

DETERMINATIONS

External reviews pursuant to *Freedom of Information Act 1991*

Applicant:	Hon Rob Lucas MLC
Agencies and references:	<ol style="list-style-type: none">Department of Further Education, Employment, Science and Technology BR10/1678; 2010/02536Primary Industries and Resources SA 2010/00570; 2010/02537South Australian Tourism Commission FOI 1/2010; 2010/02538Department for Correctional Services CEN/10/0401; 2010/04003Department of Planning and Local Government PLAN F2010/000561; 2010/04004Attorney-General's Department (Multicultural SA) 10/1507; 2010/04005Department of Treasury and Finance T&F10/0537 and TF10D04204; 2010/04006Attorney-General's Department 10/1508; 2010/04007Attorney-General's Department (Office of Recreation and Sport) 10/1506; 2010/04008Department for Water 10DFW01796; 2010/05560
Determinations:	<p>The determinations of agencies 4, 6, 7 & 9 are confirmed</p> <p>The determinations of agencies 1-3, 5, 8 & 10 are varied</p>

REASONS FOR DETERMINATIONS

Background

- On 29 March¹ or 31 March 2010,² the applicant applied under the *Freedom of Information Act 1991 (FOI Act)* to each of the agencies for access to:

copies of all briefing documents prepared by the agency for a possible incoming Liberal Government.
- The Department of Planning and Local Government (**DPLG**) clarified with the applicant's office that his application related to the 2010 election. I have proceeded on

¹ Agencies 2 to 10.

² Agency 1.

the basis that this was the applicant's intention regarding the nine other applications before me.

3. 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.³

Agency	Number of documents identified ⁴	Date of original determination ⁵	Exemption clauses relied upon initially	Date of internal review application	Date of internal review determination	Date of external review application
1. DFEEST	2	27 April 2010	1(1)(a); 1(1)(f)	12 May 2010	19 May 2010	15 June 2010
2. PIRSA	3	29 April 2010	1(1)(a); 1(1)(b)	12 May 2010	25 May 2010	15 June 2010
3. SATC	1	10 May 2010	1(1)(a); 1(1)(b)	On or about 11 May 2010	25 May 2010	15 June 2010
4. DCS	4	16 June 2010	1(1)(a); 1(1)(b)	9 July 2010	23 July 2010	12 August 2010
5. DPLG	5 ⁶	15 July 2010	1(1)(b); 9(1); 13(1)(b)		30 July 2010	12 August 2010
6. AGD (MSA)	1	28 June 2010	1(1)(a)	On or about 8 July 2010	21 July 2010	12 August 2010
7. DTF	3	14 July 2010	1(1)(a); ⁸ 7(1)(c); 14; 15	19 July 2010	1 August 2010	12 August 2010
8. AGD	11	28 June 2010	1(1)(a) - 1 to 7; 1(1)(b) - 8 to 11 ⁹	On or about 8 July 2010	21 July 2010	12 August 2010
9. AGD (ORS)	1	28 June 2010	1(1)(b) ¹⁰	On or about 8 July 2010	21 July 2010	12 August 2010
10. DFW	6	8 June 2010	1(1)(a); 9(1); 16(1)(a)(iv) & 16(1)(b)	9 July 2010	10 September 2010	11 October 2010

4. The level of detail included in the agencies' determinations varied. The following are extracts from notices of some of the agencies' determinations following internal review in support of their reliance on clause 1(1) of Schedule 1 to the FOI Act:

Agency 5

This agency prepared the documents in accordance with the instructions from the Department of Premier and Cabinet. The purpose behind the production of the documents was to enable this agency's Chief Executive to brief the new Minister of their portfolio in the event of a change in Government. However, the briefs were also prepared to be incorporated into a compendium of briefs from each agency to provide Cabinet with a whole of Government overview of all key issues facing Government in preparation for a new Parliamentary session.

³ Although they did not always rely on the same exemption clauses.

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

⁵ Most of these determinations were made after the Department of the Premier and Cabinet returned transferred applications to the agency, following communications with the applicant.

⁶ One of these documents may be described as a 'foreword'. DPLG has numbered it document 3 (DPLG 3).

⁷ I have inferred the part of clause 1(1) relied upon from the wording of the determination.

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

⁹ I have inferred the parts of clause 1(1) relied upon from the wording of the determination.

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

Agency 7

In making the initial determination, the Accredited FOI Officer followed advice provided by the Crown Solicitor's Office (CSO) and Cabinet Office. Prior to the election, Cabinet Office advised agencies that the Labor and Liberal incoming briefs would be noted at the first meeting of Cabinet depending on who won the election and therefore the briefs were prepared for submission to Cabinet...

Your assertion that Labor Ministers would not have seen the Liberal incoming briefs is correct, however, when the briefings were prepared, they were prepared with the intention that they would be provided to Cabinet to note if the Liberal Party won the election.

To be exempt under the Cabinet clause a document must be prepared with the intention of being submitted to Cabinet, and therefore this exemption clearly applies to the Liberal incoming government briefs.

Agency 8

As provided for in Schedule 1 it is irrelevant whether the documents concerned actually went to Cabinet. The documents fall within the scope of the exemption when the intention of the author of the document was that the document was for submission to Cabinet or was a preliminary draft of same.

Agency 10

In this instance, the clear instruction from the Department of the Premier and Cabinet was that briefings would be presented to Cabinet – the returning government briefs in the event that the government was returned, and the Liberal Party briefs to the Liberal Cabinet in the event that the Opposition had won the elections. I am advised that this is in fact what transpired.

5. 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.

The briefing folders at this election prepared for a possible Liberal Minister would not be shown or presented to current Labor Ministers and certainly would not have been presented to Cabinet.¹¹

External review process

6. Following receipt of the applications, I requested the following information from each agency:

- a) The applications for access and internal review
- b) The agency's determinations
- c) The documents within the scope of the application for access¹²
- d) Any further correspondence or file notes recording communication between the agency and the applicant relevant to the application

¹¹ The applicant included similar submissions in his applications for internal review.

¹² Despite repeated requests, it took seven months for SATC to provide the document, and four months for DTF to agree to provide the documents. This necessarily, and unfortunately, delayed the progress of my reviews.

- e) Any internal communications, or communications between the agency and any other party (other than my office), relevant to the determinations (documentation relevant to consultations undertaken, or legal advice, for example)
- f) Any documents that support or are relevant to the claim under clause 1(1) of Schedule 1 to the FOI Act.
7. On 24 August 2010, Ms Judy Hughes of the Crown Solicitor's Office (**CSO**) contacted Ms Tonia Nielsen of my office. She offered to coordinate the agencies' responses, given the likelihood of their submissions being similar. At the time, the Crown Solicitor had only received instructions from agencies 5 to 9.
8. On 31 August 2010, Ms Nielsen wrote to agencies 1 to 4, and on 15 October 2010 I wrote to agency 10 requesting consent to communicate with Ms Hughes of the CSO on their behalf. They all provided their consent. Given this consent, and the similar issues involved, I have decided to consolidate my determinations in one document.
9. By letter dated 20 September 2010 I wrote to Ms Hughes (**my letter**) and requested various information and submissions. I referred to the onus on each of the agencies to justify their determinations under section 48 of the FOI Act. At the same time, I asked Ms Hughes to identify any information in my letter and the Crown Solicitor's response that the agencies did not want disclosed to the applicant, *and to provide reasons why*.
10. The Crown Solicitor provided submissions by letter dated 18 October 2010 (**the Crown Solicitor's letter**), supported by nine annexures. Seven of the annexures are legal opinions in response to item 1 of my letter, one is a minute from the Chief Executive of AGD in response to part 2, and one is 'A Guide for SA Government Agencies'. Agency 10 subsequently adopted the submissions contained in the Crown Solicitor's letter. The agencies expressed the view that the submissions were confidential, along with parts of my letter 'that would tend to identify any particular document delivered ... [to me] in response to ... [my] request for explanatory information'. The Crown Solicitor's letter advised that:
- In the agencies' submission, there is no right in the Act for the applicant to receive anything further than your decision as to whether or not you were satisfied that the agencies' claims of exemption should be upheld, reversed or varied.
11. Subject to the restriction imposed by section 39(15) of the FOI Act,¹³ my view is that an applicant should be fully informed of the facts and arguments in an external review. This is notwithstanding the fact that the applicant bears no legal burden to disprove the agency's claims.
12. Below I have quoted from or paraphrased the relevant parts of my and the Crown Solicitor's letters.¹⁴ I have nevertheless excluded most of the references to particular documents.

Response to item 2 of my letter, requesting a summary of any additional advice or instructions given to agencies about the preparation of the briefs:

... The agencies were advised that the process would be an iterative one and that they were to complete sections 2 and 3 of the template first and submit the results. DPC worked on sections 1 and 4 and all four were sent out to agencies and then

¹³ Section 39(15) of the FOI Act says that I should avoid disclosing matter that an agency claims is exempt in the reasons for my determination.

¹⁴ I have omitted paragraph numbers. Paragraph 12 of these reasons is the same as paragraph 13 of the reasons for my revised provisional determination dated 12 May 2011.

returned where significant re-writing occurred in relation to some portfolio[s] and some parts. Agencies were advised from the beginning that the 'red' briefings would be collated into the compendium and noted by Cabinet if Labor was returned, and the 'blue' briefings would be noted by the new Liberal Government if the Liberal Party won the election. Agencies were told that a copy of the approved final version of the brief in respect of each portfolio would be returned to each agency to use to brief the Minister in relation to the respective party's election commitments...

Response to item 6 of my letter, requesting a response to the applicant's claims that:

- a** briefing documents were not presented to Cabinet when Mr Lucas was a Minister
- b** briefing documents were released to Mr Lucas under the FOI Act in 2002.

I expressed particular interest in whether there had been a procedural change and, if so, when, how and why this came about (noting the Department of Correctional Services' claim never to have released such documents):

I am advised by DPC that briefings were not presented to Cabinet in 1997 (or before). The applicant's request for copies of such briefings from DPC following the 2002 election triggered consideration of the nature of the documents. The documents clearly meet the criteria for note to Cabinet, namely they contained high level policy and sensitive material and affected the whole of the Government and not simply one part of it. However, they were not submitted to the pre-election Cabinet because they were specifically not for that Cabinet. The briefings were for a Cabinet to note, but not the Cabinet of the day. They were either for a re-elected Government, with possibly a new Cabinet, or a new Government altogether. The caretaker convention prevents the versions for an alternative Government being submitted to Cabinet. Thus their sensitivity and high level policy content could not be given the usual "Cabinet" treatment *prior to the election*.

... the Department of Treasury and Finance and the Department of the Premier and Cabinet released some documents in part... The agencies covered by this submission (apart from DTF) were not, on my understanding, subject to separate FOI requests in respect of the briefings, which explains the Department of Correctional Services' claim that it has never released documents.

It appears that these issues were highlighted by the applicant's 2002 requests and was a contributing reason to a revised process in 2006. The other significant contributor was, however, a Chief Executive of DPC who commenced a process of centralising the briefing process in the lead-up to an election.

There were further procedural changes upon the commencement of the current Chief Executive, DPC, in February 2009. He and the Deputy Chief Executive, who had been appointed just prior to the 2006 election, reviewed and revised the process for preparing for a change of Government, or a returned Government with a new platform. The content and quality of the briefings was rendered more consistent and aligned to the highest level of Government policy objectives... The applicant's request to have access to the agencies briefings reflected, it is submitted, his understanding that these were essentially agencies' documents that were refined by DPC. The 2010 process, however, had a different focus. It was an increasingly centralised process with greater input by DPC. Nevertheless, agencies were attempting to make submissions to this process that would constitute the final text for the document that would be submitted to Cabinet to note.

Response to item 7 of my letter, requesting reasons for the agencies' claims that 'generic briefings' (not necessarily prepared for a Labor or a Liberal government) are outside the scope of the applications, and requesting copies of any additional documents

According to the Crown Solicitor's letter, neither forewords nor generic briefings are within the scope of the applications. Generic briefings were 'not specific to either party. Hence, none is identifiable as for the incoming Liberal Government.' Forewords were prepared 'to cover ... the final version of the briefing ... for the Chief Executive to brief his or her Minister [and] not for the "incoming Government".'

At the time, generic briefings were thought to be 'unique to AGD',¹⁵ and were provided by divisions to incorporate into briefings, and not all agencies prepared forewords.

Response to part 9 of my letter, asking the agencies to specify the parts of clause 1 of Schedule 1 to the FOI Act relied upon, including evidence and legal authority. I specifically asked whether the agencies relied on clauses 1(1)(a) (given agencies sent the document to DPC to be reviewed and amended, and [DPC] then collated and printed them) and 1(1)(e) of Schedule 1 to the FOI Act¹⁶ (given my understanding that the documents were not submitted to Cabinet). In addition, I asked for an apparent discrepancy to be explained.

... The Incoming Government Briefs are prepared under the principles of caretaker Government... It is only during the caretaker period, in anticipation of a possible change of Government, that an agency¹⁷ undertakes work for the Opposition. It does so in order to ensure that in the event that there is a change of Government, the new Government is not hampered by a lack of information and the activities of Government can continue without interruption. Although the Incoming Government Briefs are prepared in an apolitical manner, they provide agencies with an important opportunity to demonstrate how they can help to deliver a new Government's agenda. For the briefs to be useful, they necessarily contain sensitive and confidential information. Accordingly, DPC explicitly directed agencies to prepare the Incoming Government Briefs for submission to Cabinet to note.

Following the election of the Labor Party, copies of the Labor briefs were formally noted at the first meeting of Cabinet. By that process, the Cabinet Ministers took collective responsibility for their knowledge of the content of the Incoming Government Briefs, which contained a snapshot of all significant issues before the Government leading into a new Parliamentary session...

The Incoming Government Briefs were created for 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.

¹⁵ The CSO subsequently advised that SATC and DPLG also produced 'generic' briefings.

¹⁶ Agency 3 raised a claim under clause 1(1)(e) in a letter to my office dated 20 July 2010.

¹⁷ Except Parliamentary Counsel [footnote 2 in the letter].

It is the first purpose that attracts the exemption. This dual purpose is not fatal to the Brief being exempt as a Cabinet document. Its Cabinet purpose need not be its sole purpose.¹⁸

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 The following evidence clearly demonstrates that the Incoming Government Briefs were prepared for Cabinet.

On 4 February 2010, DPC convened a meeting to brief agencies on developing the Incoming Government Briefs. At this meeting, agencies were advised that their briefs would be submitted to Cabinet. I understand that you have a copy of the PowerPoint presentation ... [which] clearly states that the relevant version (Government or Opposition) of the collated briefs would be submitted to Cabinet.

Soon after this meeting, DPC provided the agencies with a template to assist with the preparation of the briefs. Each page of the template was marked '*Cabinet-in-Confidence*', reinforcing the directive that the briefs would be submitted to Cabinet. It is normal practice within Government to mark documents prepared for Cabinet with this endorsement. The briefing template was also password protected, thus reinforcing the confidential nature of the document. This is consistent with the manner in which Cabinet documents are treated.

In this context, the agencies prepared the Incoming Government Briefs with the intention and on the clear understanding that it would be submitted to Cabinet should the Liberal Party win the election.

Claiming the exemption is not affected by the fact that, depending on the result of the election, only one party's briefs would ever be submitted to Cabinet. Clause 1(1) of the FOI Act operates by reference to the intention that was held at the time the document was prepared. This is clear from the inclusion of the words '*...whether or not it has been so submitted*' in clause 1(1) of Schedule 1. The important point is that at the time the agencies prepared both the Liberal and Labor briefs, each was prepared with the intention that it would be submitted to Cabinet.

If the applicant were to be granted access to the Briefs, an important principle underpinning the caretaker convention would be undermined. In order to prepare properly for an election under the Westminster system, government agencies are required, for a short period, to disengage from the elected component of the Executive. During that period, it is appropriate for the most senior executives of Government departments to brief the Opposition in certain circumstances (e.g. matters of major public significance) and to refrain from undertaking major decision-making under delegated powers from Ministers. The corollary of this is that those actions, and the documents associated with them, must not be obtained by the newly elected Government so that the integrity of this process can be preserved. This application would undermine those conventions by seeking access to documents prepared during this special period to assist the Opposition if it were to successfully contest the election. Given that the Opposition was not successful in contesting the election, it is not appropriate for either the Government or the Opposition to have access to the document. There is significant public benefit in the proper maintenance of caretaker processes. They enable ordinary Government business to continue in a period of transition and they ensure that a newly-elected Government is not disadvantaged by commencing a term in an information vacuum.

¹⁸ *Secretary to the Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11 per Buchanan JA at para 13 [footnote 3 in the letter].

¹⁹ *Re Fisse and Department of Treasury* (2008) 101 ALD 424, 434 [footnote 4 in the letter].

Alternative Cabinet Document Exemption

Alternatively, the agencies submit that the Briefs are exempt under clause 1(1)(e) as they contain matters the disclosure of which would disclose information concerning a deliberation or decision of Cabinet.

The Incoming Government Briefs are in large part very similar to their Labor counterparts²⁰, a copy of which was noted by Cabinet. Although two distinct briefs were prepared by agencies, a large proportion of the two briefs contain the same information, advice and recommendations.

In *Re Fisse*,²¹ the Tribunal discussed whether a document was exempt under clause 1(1) if the document was not provided to Cabinet, but its release would disclose material that formed part of a document submitted to Cabinet. According to the Tribunal, the fact that a document has not been submitted to Cabinet does not necessarily weaken a claim of Cabinet confidentiality. The Deputy President stated that although the document did not itself fall within the exemption afforded to Cabinet, it was inextricably interwoven with the submissions ultimately placed before Cabinet, and was therefore exempt.²²

Releasing the Liberal Incoming Government Brief would necessarily disclose material that was submitted to Cabinet to note, namely the Brief prepared for the Labor Government. In *Re Fisse*, the Deputy President quoted a passage from *Re Reith and Attorney-General's Department*,²³ which concluded that the important principle of Cabinet secrecy would be undermined if access to a document was granted in these circumstances.²⁴

Having been unsuccessful in contesting the election, the caretaker convention ought not be undermined by the provision of the document to the applicant. Further, it would indirectly provide access to [the] bulk of the material in the Government's Brief and this would undermine the benefit derived from the newly-elected Government's receipt of a comprehensive account of all of the issues facing the Government in preparation for a new Parliament.

Internal Working Documents

... The document contains opinion, advice and recommendations prepared for the purposes of the decision-making functions of a new Minister and Government regarding the agencies' business. The document was designed to inform a new Minister about issues that an incoming government would need to focus on in the initial phase of a new term, as well as providing recommendations for consideration.

In considering the public interest component of this exemption, the agencies have sought to balance on the one hand, 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.

The preparation of Incoming Government Briefs for both major political parties in an impartial and apolitical manner is a core responsibility of the public service. I repeat the submissions in relation to the role of this document in the caretaker period above.

I therefore consider that disclosure of the Incoming Government Briefs would be contrary to the public interest.

²⁰ With some variation between agencies... [One agency's] alternative briefs are more dissimilar than other agencies' briefs [footnote 5 in the letter].

²¹ [2008] AATA 288 [footnote 6 in the letter].

²² *Re Fisse v Department of Treasury* [2008] AATA 288 [footnote 7 in the letter].

²³ (1986) 11 ALD 345 [footnote 8 in the letter].

²⁴ [2008] AATA 288 [footnote 9 in the letter].

The Crown Solicitor claimed 'that there are other exemptions that apply to portions of the Brief', but has not addressed these claims in light of the claims made with respect to the documents as a whole.

The agencies also confirmed their reliance on clause 1(1)(a) of Schedule 1 to the FOI Act. The Crown Solicitor's letter included the following reasons:

... When the document was prepared, although agencies were aware of the possibility - even likelihood that DPC would amend the document, it was prepared with a view to it being the final document that would be incorporated into the compendium and be submitted to Cabinet.

... The fact that DPC may - but equally may not - have intervened to amend and collate does not detract from the primary argument that the document was prepared for Cabinet.

Cabinet submissions are regularly re-formatted on receipt from agencies. They are often submitted in an electronic format...

The agencies also claim exemption based on 1(1)(b) and 1(1)(c). All of the first three grounds in clause 1(1) have as their critical words "specifically prepared". So far as agencies were aware, their electronic or paper contribution may have been the final document, a draft, or contain an extract from or be part of, the final version...

Explain the apparent discrepancy between the handwritten note on ... [the] letter ... indicating that volumes for CEs to brief incoming Ministers were not for Cabinet, and the text that copies of each of the portfolio volumes would be noted at the first meeting of Cabinet.

On the version I hold, with hand-written notes, the effect is not as stated above. The margin note reads "only to Prem not to whole of Cabinet". These words are next to the text, "The Premier's overview will be submitted to him or her as chair of Cabinet only so would not be circulated more widely."

Note that the "overview" referred to here is not the same as the "overview" at the beginning of each of the Portfolio volumes. The Premier's "overview" was a DPC document [and] was intended to be submitted to the Premier as chair of Cabinet but not to the rest of Cabinet. It was prepared by DPC, not by agencies. It is not within the scope of the applications made to the agencies covered by this submission.

Response to item 10 of my letter, asking the agencies to specify the exemption clause(s) relied upon if they claimed the forewords exempt, and to provide brief reasons to support their claims.

The Crown Solicitor submitted the forewords would be exempt under clause 9(1), and relied on the reasons set out in the second and fourth paragraphs under 'Internal Working Documents' in support of the claim that it would be contrary to the public interest to release them.²⁵

²⁵ The second paragraph quotes clause 9(1) of Schedule 1 to the FOI Act, and the fourth paragraph commences 'In considering the public interest' and is quoted above.

Response to item 11 of my letter, querying the practicability of providing partial access to the documents (for example, tables, statistics and information that is available publicly).

The agencies asked to make separate submissions about the practicability of partial release in the event that I am not satisfied that the documents are exempt under clause 1(1). This is because they claim that in the alternative the documents would be exempt under clause 9(1) of Schedule 1 to the FOI Act.

13. Given the agencies' claims, I invited the CSO to identify any claimed exempt matter in the reasons to my provisional determination dated 1 March 2011. By email dated 8 March 2011 Ms Hughes objected to certain information being included in my provisional determination, but advised that it did not contain claimed exempt matter. I received submissions on this point during a meeting on 16 March 2011 between Ms Hughes of the CSO and Ms Megan Philpot and Ms Nielsen of my office. I received further submissions and documents from the CSO by emails dated 8 March, 22 March, 27 April and 4 May 2011, and a letter dated 9 March 2011. In addition, on 7 March 2011 DTF provided part of one document to my office that had previously not been provided (DTF 2, headed 'Minister for Finance'). DTF explained that the document was located in a locked cabinet in the office of a staff member who had been absent when the initial searches were conducted; it was located when conducting further searches in response to my provisional determination dated 1 March 2011.
14. By email dated 8 March 2011 Ms Hughes advised that the forewords were prepared in the same manner as the briefings, and incorporated into the final documents submitted to Cabinet. The CSO therefore submitted that clause 1(1)(a) of Schedule 1 to the FOI Act applied, and Ms Hughes attached an email chain from Mr Eccles to various agencies dated 2 March and 10 March 2010 in support of that claim. At the meeting on 16 March 2011 Ms Nielsen expressed the view that the evidence provided to date appeared insufficient to justify the claim of exemption under clauses 1(1).
15. By email dated 27 April 2011 the CSO provided submissions about the forewords and documents B4 and B5. The CSO reasserted the agencies' position that the forewords are outside the scope of the applications as they 'are not briefing documents'. I have been informed that by email dated 2 March 2010 agency Chief Executives were asked to provide forewords by the Chief Executive of DPC separately to the request for briefings, and were prepared 'later than the briefings and very close to the election itself'. In my view, however, the 10 March and not the 2 March 2010 contains the request. The CSO submitted that '[i]f the forewords [sic] are a "briefing", then they fall on the edge of that category. They do not convey substantive information; they provide an overview of information.' The agencies have submitted, however, that the forewords 'relate closely to the "substantive" briefing documents and it is open to argument as to whether they constitute briefing documents themselves.' In the alternative, the agencies claimed the forewords are exempt under clauses 1(1)(a), 1(1)(f) and 9(1) of Schedule 1 to the FOI Act. The agencies relied on previous submissions made with respect to clause 9(1). In support of the claims under clauses 1(1)(f) and 1(1)(a), the CSO submitted on behalf of the agencies that the forewords were:

prepared for a Minister in circumstances in which:

- the document would in fact go to Cabinet with the briefings if the Liberal Party was elected to Government; and
- the document is directed at conveying the Chief Executive's overview to his or her Minister *in relation to* the matter of the substantive briefings, which were proposed to be submitted to Cabinet.

... Finally, it is clear that if the Liberal Party had won Government, the Liberal forewards [sic] would have been submitted to Cabinet. This much can be concluded from the fact that the Labor forewards [sic] were bound into the booklets that make up the Labor briefings and submitted to Cabinet. It is therefore further submitted that the documents are exempt under clause 1(1)(a) because the process for which they were created was one in which the documents would be submitted to Cabinet.

16. The CSO further advised of the AGD's claims that documents B4 and B5 are outside the scope of the application:

... Neither B4 nor B5 is part of the agency's (AGD's) briefing. Rather, it is content from a business unit within AGD proposed for inclusion into or to provide a basis for content for, the AGD briefing.

17. As a result of documents and submissions received in response to my provisional determinations and reasons dated 1 March 2011, I revised some of my provisional determinations and reasons.
18. On 12 May 2011 I provided my revised provisional determinations and reasons to the applicant and the CSO, and invited their responses.
19. The CSO responded by email dated 26 May 2011 and advised as follows:

... The agencies do not resile from their earlier submissions but do not wish to make any further submissions in support of their claims...

DPLG submits that these [two] paragraphs might reasonably be expected to cause damage to intergovernmental relations contrary to the public interest and as such are exempt pursuant to clause 5. The content of these paragraphs is speculative and to publicise it now may unnecessarily interfere with the policy development process...

20. The applicant's response dated 26 May 2011 included the following submissions:

As previously advised, I note under this same Freedom of Information Act I received copies of 2002 documents prepared for an incoming Labor Government.

It is now apparent that this Government has used the device of tabling in Cabinet as an attempt to get around the Freedom of Information Act and prevent this type of document being released.

Whatever your decision, I hope in your reasons you can indicate whether the 'intention' was going to be that all Ministers had copies of all briefing documents or only those that related to their responsibilities – which of course they would already have from their department.

I note the major reason for your provisional determination appears to be the argument departments had an intention to present those documents to Cabinet.

However, I submit that contention is wrong. The intention to present these documents was only if a Labor Government had won the election. The clear intention of Departments in preparing those documents was they not be presented to Cabinet in the event the Labor Government won the election. This in fact is what actually happened. Therefore the departments cannot use this device to get around the Freedom of information Act.

Exemption clauses

21. According to the joint submissions made in the Crown Solicitor's letter and subsequent emails from the CSO, the agencies rely on clauses 1(1) and 9(1) of Schedule 1 to the FOI Act to claim exemption over the briefs and the forewords in their entirety. In addition, DPLG relies on clause 5(1) to claim that parts of DPLG 3 are exempt.

Clause 1

22. Clause 1 of Schedule 1 to the FOI Act provides:

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.

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

24. 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.²⁶

25. 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.²⁷ Subsequent changes to Cabinet, whether through the appointment of a new minister or the introduction of an entirely new Cabinet, are therefore irrelevant.

²⁶ *Secretary to the Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11, [13] per Buchanan JA.

²⁷ *Re Fisse and Department of Treasury* (2008) 101 ALD 424, 434.

Clause 5(1)

26. Clause 5(1) of Schedule 1 to the FOI Act provides as follows:

- (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.

27. To justify a claim that a document is exempt pursuant to clause 5(1), each of the following criteria must be satisfied:

- (a) The document contains information the disclosure of which either:
 - (i) could reasonably be expected to cause damage to intergovernmental relations
 - (ii) would divulge information from a confidential intergovernmental communication.

In my view, the term ‘intergovernmental’ means between different entities of government, whether Commonwealth, State or local government.

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

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’.²⁸

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)

28. 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.

²⁸ *Ipex 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.

29. 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).

Other relevant provisions

30. 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'.
31. Under section 20(1)(a) of the FOI Act, 'an agency may refuse access to a document if it is an exempt document'.
32. Section 48 of the FOI Act places the onus on the agency to justify its determination in my external review.
33. 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.

Consideration of submissions and conclusions

Claimed out of scope documents

- *Generic and other briefing documents*

34. I have received 14 briefing documents from AGD (agency 8), all of which are claimed to be outside the scope of the application:

B1 - Volume VIII: Minister for Correctional Services
 B2 - Volume VIII: Minister for Emergency Services
 B3 - Generic briefings (suitable for both ALP and Liberal except where noted)
 B4 - Background briefing - Public Trustee, marked 'LIB'
 B5 - Background briefing - Public Trustee, marked 'ALP'
 B6 - Minister for Consumer Affairs - 2009 Liquor Licensing Amendments
 B7 - Minister for Consumer Affairs - 2010 Review of the *Liquor Licensing Act 1997*
 B8 - Minister for Consumer Affairs - Review of the Code of Practice
 B9 - Minister for Consumer Affairs - Dry Areas
 B10 - Minister for Consumer Affairs - Police Power to Bar
 B11 - Minister for Consumer Affairs - Accords and Precinct Management Groups
 B12 - Minister for Consumer Affairs - Continuous Improvement Program
 B13 - Volume VIII: Minister for Consumer Affairs
 B14 - Volume VIII: Minister for the Status of Women.

35. Documents B1, B2, B13 and B14 are in the same format as the majority of documents initially identified by the agencies as within scope. Documents B3 to B12 are in different formats.
36. Having regard to their contents, I am satisfied that documents B1 and B2 were prepared for a possible incoming Liberal Government. I note that document B1 differs from the documents discovered by agency 4, however. B1 appears to have been prepared by the Department of Justice, and B2 appears to have been prepared by SA Fire and Emergency Commission (**SAFECOM**). SAFECOM comes under the umbrella of the Department of Justice. Although the Department of Justice and AGD share the same Chief Executive, my view is that they are separate agencies for the purpose of the FOI Act. In addition, AGD has provided information to my office indicating that it did

not prepare documents B1 and B2. Rather, AGD acted as a mailbox. I accept this claim. In the circumstances, and having regard to the application for access (which specifically identified AGD), my view is that documents B1 and B2 are outside the scope of the applications made to AGD.

37. Document B3 appears to have been prepared with either a Labor *or* Liberal government in mind (although some parts were clearly intended only for a returning Labor government, and consideration was to be given to whether other parts were to be included in both versions). According to the Crown Solicitor's letter, generic briefings were prepared for incorporation into the briefings and are out of scope as they were 'not specific to either party' and are not 'identifiable as for the incoming Liberal Government'. The applicant has requested 'briefing documents ... prepared for a possible incoming Liberal Government'. He has not requested documents that were prepared *solely* for a possible incoming Liberal government. In my view the terms of the application do not exclude documents that were prepared with a possible incoming Liberal government or a returning Labor government in mind. My view is that document B3 is therefore within the scope of my external review.
38. The abbreviation 'LIB' appears immediately below the heading in document B4. By email dated 27 April 2011, the CSO advised that document B4 'is content ... proposed for inclusion into or to provide a basis for content for, the AGD briefing.' I have considered document B4 in conjunction with documents B5 and AGD 1. There are differences between documents B4 and B5, and some of the information in document B4 is replicated in document AGD 1. I accept that document B4 was created to assist with preparation of the AGD portfolio brief, and not to brief an incoming Liberal government as such. My view is that document B4 is therefore outside the scope of the of my external review.
39. The acronym 'ALP' appears immediately below the heading in document B5. My view is that it was not prepared for a possible incoming Liberal Government, and is therefore outside the scope of my external review.
40. Documents B6 to B12 are in a similar format, and are different to other briefing documents received from the agencies. They bear 'expiry' dates that post-date the 2010 State election. The chronologies in documents B7 and B8 describe future events, which would have pre-dated the 2010 State election at the time of their creation. Although it is possible that they were used to assist in the drafting of the incoming government brief, it seems to me that they were most likely prepared to address various issues relevant to the Minister for Consumer Affairs, and not 'for a possible incoming Liberal Government'. I am not satisfied that they are within the scope of the application.
41. Documents B13 and B14 are consistent with the template provided by DPC, and are both marked 'cabinet-in-confidence'. In my view, they are both within scope, even though they were prepared for a possible incoming Liberal or Labor government.

- *Forewords*

42. According to the Crown Solicitor's letter, the forewords were prepared to assist the Chief Executive in briefing the minister, and not for the 'incoming Government'. The Crown Solicitor has submitted on behalf of the agencies that forewords are therefore out of scope. In the alternative, the forewords are claimed exempt under the FOI Act.

43. I have received nine forewords from AGD (AGD F1 to AGD F8 and SAFECOM F9); one from DPLG (DPLG 3);²⁹ one from PIRSA (PIRSA F1); two from DFEEST (DFEEST F1 and DFEEST F2); one from the Department for Water (DFW F1³⁰); and one from SATC (SATC F1). They take the form of undated letters to ministers. PIRSA F1, DFEEST F1 and F2, and DFW F1 were prepared specifically for an incoming Liberal government. The remaining forewords were prepared for either a Labor or Liberal government. It is my understanding that DTF did not produce a foreword, and DFW did not produce a foreword in relation to water security. I have not received any forewords from DCS
44. AGD F1 to AGD F8 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. SAFECOM F9 is signed by Mr David Place, Chief Executive of SAFECOM. The remaining forwards were all signed by their respective chief executives.
45. I have had regard to submissions received on behalf of the agencies, the documents themselves, and the terms of the applications. My view is that the terms of the applications are sufficiently broad to capture forewords, and that all of the forewords provided to me, except for SAFECOM F9, are within the scope of the applications. In my view, SAFECOM F9 is out of scope for the same reasons as documents B1 and B2.

Claimed exempt documents

- *Portfolio Briefs, B13 and B14*³¹

46. I am satisfied that the portfolio briefs 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. Clause 1(1)(a) of Schedule 1 to the FOI Act makes the fact that the portfolio briefs were never submitted to Cabinet; the reasons they were not submitted; and whether copies were to be provided to all or some ministers, irrelevant. 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, if the Liberal Party had won the election.
47. In reaching this conclusion I have had regard to the fact that the portfolio briefs are all consistent with the template provided by DPC, and are all marked 'cabinet-in-confidence'. 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.
48. 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).
49. My view is that the portfolio briefs are exempt under clauses 1(1)(a) or 1(1)(b) of Schedule 1 to the FOI Act.
50. 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.³²

²⁹ A duplicate of this document was provided by email from the CSO on 27 April 2011.

³⁰ The CSO has submitted that DFW 1 is in draft form, notwithstanding the electronic signature.

³¹ This section excludes AGD 8 to 11; DPLG 3 and 4 (DPLG 4 is headed 'State/Local Government Relations'); DFW 1 (headed 'Volume X: Minister for River Murray'); and DTF 1 to 3.

³² 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].

- *Documents B3; AGD 8 to 11; DPLG 4; DFW 1; DTF 1 to 3*

51. These documents all differ from the template provided by DPC. DPLG 4, DFW 1, and DTF 1 to 3 are largely consistent with the template, but only DPLG 4 and DTF 1 to 3 are marked 'cabinet-in-confidence'. I note that DTF 1 includes three separate appendices, each of which is referred to in the body of the main document. Appendix 1 is made up of 27 briefs on various topics (briefs 7, 14 and 16 of which each include an attachment). The three appendices and the 27 briefs are all marked 'cabinet-in-confidence'. Although documents B3 and AGD 8 to 11 differ significantly from the DPC template, it is clear to me from their contents, including the header of document B3 and the footers of each, that they were prepared with an incoming government in mind. I am satisfied that they are all preliminary drafts of documents specifically prepared for submission to Cabinet.
52. My view is that documents B3; AGD 8 to 11; DPLG 4; DFW 1; and DTF 1 to 3 are exempt under clause 1(1)(b) of Schedule 1 to the FOI Act.
53. 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.

- *Forewords*³³

54. The Crown Solicitor has claimed that, if within scope, the forewords are exempt under clauses 1(1)(a); 1(1)(f) and 9(1) of Schedule 1 to the FOI Act. DPLG has also claimed that DPLG is exempt in its entirety under clause 1(1)(b), and that two paragraphs are exempt under clause 5(1) of Schedule 1 to the FOI Act.

Clause 9(1)

55. 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.
56. 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. DPLG 3, for example, refers to facts that are in the public domain.³⁴ The comments and observations drawn from these facts seem fairly straightforward, and not what I would describe as novel.
57. The Crown Solicitor has submitted that disclosure of the forewords would be contrary to the public interest, after balancing:

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.

58. In addition, following internal review, DPLG included the following discussion regarding the public interest:

I have had regard to the arguments for and against the release of the documents in relation to the public interest, and have formed the view that it would be against the public

³³ Excluding SAFECOM F9.

³⁴ For example: http://www.coag.gov.au/coag_meeting_outcomes/2009-12-07/index.cfm#cap_city_strat and http://www.dplg.sa.gov.au/html/files/DPLG_AR_181110.pdf.

interest to release the document. The agency needs to be able to equip an incoming Minister and Government with the confidential information and frank advice needed to administer the State.

59. 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 forewords appears to be based on objectives set out in *South Australia's Strategic Plan 2007* or the *South Australian Tourism Plan 2009-2014*, which are public documents.

60. 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), 1(1)(b) and 1(1)(f)

61. The CSO has claimed that the forewords are exempt under clauses 1(1)(a) and 1(1)(f) of Schedule 1 to the FOI Act. The CSO submitted that forewords prepared with the Liberal Party in mind would have been submitted to Cabinet if the Liberal Party had won government, and that the forewords prepared for the Labor Party (and presumably the generic forewords) were bound into booklets with the relevant portfolio brief and were submitted to Cabinet following the 2010 election.

62. Following internal review, DPLG claimed that DPLG 3 is exempt under clause 1(1)(b) of Schedule 1 to the FOI Act.

63. The agencies have not satisfied me that the forewords were specifically prepared for submission to Cabinet as required by clause 1(1)(a), or that DPLG 3 is a preliminary draft of a document that was specifically prepared for submission to Cabinet as required by clause 1(1)(b).

64. 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.

65. 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. The fact that both Labor Party and generic versions of the forewords were submitted to Cabinet does not change my view. It seems to me that the forewords were prepared for ministers as a general overview of issues considered relevant to their respective portfolios.

Clause 5(1)

66. DPLG claims that the disclosure of two paragraphs on the second page of DPLG 3 (the first commencing with 'To', and the second commencing with 'Over') could cause damage to intergovernmental relations;³⁵ 'may unnecessarily interfere with the policy development process' as the contents are 'speculative'; and would be contrary to the public interest.

³⁵ DPLG has not relied on clause 5(1)(a)(ii).

67. I accept that it is possible that disclosure of the first paragraph might put a strain on intergovernmental relations as it is critical in nature. That said, I consider the possibility to be slight as there is often tension between the two levels of government in question, over various issues. I am not satisfied on the basis of the information before me that disclosure of the second paragraph could reasonably be expected to cause damage to intergovernmental relations.
68. I have considered the additional submissions made by DPLG, but am not satisfied that disclosure of the first or second paragraphs would, on balance, be contrary to the public interest for the same reasons I have rejected the claim that the forewords are exempt in their entirety under clause 9(1) of Schedule 1 to the FOI Act.

Determinations

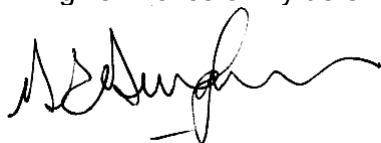
69. In light of my reasoning above, I am **confirm** the determinations made by agencies 4, 6, 7 and 9, and **vary** the determinations made by agencies 1 to 3, 5, 8 and 10, to enable the forewords to be released.

Comment - section 39(12) of the FOI Act

70. 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 these 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. I consider these public interest factors to be strongest with respect to generic documents, that is documents prepared with either a returning Labor or an incoming Liberal government in mind.

Right of appeal

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



Richard Bingham
SA OMBUDSMAN

3 June 2011