



## Determination

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

<b>Applicant:</b>	Mr Rex Patrick
<b>Agency:</b>	Department for Environment and Water
<b>Ombudsman reference:</b>	2023/04489
<b>Agency reference:</b>	N/A
<b>Determination:</b>	<p>The determination of the agency is <b>varied</b>, the effect of which is:</p> <ul style="list-style-type: none"><li>• that documents 5 and 6 are not exempt</li><li>• the remainder of the documents are exempt</li></ul>
<b>Date of Ombudsman's determination:</b>	14 December 2023
<b>Issues considered:</b>	Inter-governmental relations Internal working documents Legal professional privilege Parliamentary privilege
<b>Exemption clauses relied upon:</b>	5, 9, 10 and 17(c)
<b>Legislation considered:</b>	<i>Freedom of Information Act 1991</i>

## 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:

1) Any briefs prepared (or being prepared) for the CEO in relation to potential options/responses to a likely failure (see the Murray Darling Basin Commissioners November 2022 report) to meet the 'supply', 'efficiency' or 'constraints' measures of the Murray Darling Basin Plan by the statutory time limit (2024).

2) Any ministerial briefs prepared (or being prepared) for Minister Close in relation to potential options/responses to a likely failure to meet the 'supply', 'efficiency' or 'constraints' measures of the Murray Darling Basin Plan by the statutory time limit (2024).

### Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.

### 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 3 November 2023. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.
5. Both the applicant and the agency provided submissions in response. I have considered these submissions in this determination and address them below.
6. On my initial viewing of the submissions, I was persuaded to alter my view in my provisional determination; namely to release documents 5 and 6 which I previously determined were exempt. In light of this, I provided the agency a further opportunity to provide submissions in response, noting that the secondary submissions were repetitive of prior submissions received.

### The parties' submissions on clause 17(c)

7. I do not propose to repeat the entire substance of the applicant's submissions, other than to refer to points I consider relevant and conducive to this review.
8. I understand that the applicant does not contest that the documents were prepared for the purpose of the proceedings of Parliament. In summary, the applicant contends that the category of parliamentary privilege claimed by the agency is the 'freedom of speech' privilege and that the documents do not attract that privilege 'because it falls outside the established context of in any court or place out of Parliament'. This was in reference to the construction of Article 9 of *Bill of Rights 1688* (UK).
9. The concept of parliamentary privilege has been developed from the fifteenth century in England and has multiple sources including custom, statutes and resolutions of the

House of Commons in England. South Australia inherited its privilege from the UK House of Commons.<sup>1</sup> Article 9 of the *Bill of Rights 1688* (UK) states that ‘freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament’.

10. The expression of the term any ‘place out of Parliament’ is an expression that was intended to operate more widely than the *Parliamentary Privileges Act 1987* (Cth).<sup>2</sup> Article 9 is not an exhaustive statement of privilege and was a reassertion of the long claimed privileges of Parliament. The intention behind the privilege is to allow Parliament to proceed with the business of carrying out its functions independently.<sup>3</sup>
11. The caselaw in South Australia is clear regarding the State’s position on the privilege and the operation of Article 9; namely that ‘... statements in the House cannot be questioned in any form at all’.<sup>4</sup> I therefore do not agree with the applicant’s submissions on the privilege regarding the construction of Article 9.
12. In my view, the crux of the issue is whether the documents were even in fact ever presented to Parliament to be able to satisfy the proceedings of Parliament test.
13. As discussed in my provisional determination, I am satisfied that documents 1, 2, 11 and 12 were presented to Parliament as evidenced by Hansard. I therefore limit my consideration of the applicant’s submissions on clause 17(c) to documents 3, 5 and 6.
14. The applicant has provided me with a copy of the transcript of proceedings on 30 January 2023. As suggested by the applicant, I cannot identify that aspects of the Murray Darling Basin Plan that are included in documents 3, 5 and 6 were also discussed in the transcript of the Committee Meeting. It must be established as to whether there is sufficient proximity connecting the documents to a proceeding of Parliament, beyond the mere preparation of a document for the intended purpose of use when not actually used. This ‘will depend on the circumstances of [the documents] creation and use. It is not enough that documents merely relate to proceedings’.<sup>5</sup> I will further address this below when considering the agency’s submissions on this issue.
15. In relation to documents 1 -3, 5 and 6 the agency confirms that it ‘has not specifically investigated what matters were discussed at the Committee appearance’. Whether the documents were prepared for the purpose of these appearances is not disputed.
16. The agency contends that it is only necessary to establish that the briefing notes were prepared for use in Parliament rather than whether they were actually referred to in the course of parliamentary proceedings or had any nexus to those proceedings.<sup>6</sup> In making this submission, the agency has relied upon case law from New South Wales, which considers House notes prepared for use in Parliament, though not presented.
17. To establish the connection between the documents and the proceedings of Parliament, it must be demonstrated that ‘the documents could involve questioning or impeachment of the proceedings of Parliament’.<sup>7</sup> The agency submits that a parliamentary briefing note is prepared on the premise that as Budget and Estimates Committee hearing can be wide-ranging, comprehensive briefing notes are required to cover a range of topics

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<sup>1</sup> Constitution Act 1934 s38

<sup>2</sup> *O’Chee v Rowley* (1997) 150 ALR 199 at 201.

<sup>3</sup> *President of the Legislative Council v Kosmas* [2008] SAIRC 41 at [36].

<sup>4</sup> *Rowan v Cornwall (No 5)* [2002] SASC 160 at [110].

<sup>5</sup> *Department of Treasury and Finance v Waters* [2023] SACAT 6 (21 March 2023) at [50] citing Hall J in *The President of the Legislative Council of Western Australia v Corruption and Crime Commission* [No 2] [2021] WASC 223 (13 July 2021).

<sup>6</sup> *Zonneville v Minister for Education and Early Childhood Learning* [2023] NSWCATAD 135 (6 June 2023).

<sup>7</sup> *Department of Treasury and Finance v Waters* [2023] SACAT 6 (21 March 2023) at [50] citing Hall J in *The President of the Legislative Council of Western Australia v Corruption and Crime Commission* [No 2] [2021] WASC 223 (13 July 2021).

potentially raised at the meetings. While I can understand the agency's position in this regard, this would mean that any document labelled as a parliamentary briefing note would be privileged and in the context of FOI, I am not convinced that would be correct. The Office of the Australian Information Commissioner provides some guidance on this; that 'disclosure of briefings to assist ministers in parliament - namely, question time briefs or possible parliamentary questions - would not ordinarily be expected to breach a privilege of Parliament'.<sup>8</sup>

18. As I pointed out in a previous determination, '[h]ad the intention of Parliament been to exempt any document prepared in anticipation of possible discussion during a Parliamentary sitting, clause 17(3) could have been drafted in similar terms to clause 1(1)(a)'.<sup>9</sup> Noting, that clause 1(1)(a) relates to documents specifically prepared for submissions to Cabinet.
19. President Hughes in *Department of Treasury and Finance v Waters* states it is arguable, in relation to the operation of the privilege in South Australia, that 'particular proceedings must be able to be identified' to determine whether that the privilege would be infringed. I am not satisfied, based on the factual evidence before me in this matter, that the specific subject matter of documents 3, 5 and 6 were raised in Parliament.
20. If it is unclear as to whether information has been raised in Parliament, it is difficult for me to be able to conclude that disclosure of that information would infringe the privilege of Parliament. I do not accept that discussion of the Murray-Darling Basin Plan more broadly is enough to establish that nexus between these documents and the proceedings of Parliament.
21. Given the agency has been unable to confirm whether the documents were used in the proceedings of Parliament, and balancing this against the evidence provided by the applicant, it seems that documents 3, 5 and 6 were not raised in Parliament.
22. The agency submits that it is not necessary to demonstrate that the information in the documents was raised in Parliament, and has referred to a previous determination where I considered that:

preparation by a witness to give evidence before Parliament is so closely and directly connected to the business of Parliament that documents created in the course of such preparation are protected by Parliamentary privilege.<sup>10</sup>
23. It is the agency's view that I should follow this above reasoning in the circumstances of this external review. However, I consider that the previous matter can be distinguished from the circumstances of this current external review insofar as the previous matter I concluded that the proximity between the information in the documents and the conduct of the relevant Estimates Committee hearing was sufficient to attract parliamentary privilege. In this instance, I am not satisfied that such a proximity exists.
24. It is my view that documents 3, 5 and 6 are not exempt by virtue of clause 17(c). I note that in my provisional determination I considered that document 3 is exempt by virtue of clause 10, so I only determine to vary the agency's determination in relation to documents 5 and 6.

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<sup>8</sup> [Part 5: Exemptions | OAIC](#) (accessed 23 November 2023) at [5.194].

<sup>9</sup> *Treasury and Finance, Department for 2022/01526* [2022] SAOmbFOI (11 July 2022).

<sup>10</sup> *Health and Wellbeing, Department for 2019/10219* [2020] SAOmbFOI 13 at [22]

The parties' submissions on clause 5

25. I move to consider only the applicant's submissions in relation to clause 5, including supporting documentation, as the agency did not provide further submissions on this.
26. The communique of 24 February 2023 outlines the subject matters discussed in respect of delivering the Basin Plan. However, the communique suggests that several of those matters were 'noted' as opposed to discussed, which would suggest that that these topics were not debated at length.
27. For example, the communique states that Ministers noted NSW and Victoria sought two more years to deliver some projects. This does not mean that those states' positions on those projects were disclosed at length, if at all. Nor does it mean that SA's position on those topics was also detailed to the level outlined in the documents.
28. There may be aspects of the documents that were discussed in more detail, however. The communique states that Ministers 'discussed that the Commonwealth has released a Strategic Water Purchase Framework for the remaining 49 giganlitres (GL) of bridging the gap.' This would suggest to me that it is likely more detail was provided about this topic than the other matters that were merely noted or acknowledged.
29. Irrespective of the above, I still need to be satisfied as to the public interest test. The applicant has not provided any submissions in response to that, and I maintain my view as outlined in my provisional determination.
30. In relation to the remainder of the applicant's submissions, I do not propose to engage with them, other than to say I do not find them persuasive and maintain my view in my provisional determination.

Clause 9

31. The agency has also claimed that documents 5 and 6 are exempt pursuant to clause 9.
32. On my viewing of the documents, I am not satisfied that the information would constitute any opinion, advice, recommendation, consultation or deliberation in the course of or for the purpose of the decision-making functions of the Government, Minister or an agency.
33. The information contained is statistical and factual, which, by virtue of clause 9(2), would mean that the documents are not exempt. I have considered the agency's submissions on this and do not find them persuasive.
34. It is my view that documents 5 and 6 are not exempt under clause 9.

**Relevant law**

35. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.<sup>11</sup>
36. 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.

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<sup>11</sup> Freedom of Information Act 1991, section 12.

37. The following clauses of Schedule 1 of the FOI Act are relevant to my external review:

**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.

**9—Internal working documents**

- (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) the disclosure of which would, on balance, be contrary to the public interest.

**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.

**17—Documents subject to contempt etc**

- A document is an exempt document if it contains matter the public disclosure of which would, but for any immunity of the Crown—
- (a) constitute contempt of court; or
  - (b) contravene any order or direction of a person or body having power to receive evidence on oath; or
  - (c) infringe the privilege of Parliament.

38. Under section 48, the onus is on the agency to justify its determination ‘in any proceedings’. This includes the external review process.
39. 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**

40. Section 14(2) of the FOI Act requires agencies to deal with applications within 30 days after they are received. Section 19(2)(b) provides that if an agency fails to determine an application within 30 days after receiving it, it is to be taken to have determined the application by refusing access to the documents sought. However, section 19(2a) of the FOI Act provides that ‘nothing prevents an agency from making a determination to give access to a document on an application after the period within which it was required to deal with the application (and such a determination is to be taken to have been made under this Act)’.
41. In my view, section 19(2a) only has operation when an agency fails to determine an application within 30 days after it is received and has no operation once an applicant has sought an internal review. It should also be noted that section 19(2a) only permits agencies to make belated determinations ‘to give access to a document’ and cannot be utilised to refuse access. I have therefore treated the agency’s purported determination on internal review as further submissions from the agency.
42. The agency identified 12 documents within the scope of the application.

## Issues in this review

43. Having regard to the agency's submissions and the exemption clauses provided in Schedule 1 of the FOI Act, it is for me to determine whether to confirm, vary or reverse the agency's determination in regard to the documents in issue in this external review.

## Consideration

### Clause 17(c)

44. The agency submits that documents 1 - 3, 5, 6, 11 and 12 are exempt pursuant to clause 17(c) as they are briefing notes prepared specifically for use in Parliament, the disclosure of which would infringe the privilege of Parliament.
45. The agency provided the following submissions:

#### ***Clause 17 - Parliamentary privilege***

1. It is the department's submission that documents created or prepared for the purpose of use in proceedings in Parliament, or in preparation for proceedings, attract parliamentary privilege and are exempt documents under clause 17 of Schedule 1 to the FOI Act. The following submissions briefly set out the relevant legal principles, followed by an identification of the relationship between the particular documents caught by the applicant's application to the proceedings of Parliament.
2. In considering what is meant by the 'proceedings of Parliament', it is clear that it encompasses the asking and answering of questions in Parliament or before a committee of the Parliament: see e.g. *Cornwall v Rowan* (2004) 90 SASR 269, [384]-[397] (Bleby, Besanko and Sulan JJ).
3. It makes no difference that relevant words are written rather than spoken, and the privilege protects the preparation and collation of written documents with the purpose of using them in proceedings (even if ultimately they are not): see *Holding v Jennings* [1979] VR 289, 292-293; *Rowley v O'Chee* [2000] 1 Qd R 207, 220-222. The privilege extends to the preparation of a document for purposes of the transacting of business of a house of Parliament (or a committee).
4. The privilege protects against demands for documents under coercive process, not only against courts examining Parliamentary speech and drawing inferences. See *Re OPEL Networks Pty Ltd (in liq)* [2010] NSWSC 142; (2010) 77 NSWLR 128, [118]-[120] (Austin J); *Sportsbet Pty Ltd v Harness Racing Victoria (No 4)* [2011] FCA 196, [20]-[22] (Mansfield J). This proposition has been accepted in the context of FOI: See e.g. *Tebutt v Minister for Lands and Water* [2015] NSWCATAD 95, [68]-[72]; *McKay v Transport for NSW* [2017] NSWCATAD 212, [58]-[62].
5. In considering whether the privilege attracts to a particular document, what is critical is the purpose for which the relevant document was prepared, but it may also be helpful to analyse a document having regard to a potential distinction between 'primary' and 'incidental' documents. 'Primary' documents are such things as a parliamentary speech; an answer to a parliamentary question; a submission to a parliamentary committee or a brief to a minister on a matter that might be raised in a parliamentary session. 'Incidental' documents may include documents used to prepare a primary document. For example, the correspondence that passes between the Minister and the department for the purpose of answering a parliamentary question is incidental to the preparation of a primary document.
6. The department submits that a Parliamentary Briefing Note (PBN) has a clear purpose connected with the proceedings of Parliament, being for the purpose of



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briefing the Minister (or someone else) in preparation for parliamentary sittings (which may include hearings of a parliamentary committee).

7. As to the particular documents in this case:

- a. Docs 1-3, and 5-6 were briefing notes for the Chief Executive's use for an appearance before the Budget and Finance Committee on 30 January 2023.
  - These were provided by a Senior Cabinet and Parliamentary Officer in the Office of the Chief Executive of DEW to the Chief Executive of DEW by email on 27 January 2023.

The process for preparation of such PBNs involves the Chief Executive or Office of the Chief Executive requesting that PBNs be prepared for the purpose of an upcoming appearance. Usually, the process involves relevant Divisions identifying a list of matters for PBNs, being matters likely to be raised in Parliament. That list is then reviewed within the Office of the Chief Executive, and additional PBNs sometimes requested. Relevant Divisions within the Department will then prepare the PBNs, which are then finalised and provided to the CE.

- b. Docs 11-12 were prepared for the Minister's use in Parliament sittings in June/July 2023.
  - Document 11 was provided by a Senior Cabinet and Parliamentary Officer in the Office of the Chief Executive of DEW to an email address for the Office of the Deputy Premier on 24 June 2023.
  - Document 12 was provided by a Senior Cabinet and Parliamentary Officer in the Office of the Chief Executive of DEW to an email address for the Office of the Deputy Premier on 26 June 2023.

These were updated versions of previous PBNs that had been provided to the Minister for use in Parliament. They were updated and provided in accordance with the Department's usual practice of preparing (and then updating) PBNs for the Minister in relation to matters that may arise for consideration and debate. Generally, there is a practice that updates are made to PBNs and provided to the Minister's office in preparation for the following week of Parliamentary sittings. Divisions within the Department will review the last batch of PBNs and determine those that need updating, those that are no longer relevant, and if any new PBNs are required. Updated PBNs are provided with changes tracked so that the Minister and her advisors can efficiently review the PBNs and focus on the updates.

### ***Clause 9 - internal working documents***

8. In addition to clause 17, the PBNs are also exempt by reason of clause 9, being advice prepared and recorded in the course of and for the purpose of the decision-making functions of the Minister and the Department, disclosure of which would be contrary to the public interest: see eg the discussion of Justice Bell P in *McIntosh v Department of Premier and Cabinet* [2009] VCAT 1528, [51]-[70]; [89], [93]. See also *Re Peters and DPC (No 2)* (1983) 5 ALN N306; *Re Fewster and Department of Prime Minister and Cabinet* [1986] AATA 433, [54]-[56]; *Re Reith and Minister of State for Aboriginal Affairs* (1998) 16 ALD 709, 711; *McKinnon v Secretary, Department of Treasury* [2006] HCA 45; (2006) 228 CLR 423, [125] (Callinan and Heydon JJ); *The Herald and Weekly Times Pty Ltd v Department of Premier and Cabinet* [2013] VCAT 250, [27]-[28], [32]-[36], [78].
9. That release of Parliamentary briefings would be contrary to the public interest goes to the fundamental basis as to why Parliamentary privilege attaches to briefings, as recognised in *Re OPEL Networks Pty Ltd (in liq)* (2010) 77 NSWLR 128, [118]:

It seems to me necessarily true, and not dependent upon the evidence of the particular case, that if briefings and draft briefings to Parliamentarians for Question Time and other Parliamentary debate are amenable to subpoenas and other orders for production, the Commonwealth officers whose



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task it is to prepare those documents will be impeded in their preparation, by the knowledge that the documents may be used in legal proceedings and for investigatory purposes that might well affect the quality of information available to Parliament. To take a step that would have that consequence would, I think, derogate from the force of the Bill of Rights and run contrary to the historical justification for that legislation ...

46. The 'proceedings of Parliament' are protected by the privilege. Case law in South Australia suggests that the meaning of 'proceedings in Parliament' is broad.<sup>12</sup>
47. I accept that 'investigating, deliberating and legislation' are central roles of the Parliament. I also accept that on a broad interpretation, the 'proceedings of Parliament' would include a parliamentary briefing note where the subject matter of that note has been explored in, or presented to Parliament.
48. I have searched Hansard which suggests that the subject matter of the briefing notes relating to documents 1, 2, 11 and 12 were presented to Parliament. It was unclear from Hansard, however, that the subject matter of documents 3, 5 and 6, were also discussed.
49. I also note that while evidence suggests that the matters contained in some of the documents have been referenced through the public comment of individual members of Parliament, as the privilege attaches to the Parliament collectively, it cannot be waived by an individual member.<sup>13</sup>
50. I have considered the agency's submissions and do not accept the agency's interpretation of *Holding v Jennings* [1979] VR 289, namely that 'proceedings of Parliament' include unspoken documents even if ultimately not used in proceedings. My understanding of the privilege and the principles arising from this particular case, is that it can protect unspoken documents, but only in the event that those documents are still tendered/tabled in Parliament. It would not include documents that have merely been prepared for and not utilised in a proceeding of Parliament.
51. I accept that a parliamentary briefing note could be prepared with the expectation that it is protected by parliamentary privilege, however, the mere preparation of a document does not mean that it is automatically covered by the privilege,<sup>14</sup> the content of which is not presented before Parliament.
52. Irrespective of the agency's submissions in relation to *Holding v Jennings*, the agency has confirmed that documents 1 - 3, 5 and 6 were provided by a Senior Cabinet and Parliamentary Officer in the Office of the Chief Executive of DEW to the Chief Executive of DEW by email on 27 January 2023 for use in the next Budget and Finance Committee meeting. Documents 11 and 12 were prepared for the Minister's use in Parliament sittings that occurred in June/July 2023 and was provided by a Senior Cabinet and Parliamentary Officer in the Office of the Chief Executive of DEW to an email address for the Office of the Deputy Premier on 24 and 26 June 2023.
53. I am satisfied that disclosure of documents 1, 2, 11 and 12 would 'infringe' upon the privilege of the Parliament, as there is evidence to suggest that the subject matter of the documents were subject to 'proceedings' in Parliament. I am not satisfied that documents 3, 5 and 6 are exempt under clause 17(c) for reasons I identified above.

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<sup>12</sup> See *Australian Broadcasting Corporation v Chatterton* (1986) 46 SASR 1 per Pryor J citing comments by Ayelsworth JA in the Ontario Court of Appeal case of *Roman Corp Ltd v Hudsons Bay Oil & Gas Ltd* (1972) 23 DLR (3d) 292 at 298. *Rann v Olsen* (2000) 76 SASR 450 at pp461, 470 per Doyle CJ.

<sup>13</sup> *Hamsher v Swift* (1992) 33 FCR 545.

<sup>14</sup> *Department of Treasury and Finance v Waters* [2023] SACAT 6 (21 March 2023) [53-55].

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54. The agency has also stated that documents 1, 2, 11 and 12 are exempt by virtue of clause 9, however, I do not propose to further consider any other exemption that may apply as it is my view that the documents are exempt by virtue of clause 17(c).

### Clause 5

55. The agency submits that documents 8 and 9 are exempt pursuant to clause 5(1).
56. It is necessary to examine whether either of the conditions in subclause 5(1)(a)(i) or (ii) are met, which relate to damage to inter-governmental relations and confidentiality of inter-governmental communications respectively.
57. It is clear documents 8 and 9 contain information about the States' positions in negotiations with respect to water management. It is foreseeable that disclosure of this information could reasonably damage inter-governmental relations by weakening positions and bargaining powers for certain states, while unfairly providing an advantage to other states that become aware of such information.
58. I am therefore satisfied that documents 8 and 9 are captured by clause 5(1)(a).
59. I now turn to consider whether this information would, on balance, be contrary to the public interest pursuant to the requirement in clause 5(1)(b).
60. The agency concluded that disclosure of documents 8 and 9 would be contrary to the public interest given:
- the potential damage and prejudice to inter-governmental relations and negotiations
  - it could hinder the frank and fearless discussion/advice, or cause departmental staff to withhold information.
61. The agency considered that factors in favour of disclosure included:
- the matter being of community interest
  - to promote the objects of the Act.
62. I agree with the agency's view that disclosure would be contrary to the public interest. The community is still able to access information about the subject matter of the documents, such as through public comment, media updates and other publicly available information provided by the agency. To provide finer details in relation to inter-governmental strategies, positions and bargaining powers could limit and hinder the intended purpose of negotiations between governments, namely, to achieve satisfactory outcomes for their respective communities.
63. In my view documents 8 and 9 are exempt pursuant to clause 5(1). The agency has claimed that these documents are also exempt by virtue of clauses 1(1)(e), 9(1)(a)(i), 9(1)(a)(ii), 10(1) and 16(1)(a)(iv), but I do not propose to examine those clauses given my views above.

### Clause 10

64. The agency submits that documents 1, 3 and 8 are exempt pursuant to clause 10(1). I only propose to discuss document 3 as I consider that documents 1 and 8 are exempt by virtue of other clauses in the Act as identified above.
65. Legal professional privilege exists to protect confidential communications between a client and lawyer. It has been established that it attaches to communications made with

the dominant purpose of giving advice or for use in actual or anticipated litigation.<sup>15</sup> The privilege can attach to communications received from salaried lawyers employed by government but only if they are made independently, in a professional capacity, are confidential, and arise from the relationship between lawyer and client.<sup>16</sup>

66. I am satisfied that document 3 is exempt by virtue of clause 10(1). Disclosure of this document would relay information about a client's anticipated legal proceedings.

#### Clause 9

67. The agency submits that document 7 is exempt by virtue of clause 9(1). For a document to be exempt pursuant to clause 9(1), both elements under clause 9(1)(a) and 9(1)(b) need to be established.
68. The scope of clause 9(1)(a) is wide, particularly given the words 'that relates to'. The 'opinion, advice or recommendation', or 'consultation or deliberation' must nevertheless have been obtained, prepared or recorded in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency.
69. On my analysis of the document, I am satisfied that document 7 contains opinion, advice and recommendations from the agency and was information obtained by the agency in course of, or for the purposes of its decision-making functions.
70. I now turn to consider whether this information would, on balance, be contrary to the public interest by virtue of clause 9(1)(b).
71. In coming to the conclusion that disclosure would be contrary to the public interest, the agency identified the following factors as favouring non-disclosure:
- pre-mature disclosure may prejudice the agency's decision making process
  - disclosure may prejudice inter-governmental negotiations
  - disclosure may cause further procedural delays in reaching agreements.
72. The agency considered factors in favour of disclosure included:
- that the matter may be of community interest
  - to promote the objects of the Act
  - to provide community insight into government decision-making.
73. On balance, I agree with the conclusion of the agency, that the factors favouring non-disclosure outweigh factors in favour of disclosure. In particular, revealing governmental strategies that could weaken a state's position and ability to negotiate effectively for the community it represents.
74. I do not propose to further consider any other exemption that may apply as it is my view that the document is exempt by virtue of clause 9(1).

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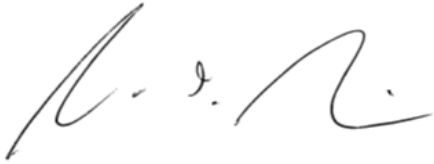
<sup>15</sup> *Esso v The Commissioner of Taxation* [1999] HCA 67, per Gleeson CJ, Gaudron and Gummow JJ at [35] and [61].

<sup>16</sup> *Waterford v The Commonwealth* (1987) 163 CLR 54, per Mason and Wilson JJ at 61-62.

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### Determination

75. In light of my views above, I vary the agency's determination; namely that documents 5 and 6 are to be released in full and that the remainder of the documents are exempt by virtue of clauses identified above.

A handwritten signature in black ink, appearing to read 'W. Lines', with a stylized flourish at the end.

Wayne Lines  
**SA OMBUDSMAN**

14 December 2023

## APPENDIX 1

### Procedural steps

Date	Event
12 June 2023	The agency received the FOI application dated 12 June 2023.
13 July 2023	The agency failed to determine the application within the 30 day period required by the FOI Act, <sup>1</sup> and is deemed to have refused access to the documents. <sup>2</sup>
1 August 2023	The agency received the internal review application dated 1 August 2023.
15 August 2023	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. <sup>3</sup>
24 September 2023	The agency conducted a belated internal review.
16 August 2023	The Ombudsman received the applicant's request for external review dated 16 August 2023.
15 September 2023	The Ombudsman advised the agency of the external review and requested submissions and documentation.
3 November 2023	The Ombudsman issued his provisional determination and invited submissions from the parties.
12 November 2023	The applicant provided submissions in response to the provisional determination.
14 November 2023	The agency provided submissions in response to the provisional determination.
27 November 2023	The Ombudsman provided the agency with a further opportunity to provide submissions given the proposal to alter his view in his provisional determination.
4 December 2023	The agency provided secondary submissions in response.

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<sup>1</sup> Freedom of Information Act 1991 s 14(2).

<sup>2</sup> Freedom of Information Act 1991 s 19(2).

<sup>3</sup> Freedom of Information Act 1991 s 29(5).