

DETERMINATIONS

External review pursuant to *Freedom of Information Act 1991*

Applicant:	Hon Rob Lucas MLC
Agencies and references:	<ol style="list-style-type: none">1. Department for Water (DFW) 11DFW00319; 2011/031732. Department of Education and Children's Services (DECS) DECS11/0844; 2011/031743. Department of Trade and Economic Development (DTED) 260/002/353; 2011/031754. Department for Correctional Services (DCS) CEN/11/0130; 2011/031775. Attorney-General's Department (AGD) 11/0154; 2011/031806. Department for Families and Communities (DFC) DFC 16083; 2011/035667. Department of Treasury and Finance (DTF) T&F11/0200 and TF11D02940; 2011/05087
Determinations:	<p>The determination of DTF is confirmed</p> <p>The determinations of DFW; DECS; DTED; DCS; AGD and DFC are varied</p>

REASONS FOR DETERMINATIONS

Background

1. On 25 January 2011¹ and 3 February 2011,² the applicant applied under the *Freedom of Information Act 1991 (FOI Act)* to each of the agencies for access to:

[c]opies of all briefing documents prepared by the agency prior to the March 2010 election for the Labor Party being re-elected to Government.³
2. The agencies refused access to the documents referred to in the table below in their entirety under a variety of exemption clauses from Schedule 1 to the FOI Act. The agencies confirmed these determinations following internal review.

¹ DFW; DECS; DCS; AGD; DFC; and DTF.

² DTED.

³ The original application to AGD was for '[b]riefing Notes for the incoming Labour [sic] Govt if elected', but the application for internal review and the agency's determinations are consistent with the above quote.

Agency	Documents 'actively' determined ⁴	Date of original determination	Exemption clauses relied upon	Date of internal review application	Date of internal review determination	Date of external review application
1. DFW ⁵	3 ⁶	8 March 2011	1(1)(a); 9(1)	23 March 2011	20 April 2011	3 May 2011
2. DECS	2 ⁷	16 March 2011	1(1)(a) ⁸ ; 9(1)	1 April 2011	14 April 2011	3 May 2011
3. DTED	4	7 March 2011	1(1)(a); 9(1)	28 March 2011	12 April 2011	3 May 2011
4. DCS	15 ⁹	23 February 2011	1(1)(a) (2 documents); 1(1)(b) (13 documents)		30 March 2011	3 May 2011
5. AGD	8	18 February 2011	1(1)(a) ¹⁰ ; 9(1)	21 March 2011	25 March 2011	3 May 2011
6. DFC	5 ¹¹	31 March 2011	1(1)(a) and 1(1)(b) ¹² (documents 1 to 5); ¹³ 1(1)(f) (document 5)	3 May 2011	6 May 2011	17 May 2011
7. DTF	2 ¹⁴	26 May 2011	1(1)(a); 7(1)(c); 14 and 15	1 June 2011	22 June 2011	20 July 2011

3. When applying for external reviews, the applicant submitted:

Having been a Minister, I am familiar with the process of public service preparation of briefing folders for incoming Ministers. These briefings were not prepared for presentation to Cabinet and were not presented to Cabinet. I also have copies of the briefing folders for the incoming Labor Government in 2002 which I received under the Act.

In my view, it is in the public interest for these documents to be released. I also note that under Federal legislation, similar briefing folders have been released in the past.¹⁵

External review process

4. On 31 May 2011 I exercised my discretion under section 39(4) of the FOI Act to extend the time for the applicant to make his applications for external review with respect to DCS and AGD. My reasons for doing so were communicated to DCS and AGD in letters dated 31 May 2011, a copy of which I provided to the applicant.

5. I requested relevant information from each agency, including the following:

⁴ In my view, some other documents are also within the scope of my external review. I will discuss these documents later.

⁵ The application for access was made to the Department of Water, Land and Biodiversity Conservation, but was considered by DFW as DWLBC's successor as of 1 July 2010.

⁶ The documents each comprise a title page, a foreword, and the portfolio brief.

⁷ The documents each comprise a title page, a foreword, and the portfolio brief.

⁸ I have inferred the part of clause 1(1) relied upon from the wording of the determination.

⁹ Document 1 comprises a title page, a foreword, and the portfolio brief.

¹⁰ I have inferred the part of clause 1(1) relied upon from the wording of the determination.

¹¹ Documents 1 to 4 each comprise a title page, a foreword, and the portfolio brief.

¹² Clause 1(1)(b) was not relied upon following internal review.

¹³ I have inferred the part of clause 1(1) relied upon from the wording of the determination.

¹⁴ Document 1, headed 'Treasurer' consists of pages 1 to 18 of 31; page 1 and 19 to 31 of 31; appendix 1; brief 1 (3 pages); brief 2 (1 page); brief 3 (4 pages); and brief 4 (2 pages).

¹⁵ The applicant argued that there was 'a public interest argument to be made for release of said material' in his applications for internal review.

- a) the documents within the scope of the application for access
 - b) copies of any generic briefings (that is, briefings prepared with either a Labor or a Liberal Government in mind)
 - c) copies of any forewords (for example, in the form of a letter from the Chief Executive to the relevant Minister)
 - d) any documents that support or are relevant to the claim that the documents are exempt under clause 1(1) of Schedule 1 to the FOI Act.
6. On 3 June 2011 I finalised external reviews of determinations made by ten agencies refusing the applicant access to 'briefing documents prepared ... for a possible incoming Liberal Government' (**Liberal briefs reviews**).¹⁶ In my view, some information and submissions, as well as some documents, received in the context of those reviews, are relevant to the matters currently under external review.
 7. Given the similar issues involved, and having regard to the information before me, I proceeded to provisional determinations. On 5 August 2011 I provided my provisional determinations and reasons to the applicant; DFW; DECS; DTED; DFC; and the Crown Solicitor, on behalf of DCS, AGD, and DTF, and invited their responses by 17 August 2011.
 8. The Crown Solicitor responded by letter dated 16 August 2011, on behalf of the Department of Justice;¹⁷ DFW; DTED; DFC and DECS. To explain why the Chief Executive of DCS did not prepare a foreword, but the 'Chief Executive (Justice)' did, the Crown Solicitor explained 'that only portfolio chief executives were asked to prepare forewords'. In response to paragraphs 57 to 59 inclusive of the reasons for my provisional determinations, the Crown Solicitor submitted on behalf of the agencies that the following five elements, and therefore clause 1(1)(f) of Schedule 1 to the FOI Act, had been satisfied:
 1. a briefing paper
 2. specifically prepared for the use of a Minister
 3. in relation to
 4. a matter
 5. submitted or proposed to be submitted to Cabinet.

Given my position regarding elements 1 and 2, the Crown Solicitor focussed on elements 3 and 4:

... The *matter* proposed to be submitted to Cabinet is *the account of each portfolio's activity insofar as it is required to be known by the Cabinet collectively and to a greater level of detail, by each Minister assuming responsibility for a particular portfolio* ("the portfolio briefing");

The foreword is an introductory statement or overview to the portfolio briefing *in relation to* the matter. Its connection to the matter is evident from its name ("foreword"), and its content (a synopsis or account or overview of all that follows in the briefings), and the fact that it was

¹⁶ My references: 2010/02536 (Department of Further Education, Employment, Science and Technology); 2010/02537 (Primary Industries and Resources SA); 2010/02538 (South Australian Tourism Commission); 2010/04003 (DCS); 2010/04004 (Department of Planning and Local Government); 2010/04005 (AGD (Multicultural SA)); 2010/04006 (DTF); 2010/04007 (AGD); 2010/04008 (AGD (Office of Recreation and Sport)); 2010/05560 (DFW). My determinations and reasons are available via <http://www.ombudsman.sa.gov.au/freedom-of-information/2536%20et%20al.pdf>.

¹⁷ Although I am not reviewing a determination made by the Department of Justice, I am reviewing a determination made by the Attorney-General's Department.

bound together with the briefing and submitted to Cabinet as a component of the briefings related to that portfolio.

Therefore, the foreword is a document that was specifically prepared for the use of a Minister in relation to a matter proposed to be submitted to Cabinet. Clause 1(1)(f), when considered against the other exemptions listed in clause 1, is intended to make exempt documents that are adjuncts, or aides, or synopses of Cabinet submissions, to assist a Minister on a matter before Cabinet. The forewords are such adjuncts, aides or synopses...

9. To date, the applicant has not responded to my provisional determination and reasons.

Exemption clauses

10. All of the agencies rely on clause 1(1)(a) of Schedule 1 to the FOI Act. Some of the agencies also rely on clauses 1(1)(b); 7(1)(c); 9(1); 14 and 15 of Schedule 1 to the FOI Act to claim exemption over the documents. DFC relies on clause 1(1)(f) over one document. I also intend to consider clause 1(1)(f) in relation to the forewords, having regard to submissions received in relation to these and the Liberal briefs reviews.

Clause 1

11. The relevant parts of clause 1 of Schedule 1 to the FOI Act provide as follows:

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
 - ...
 - (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.

12. I consider that in the context of clause 1(1) the word ‘specifically’ means ‘specially’ prepared for submission to Cabinet.

13. It will be sufficient if submission to Cabinet was 'the dominant purpose or one of a number of significantly contributing purposes' for the document's creation.¹⁸
14. Whether a document has been prepared for submission to Cabinet is to be ascertained by reference to the events at the time the document was created.¹⁹ Subsequent changes to Cabinet, whether through the appointment of a new minister or the introduction of an entirely new Cabinet, are therefore irrelevant.

Clause 7(1)(c)

15. Clause 7(1)(c) of Schedule 1 to the FOI Act provides:
- (1) A document is an exempt document-
 - (c) if it contains matter-
 - (i) consisting of information (other than trade secrets or information referred to in paragraph (b) ['information (other than trade secrets) that has a commercial value to any agency or any other person']) 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.
16. To successfully claim that a document is exempt under clause 7(1)(c), I must be satisfied that:
- (a) Matter in the document consists of information (other than trade secrets or information that has a commercial value to any agency or any other person) concerning the business, professional, commercial or financial affairs of an agency or person; and
 - (b) Disclosure of that information could reasonably be expected to either:
 - o have an adverse affect on those affairs

It will be sufficient:

 - o if any adverse effect is established... However, it must be something which can be properly categorised as an adverse effect and not something so de minimus [sic] that it would be properly regarded as inconsequential... It will be sufficient if the adverse effect is produced by that document in combination with other evidence which is before the Court on the appeal.²⁰
 - o prejudice the future supply of such information to the government or to an agency; and
 - (c) Disclosure of that information would, on balance, be contrary to the public interest.

¹⁸ *Secretary to the Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11, [13] per Buchanan JA.

¹⁹ *Re Fisse and Department of Treasury* (2008) 101 ALD 424, 434.

²⁰ *Ipex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54 at 65.

This means showing that there is something adverse to the public interest likely to flow from disclosure of the document, and that 'on balance the factors in the public interest against disclosure outweigh the factors in favour of disclosure'.²¹

The public interest has many facets. For example, there is clearly a public interest in the effective and efficient workings of representative government and its agencies, as well as in ensuring just administration and accountability within representative government and the ability to scrutinise public administration.

Clause 9(1)

17. Clause 9(1) of Schedule 1 to the FOI Act provides that:

- (1) A document is an exempt document if it contains matter—
 - (a) that relates to—
 - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and
 - (b) would, on balance, be contrary to the public interest.

18. To justify a claim that a document is exempt pursuant to clause 9(1), it must be shown that the document in question satisfies paragraphs (a) and (b) of clause 9(1). The scope of clause 9(1)(a) is wide, particularly given the words 'that relates to'. Clause 9(1)(b) introduces a public interest test, which limits the expansive scope of clause 9(1)(a).

Clause 14

19. Clause 14 of Schedule 1 to the FOI Act provides as follows:

- A document is an exempt document if it contains matter the disclosure of which—
- (a) could reasonably be expected—
 - (i) to have a substantial adverse effect on the ability of the Government or an agency to manage the economy, or any aspect of the economy, of the State; or
 - (ii) to expose any person or class of persons to an unfair advantage or disadvantage as a result of the premature disclosure of information concerning any proposed action or inaction of the Parliament, the Government or an agency in the course of, or for the purpose of, managing the economy of the State; and
 - (b) would, on balance, be contrary to the public interest.

20. To justify a claim of exemption under clause 14 it is necessary to show that:

- (a) The document contains information the disclosure of which could reasonably be expected to:

²¹ *Iplex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54 at 70 per Judge Lunn. These comments were made in relation to clause 9(1)(b) of Schedule 1 of the FOI Act, but are relevant to the public interest test in other clauses.

- (i) have a substantial adverse effect on the government's or an agency's ability to manage South Australia's economy, or an aspect of it.

The phrase 'substantial adverse effect' is not defined in the FOI Act. In the decision of *Konieczka v South Australian Police*²² Judge Boylan concluded that the phrase refers to an effect that is 'sufficiently serious or significant to cause concern to a properly informed reasonable person'.²³ In addition, he agreed with counsel for the agency that the test 'is a high one'.²⁴

or

- (ii) expose a person or class of people to unfair advantage or disadvantage because information concerning parliament's, the government's or an agency's proposed action or inaction in the course of, or for the purpose of, managing South Australia's economy, is disclosed prematurely.
- (b) Disclosure of the information would, on balance, be contrary to the public interest.

Clause 15

21. Clause 15 of Schedule 1 to the FOI Act provides as follows:

A document is an exempt document if it contains matter the disclosure of which—

- (a) could reasonably be expected to have a substantial adverse effect on the financial or property interests of the State or an agency; and
- (b) would, on balance, be contrary to the public interest.

22. To justify a claim of exemption under clause 15 it is necessary to show that:

- (a) The document contains information, the disclosure of which could reasonably be expected to have a substantial adverse effect on South Australia's or an agency's financial or property interests.
- (b) Disclosure of the information would, on balance, be contrary to the public interest.

Other relevant provisions

23. Section 12 of the FOI Act provides that 'a person has a legally enforceable right to be given access to an agency's documents in accordance with this Act'.
24. Under section 20(1)(a) of the FOI Act, 'an agency may refuse access to a document if it is an exempt document'.
25. Section 48 of the FOI Act places the onus on the agency to justify its determination in my external review.
26. Section 39(11) of the FOI Act provides that in my external review, and based on the circumstances existing at the time of my review, I may confirm, vary or reverse the agency's determination.

²² [2006] SADC 134 (unreported, Judge Boylan, 8 December 2006).

²³ [2006] SADC 134 (unreported, Judge Boylan, 8 December 2006) at paragraph 17, citing *Re Thiess and The Department of Aviation* (1986) 9 ALD 454, at paragraph 24.

²⁴ [2006] SADC 134 (unreported, Judge Boylan, 8 December 2006) at paragraph 18.

Consideration of submissions and conclusions

27. I received submissions in the context of the Liberal briefs reviews about the creation of the portfolio briefs and the forewords. I note that the majority of the agencies involved in these reviews are represented by the Crown Solicitor, whose office provided the majority of the submissions to my office during the Liberal briefs reviews. In addition, I have had regard to the determinations relevant to Liberal briefs reviews, and supporting documentation provided by the agencies. I will briefly summarise my understanding of the background.

Incoming government briefs

- On 4 February 2010 there was an interagency meeting of agency officers regarding incoming government briefs. The Department of the Premier and Cabinet (**DPC**) advised the agencies that the briefs would be submitted to Cabinet to note. In the context of the Liberal briefs reviews I received a copy of a PowerPoint presentation supporting this.
- Soon after this meeting, DPC provided the agencies with a template to assist them to prepare the briefs. I received a copy of the template in the context of the Liberal briefs reviews. Each page of the template is marked 'Cabinet-in-Confidence'. It includes headings to be addressed and has characteristic formatting. According to the Crown Solicitor's Office (**CSO**), the briefing template was password protected.
- According to the CSO, each brief was prepared with a view to it being the final document, which would be submitted to Cabinet. That said, the agencies were aware of the possibility or likelihood that DPC would amend the documents before this occurred.
- Following the election of the Labor Party, copies of the Labor briefs were formally noted at the first meeting of Cabinet on 29 March 2010.
- In the Liberal briefs reviews, the CSO submitted that the briefs were created for the following two purposes:

to be incorporated into a compendium of briefs from each agency to provide Cabinet with a whole-of-government overview of those issues that a newly elected government is required to focus on, particularly for a new Parliamentary session; and

To enable a portfolio Chief Executive to brief the new Minister (if applicable) on his or her portfolio in the event of a change of Government or change of Minister.

- The Labor and Liberal incoming government briefs are similar.²⁵

Forewords

- It is clear from a number of the documents relevant to these reviews that forewords were incorporated into the final documents submitted to Cabinet.
- The request for forewords was made separately to the request for portfolio briefs.
- In the Liberal briefs reviews the CSO provided an email chain from Mr Chris Eccles, former Chief Executive of DPC, to the Chief Executives of various agencies dated 2 March and 10 March 2010 in support of the claim that the forewords were prepared in the same manner as the briefings.

²⁵ I understand that the extent of the differences varied between agencies.

- The forewords were prepared 'later than the briefings and very close to the election itself'.

Documents within the scope of my review

Briefs prepared specifically for an incoming Labor Government

28. Briefly stated, the briefs prepared specifically for an incoming Labor Government are the documents referred to in the table in paragraph 2. I will refer to these documents, excluding the forewords and DFC 5, collectively as the portfolio briefs.

Generic briefing documents

29. None of the agencies have provided generic briefings in response to the requests I made in the context of these reviews. DECS, DTED and DFC have specifically advised my office that they do not hold any such documents. During the Liberal briefs reviews I concluded that three generic briefings held by AGD were within the scope of my external reviews, notwithstanding claims made on behalf of AGD to the contrary. I described them as follows:

B3 - Generic briefings (suitable for both ALP and Liberal except where noted)

B13 - Volume VIII: Minister for Consumer Affairs

B14 - Volume VIII: Minister for the Status of Women.

There is nothing akin to (AGD) B3 among the documents received from AGD on 16 June 2011. (AGD) B13 appears to be a preliminary draft of AGD 2. (AGD) B14 appears to be a preliminary draft of AGD 6. In my view, documents (AGD) B3, (AGD) B13 and (AGD) B14 are also within the scope of my current external review of the determination made by AGD.

Forewords

30. I have received the following forewords:

DFW F1²⁶; DFW F2; DFW F3

DECS F1; DECS F2

DTED F1; DTED F2; DTED F3; DTED F4

DCS F1

AGD F1²⁷; AGD F2²⁸; AGD F3; AGD F4²⁹; AGD F5³⁰; AGD F6³¹; AGD F7³²; AGD F8³³; AGD F9³⁴

DFC F1; DFC F2; DFC F3; DFC F4

31. DTF has advised that it did not prepare any forewords.
32. The forewords take the form of undated letters to ministers.

²⁶ I understand that DWLBC prepared separate forewords for Labor and Liberal governments. This document is similar to DFW F1 in the Liberal briefs reviews, however.

²⁷ This document is identical to AGD F1 in the Liberal briefs reviews.

²⁸ This document is identical to AGD F2 in the Liberal briefs reviews.

²⁹ This document is identical to AGD F3 in the Liberal briefs reviews.

³⁰ This document is identical to AGD F4 in the Liberal briefs reviews.

³¹ This document is identical to AGD F6 in the Liberal briefs reviews.

³² This document is identical to AGD F7 in the Liberal briefs reviews.

³³ This document is identical to AGD F5 in the Liberal briefs reviews.

³⁴ This document was AGD F8 in the Liberal briefs reviews. It was not provided in the context of my current external reviews. It is similar to DCS F1. In my view, it is within the scope of the application made to AGD. In saying this, my understanding is that AGD forewords were prepared with a Labor or Liberal government in mind.

33. DCS F1 and AGD F1 to AGD F9 are signed by Mr Jerome Maguire, as Chief Executive of AGD and the Department of Justice. I note that only the Department of Justice is referred to in the top right-hand corner, however. DFW F1 to DFW F3 are signed by Mr Scott Ashby, as Chief Executive of the Department of Water, Land and Biodiversity Conservation. The remaining forwards were all signed by their respective chief executives.
34. The determinations made by DFW, DECS, DCS and DFC addressed the forewords. The forewords provided by DTED and AGD have not been the subject of 'active' determinations.
35. I note that the CSO made submissions on behalf of the agencies in the Liberal briefs reviews that the forewords are outside the scope of the applications as they 'are not briefing documents', or that they fall on the edge of that category.
36. My view is that the terms of the applications for access are sufficiently broad to capture all of the forewords provided to my office, and that they are therefore within the scope of the applications. I intend to discuss them separately when assessing the claims of exemption.

Claimed exempt documents

- *Portfolio Briefs, (AGD) B13 and (AGD) B14*
37. I am satisfied that the portfolio briefs, (AGD) B13 and (AGD) B14 were specifically prepared for submission to Cabinet, or are preliminary drafts of such documents. This is notwithstanding that they were also prepared to assist Chief Executives to brief any new ministers.
 38. In my view the intention behind the creation of the documents is critical. I am satisfied that when creating the documents, the agencies intended that they would be submitted to Cabinet, and that some of the documents were in fact submitted to Cabinet. In my view, it is irrelevant that some of the documents were not submitted to Cabinet.
 39. In reaching this conclusion I have had regard to the fact that the portfolio briefs are all essentially consistent with the template provided by DPC, and are all marked 'cabinet-in-confidence'. There are some minor differences between some of the documents and the template, but I do not consider these to be significant. I have also borne in mind the advice provided to the agencies by DPC prior to the portfolio briefs being created and the submissions made by and on behalf of the agencies in these and the Liberal briefs reviews.
 40. It is my view that none of the exceptions in clauses 1(2) and 1(2a) of Schedule 1 to the FOI Act apply. Specifically, the documents do not *merely* consist of factual or statistical information for the purposes of clause 1(2)(a)(i).
 41. I am satisfied that the portfolio briefs are exempt under clauses 1(1)(a) or 1(1)(b) of Schedule 1 to the FOI Act.³⁵
 42. In my view section 20(4) of the FOI Act has no application in this instance, because of the way clause 1(1) of Schedule 1 to the FOI Act is worded.³⁶

³⁵ Given this, I do not consider it necessary to address clauses 9(1); 7(1)(c); 14 or 15.

³⁶ Clause 1(1)(a) provides that '[a] document is an exempt document *if it is a document* that has been specifically prepared for submission to Cabinet' [my emphasis]. This is in contrast to a number of other exemption clauses that provide that '[a] document is an exempt document *if it contains...*' [my emphasis].

- *Document (AGD) B3*

43. (AGD) B3 differs significantly from the template provided by DPC. It is nevertheless clear to me from its contents, including the header and footer, that (AGD) B3 was prepared with an incoming government in mind. I am satisfied that it is a preliminary draft of a document specifically prepared for submission to Cabinet.
44. I am satisfied that document (AGD) B3 is exempt under clause 1(1)(b) of Schedule 1 to the FOI Act.³⁷
45. As with the portfolios briefs, my view is that the exceptions in clauses 1(2) and 1(2a) of Schedule 1 to the FOI Act, and section 20(4) of the FOI Act, do not apply.

- *Document DFC 5*

46. According to DFC's determination following internal review, DFC 5 was 'prepared for the Assistant Under Treasurer, Revenue & Economics to contribute to briefings being prepared for the incoming Minister for Gambling'.
47. DFC 5 consists of a minute dated 3 March 2010 and two short briefs. The subject of the minute is 'incoming government briefs'. The briefs are headed 'Minister for Gambling'. It is clear from the contents of the minute that the briefs were intended to contribute to the brief for the incoming Minister for Gambling.³⁸ My view is that the two briefs are exempt under clause 1(1)(f) of Schedule 1 to the FOI Act. Based on the information before me, I am not satisfied that the minute itself is exempt under this clause, however.
48. Accordingly, I am satisfied that DFC 5 is exempt under clause 1(1)(f) of Schedule 1 to the FOI Act, but consider that it would be practicable to release the minute in accordance with section 20(4) of the FOI Act.

- *Forewords*

49. In the Liberal briefs reviews, the CSO claimed that, if within scope, the forewords were exempt under clauses 1(1)(a); 1(1)(f) and 9(1) of Schedule 1 to the FOI Act. The CSO submitted that the forewords were 'directed at conveying the Chief Executive's overview to his or her Minister *in relation to* the matter of the substantive briefings'. In response to my provisional determinations and reasons regarding these reviews, the Crown Solicitor claimed that the forewords are exempt under clause 1(1)(f) of Schedule 1 to the FOI Act.

Clause 9(1)

50. I accept that the forewords contain advice and opinions recorded for the purpose of the decision-making functions of ministers holding the relevant portfolios. I therefore accept that they satisfy clause 9(1)(a) of Schedule 1 to the FOI Act. In my view, whether or not the forewords are exempt under clause 9(1) therefore turns on public interest considerations.
51. The forewords contain limited information, which I would describe as general in nature. Briefly stated, they include predictions/goals about the future, and identify strategies for realising these predictions/goals. The comments and observations drawn from these facts seem fairly straightforward, and not what I would describe as novel.
52. In the Liberal briefs review, the CSO submitted that disclosure of the forewords would be contrary to the public interest, after balancing:

³⁷ Given this, I do not consider it necessary to address clause 9(1).

³⁸ I do not have the brief submitted/intended to be submitted to the Minister for Gambling, however.

the importance of transparency and openness and the interest that the public has in the decision-making processes of Government, with the importance of Cabinet confidentiality and caretaker conventions on the other.

53. DFW and DECS relied on clause 9(1) of Schedule 1 to the FOI Act to refuse access to documents, including the forewords.

54. According to the original determination, DFW considered the following factors, before concluding that disclosure would be contrary to the public interest:

In favour of release:

The public's potential interest and the importance of transparency.

Against release:

The importance of Cabinet confidentiality and caretaker conventions.

55. In the notice of determination following internal review, DECS provided the following reasons in support of its clause 9(1) claim:

The public interest test ... requires me to balance competing public interests. The documents were produced ... under the Caretaker Conventions which are an essential part of a Westminster style democracy. The release of the documents could undermine those conventions. It is in the public interest that those conventions are maintained ... Although I acknowledge the competing public interests you raise, in this instance, the Westminster public interest carries the greater weight.

56. I have considered these factors, but am not persuaded that the 'importance of Cabinet confidentiality' is a relevant factor when considering the forewords. In addition, I have had regard to the objects of the FOI Act in section 3, which include promoting accountability of ministers and the government, and facilitating more effective participation by members of the public, and the principles of administration in section 3A of the FOI Act. I have also considered the contents of the documents. I note that much of the information in the forewords appears to be based on objectives set out in *South Australia's Strategic Plan 2007*, which is a public document. A number of the forewords refer to information in the public domain.

57. On balance, I am not satisfied that it would be contrary to the public interest to release forewords. Accordingly, my view is that they are not exempt under clause 9(1) of the FOI Act.

Clauses 1(1)(a) and 1(1)(f)

58. During the Liberal briefs reviews the CSO claimed that the forewords were exempt under clauses 1(1)(a) and 1(1)(f) of Schedule 1 to the FOI Act. In response to the reasons for my provisional determinations the Crown Solicitor has reiterated the agencies' claim that the forewords are exempt under clause 1(1)(f). In support of this claim, the Crown Solicitor has referred to their description as 'forewords'; their content; and the fact that they were bound with the briefings and submitted to Cabinet following the 2010 election, in particular.

59. I am not satisfied that the forewords were specifically prepared for submission to Cabinet as required by clause 1(1)(a).

60. I am satisfied that the forewords were specifically prepared for the use of a minister; they are clearly addressed to individual ministers. I am not satisfied that they were *specifically*

prepared for use in relation to a matter submitted, or proposed to be submitted to Cabinet as required by clause 1(1)(f), however.

61. In forming these views I have had regard to the form and contents of the forewords, and the apparent intention behind their creation based on the email from Mr Eccles of DPC to Chief Executives dated 10 March 2010. Their description as 'forewords' and the fact that they were submitted to Cabinet does not change my view. It still seems to me that the forewords were prepared for ministers as a general overview of issues considered relevant to their respective portfolios.
62. The fact that the DECS forewords specifically refer to a 'briefing' as being attached does not change my view. In saying this I am mindful that in addition to being prepared for Cabinet, the portfolio briefs were prepared to enable the 'Chief Executive to brief the new Minister ... on his or her portfolio in the event of a change of Government or change of Minister'.

Determinations

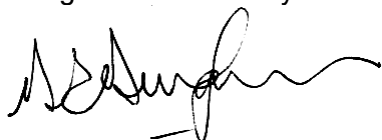
63. In light of my reasoning above, I **confirm** the determination made by DTF, and **vary** the determinations made by DFW; DECS; DTED; DCS; AGD; and DFC, to enable the forewords and the minute in DFC 5 to be released.

Comment - section 39(12) of the FOI Act

64. Section 39(12) of the FOI Act provides that if I am satisfied that a document is an exempt document, I do not have the power to make a determination to the effect that access is to be given to the document. I may however, if I think fit, offer reasons why the agency might give access to a document despite its exempt status. In my view, there are reasons why the agencies might give access to *parts* of the portfolio briefs and other briefing documents, notwithstanding that they are exempt. I note that the documents contain information that is in the public domain. In addition, I consider that there is a strong public interest in members of the public being aware of policy initiatives and other issues that the agencies consider important to South Australia. In my view, access to such information would enhance public participation in discussions about South Australia's future, and would be consistent with the objects of the FOI Act of promoting openness and accountability, as well as the principles of administration.

Right of appeal

65. Any person aggrieved by my determinations may appeal to the District Court of South Australia under section 40(2) of the FOI Act.
66. The agencies may also appeal against my determinations, but only on a question of law and only with the permission of the court, under section 40(1) of the FOI Act.
67. Under section 40(3) of the FOI Act, any such appeals should be commenced within 30 days after receiving notice of my determinations; or in the case of a person who is not given notice of my determinations, within 30 days after the date of my determinations.



Richard Bingham
SA OMBUDSMAN

18 August 2011