much of the information is outdated (going back as far as 2012) or is already in the public domain.
 125. These are highly relevant factors in favour of disclosure that do not appear to have been considered by the Principal Officer, nor by the Director, Governance and Research who authorised the supplementary determination dated 3 February 2017.
 126. Therefore, in light of my reasoning above, I do not consider that the release of information could reasonably be expected to have an adverse effect on the agency's business affairs.

Would the disclosure of the document, on balance of interest, be contrary to the public interest? (clause 7(1)(c)(ii)(B))

127. Whilst I do not accept that the release of information could reasonably be expected to have an adverse effect on the agency's business affairs, for completeness of my determination I will consider whether disclosure would be contrary to the public interest.
128. Where an adverse effect under clause 7(1)(c)(ii)(A) is made out, the agency must also prove disclosure is contrary to the public interest. Whilst the adverse effect is a public interest factor supporting non-disclosure, in isolation it is not generally enough to form a basis for a finding that disclosure would be contrary to the public interest.
129. The agency did not provide compelling reasons as to why it considered it was not in the public interest to release the information. Whilst the agency acknowledged there were inherent public interest factors in favour of disclosure prescribed under the FOI Act such as openness and transparency, it did not provide any public interest

considerations in favour of non-disclosure. The agency merely reiterated that it considered exemption clauses applied and that it would not be in the agency's interests for it to be released.

130. The fact that the release of information may have negative consequences for the agency is not a public interest consideration, as the agency itself does not constitute the public.
131. I do not consider there are any public interest factors in favour of non-disclosure that the agency has not considered in its submissions. However, there are strong public interest factors in favour of disclosure, such as the public's right to scrutinise the agency, and assess whether it is providing an efficient, value-for-money service.
132. I once again remind the agency that whilst information may be unflattering and cause it to receive negative attention, that alone is not a reason to withhold information as it is inconsistent with the objects of the FOI Act and is not a valid ground for exemption.
133. Therefore, in light of my reasons above, I do not consider that any of the matter within the documents is exempt under clause 7(1)(c).

Clause 10(1) - Legal Professional Privilege

134. The agency partially refused access to the following documents on the ground that it considered parts of those documents exempt under clause 10(1) of the FOI Act:
 - Document 2, paragraph 5
 - Document 12, paragraph 5.4
 - Document 40, paragraph 9.3
 - Document 46, paragraph 5, 6.2
 - Document 50, paragraph 7.1
 - Document 60, paragraph 5, 8.2
 - Document 64, paragraph 4, 6.4
135. Clause 10(1) provides that:

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.
136. 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:
 - i. confidential
 - ii. communication between a client and their lawyer
 - iii. 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.³³
137. The word 'dominant' has been held to mean a 'ruling, prevailing or most influential' purpose.³⁴
138. In regard to document 2, paragraph 5, I do not consider that legal professional privilege applies to the redacted information. The information is not communication between a

³³ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

³⁴ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

client (the agency) and their lawyer, nor was it created for the dominant purpose of obtaining or giving legal advice, or for the dominant purpose of use in existing or anticipated legal proceedings.³⁵

139. The fact that the matter makes reference to a body that provides legal advice does not in itself provide sufficient ground for exemption under clause 10(1).
140. In regard to document 12, paragraph 5.4, I do not consider that legal professional privilege applies to the redacted information. The information relates to the fact that a legal document was being drafted.
141. The details of the document are not included in the minute. I do not consider the mere fact that a request for legal advice was made to be confidential in nature.
142. I also do not consider that this reference would meet the requirement that the information was '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,'³⁶ as there is no exchange of, or reference to actual advice, nor is the information to be used for the dominant purpose of use in existing or anticipated legal proceedings.
143. Therefore, I do not consider document 12, paragraph 5.4 to be exempt under clause 10(1).
144. In regard to document 46, paragraph 5 and 6.2, I do not consider that legal professional privilege applies to the redacted information. Whilst the information vaguely refers to a legal issue that the agency has sought advice on, it is not clear what the advice is and I am not satisfied that it is a communication between a client and their lawyer. Therefore, I do not consider it is exempt.
145. In regard to document 50, paragraph 7.1, I do not consider that legal professional privilege applies to the redacted information. The information refers to a potential legal issue with no reference to seeking legal advice. Therefore, I also do not consider this information is exempt as there is no exchange of, or reference to actual advice, nor is the information to be used for the dominant purpose of use in existing or anticipated legal proceedings.
146. I also do not consider document 64, paragraph 4 is exempt under clause 10(1) for similar reasons as above.
147. Although the agency has not provided supporting submissions, I am of the view that the information within the following documents satisfies the requirements of legal professional privilege:
 - document 40, paragraph 9.3
 - document 46, paragraph 5
 - document 60, paragraph 5 and 8.2
 - document 64, paragraph 6.4
148. I am reasonably satisfied the information is confidential, a communication between a lawyer and their client, and created for the dominant purpose of giving legal advice.
149. Therefore, I accept that this information is exempt under clause 10(1).

³⁵ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

³⁶ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

Clause 16(1)(a)(iv) - Documents concerning operations of agencies

150. The agency has claimed that the following documents are exempt under clause 16(1)(a)(iv):

- Document 12, paragraph 3, 5.3
- Document 21, paragraph 5
- Document 36, paragraph 6.8
- Document 40, paragraph 6.4, 6.5
- Document 42, paragraph 6.4, 6.5
- Document 44, paragraph 4
- Document 46, paragraph 5, 6.3, 6.5
- Document 50, paragraph 4, 7.2
- Document 54, paragraph 5
- Document 60, paragraph 7.1, 7.6
- Document 62, paragraph 4
- Document 64, paragraph 5, 6.1, 6.6
- Document 66, paragraph 6.1, 6.2, 8.2

151. Clause 16(1)(a)(iv) provides that a document is an exempt document if it contains matter the disclosure of which:

- could reasonably be expected to have a substantial adverse effect on the effective performance by an agency of the agency's functions; and
- would, on balance, be contrary to the public interest

152. As the agency did not provide submissions in regard to the application of this particular exemption clause, I assume the Principal Officer's submissions on 30 September 2016 were intended to apply to both clause 7(1)(c) and clause 16(1)(iv).

153. I am not satisfied that the release of the information in any of the documents could reasonably be expected to have a substantial adverse effect on the effective performance by the agency of its functions.

154. Further, I do not consider that it would, on balance, be contrary to the public interest and I refer to the public interest considerations raised in relation to clause 7(1)(c) above.

155. Therefore, I do not consider the documents are exempt under clause 16(1)(a)(iv).

Sufficiency of search and satisfying the scope of the application

156. I consider there is a correlation between the issue of sufficiency of search, and whether or not the agency has satisfied the terms of the scope of the applicant's application.

157. I refer to the agency's submission³⁷ that:

Clause 9.3 of the TAFE SA Ministerial Charter, operational from 29 January 2015 (as tabled on 26 February 2015) requires the TAFE SA Board to provide "to the Treasurer, any reports and information as requested by the Department of Treasury and Finance". (sic)

My document discovery process has confirmed the existence of numerous communications between TAFE SA and Department of Treasury and Finance (DTF) staff, in relation to operational budgetary matters.

³⁷ Letter dated 2 November 2016.

However, pursuant to section 23(1)(b) of the FOI Act, I advise that following this search process, I was not able to identify any documents where DTF has specifically requested the TAFE SA Board to provide reports or information to the Treasurer, in accordance with the TAFE SA Ministerial Charter.

158. The agency submitted³⁸ that as the TAFE SA Ministerial Charter (**the Charter**) specifically refers to reports and information that have been *requested* by the Department of Treasury and Finance (**DTF**), reports given freely to DTF are not considered to be within the scope of the application.
159. I disagree with the agency's submission, as I do not consider that the wording of the Charter is intended to imply that reports and information only be given when expressly requested.
160. 'As requested by the Department of Treasury and Finance,' could mean that the agency is expected to provide annual, quarterly, or monthly reports.
161. I also consider that it is unlikely the agency would report such information to DTF unless there was an agreement, or an expectation that such information would be provided.
162. Therefore, unless the agency can show that the Charter is intended only to apply when information is expressly requested by DTF, my interpretation is that the word 'requested' under the Charter is much broader than the agency has applied to their determination of the application.
163. In light of my reasoning above, I informed the agency in my provisional report that I did not consider the documents identified as being out of scope.
164. However, the agency highlighted that the communications between TAFE SA and Department of Treasury and Finance (DTF) that had been located were separate to any communications between the TAFE SA Board and DTF.
165. The agency clarified that only one document of correspondence between the TAFE SA Board and DTF had been located, and that it proposed to release it to the applicant as recommended in my provisional report.
166. The agency further clarified that as correspondence between the operational arm of TAFE SA (as opposed to the Board) and DTF falls outside the Charter, it did not consider that the other documents, which were identified in the agency's original determination, are within scope. I am persuaded by this submission, and confirm that documents between the operational arm of the agency, which is distinct to the Board, are not within the scope of the application.
167. In regard to the sufficiency of the agency's searches, I have considered the following:
 - the search terms used by the agency,
 - the locations where that information was sought, and
 - the time spent locating documents.
168. In light of the agency's submissions in regard to those considerations, I am satisfied the agency conducted sufficient searches.

³⁸ Letter dated 2 November 2016.

169. However, I do consider that any documents located in relation to the Charter between the TAFE SA Board and DTF, are within the scope of the application and should be released.

Ombudsman's comment

170. Pursuant to section 39(16) of the FOI Act, I consider it necessary to comment on the agency's conduct in relation to the processing of this application.
171. Whilst the Principal Officer is entitled to depart from the FOI officer's views and come to his own view in making a determination, I do not consider that the Principal Officer gave sufficient thought to the objects of the FOI Act in making his determination.
172. Further, I consider that the original advice provided by the FOI officer should have indicated that some of the exemptions claimed over the documents were unlikely to apply, and more weight should have been given to the various factors in favour of disclosure.
173. In my view, it is likely that more thoughtful consideration of the objects and exemption clauses under the FOI Act would have resulted in a more efficient processing of the application.

Determination

174. In light of my views above, I vary the agency's determination.
175. I consider that the document identified in relation to the Charter should be released to the applicant, and that all the other documents identified as being within scope also be released in full except for:

Clause 1(1)(e) - Cabinet documents

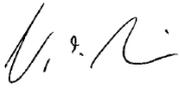
- document 2, paragraph 3.1
- document 24, paragraph 4.2

Clause 6(1) - Documents affecting personal affairs

- document 6, paragraph 5.3
- document 12, paragraph 4
- document 14, paragraph 4
- document 16, paragraph 2
- document 56, paragraph 5

Clause 10(1) - Legal Professional Privilege

- document 40, paragraph 9.3
- document 46, paragraph 5
- document 60, paragraph 5 and 8.2
- document 64, paragraph 6.4



Wayne Lines
SA OMBUDSMAN

7 April 2017

APPENDIX

Procedural steps

Date	Event
22/07/2016	The agency received the FOI application dated 19 July 2016.
30/09/2016	The agency negotiated two extensions of time to respond to the applicant. The Principal Officer then provided a determination dated 30 September 2016.
10/10/2016	The Ombudsman received the applicant's request for external review dated 10 October 2016.
12/10/2016	The Ombudsman advised the agency of the external review and requested submissions and documentation.
2/11/2016	The agency provided the Ombudsman with its submissions and documentation.
3/02/2017	The agency made a supplementary determination to partially-release further documents to the applicant.
21/02/2017	The Ombudsman made a provisional determination.