



OmbudsmanSA

Determination

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

Applicant	Mr Steven Marshall MP
Agency	Department of Manufacturing, Innovation, Trade and Resources
Ombudsman reference	2012/08625
Agency reference	2012/04102
Determination	The determination of the agency is varied.

REASONS

Background

1. This determination relates to one of two applications made by Mr Steven Marshall MP to the agency under the *Freedom of Information Act 1991* (the FOI Act, the Act) for information relating to the Port Pirie Nyrstar smelter.
2. By application received by the agency on 16 July 2012, the applicant requested access to:
All briefs prepared for the Minister for Manufacturing, Innovation and Trade regarding the Port Pirie Nyrstar smelter from January 2010 to July 2012 inclusive.
3. I have summarised the FOI processes which ensued as a result of the application in the appendix to this determination. I will make reference to those processes in my reasons below.

The documents

4. The agency identified seven (7) documents as falling within the scope of the application. The agency's schedule setting out these documents is attached. The agency refused access to all of the documents; and all lie for my consideration in this review.

Relevant provisions of the FOI Act

5. The objects of the Act are set out in section 3, to 'promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State'; and 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'.
6. The Act provides that upon receipt of an application for access to documents, an agency is entitled to make a determination to refuse access where the documents are 'exempt'. The term 'exempt document' is defined as 'a document which is an exempt document by virtue of Schedule 1.'¹ Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access.

¹ See *Freedom of information Act 1991* section 4 and section 20(1)(a).

7. Under section 48, the onus is on the agency to justify its determination ‘in any proceedings’. Section 39(11) provides that a relevant review authority (such as 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.

The agency's initial claims

8. The agency claimed exemption clauses 1, 9(1), 7(1)(c), 14 and 16(1)(iv)(a) and (b) of Schedule 1 as a basis for refusing access to some or all of the documents . With the exception of clause 1 (Cabinet documents), all of these exemptions contain a public interest test.²
9. In my provisional determination, I was not persuaded that the agency had justified its determination in relation to some of the documents (notably 2, 3, 4 (in part), 6 and 7).
10. The Minister for the Public Sector subsequently advised me of his assessment of the public interest for the purposes of section 39(9) of the Act (**the Minister's assessment**). This provides:

If, in determining an application for a review under this section-

- (a) The relevant review authority is advised that the determination of the agency was made on grounds of public interest; and
- (b) The Minister administering this Act makes known to the relevant review authority the Minister's assessment of what the public interest requires in the circumstances of the case subject to review,

The relevant review authority must, in determining the application, uphold that assessment unless satisfied there are cogent reasons for not doing so.

The Minister's assessment of the public interest

11. The Minister's assessment was couched in the following terms:

In my assessment of the public interest for these two applications, I have considered the following matters relevant:

- the impact on the business (Nyrstar) if this information is released, in particular the confidence of investors as well as other businesses in the supply chain, and the risk of significantly adverse market-based demand impacts;
- the impact on the state economy, and in particular the regional economy of the Port Pirie area;
- the impact on the future ability for confidential discussions regarding financial sustainability to continue to occur between businesses that make substantial contributions to the State's economic and social welfare and Government; and
- the impact on the maintenance of the effective conduct and administration of public affairs through the free and frank exchange of information and opinions within Government.

I advise that in relation to these two applications under consideration, I have borne in mind the objects of the Act, specifically the objectives to promote openness and accountability in government, Ministers and agencies, and the legally enforceable right for members of the public and members of parliament to be given access to documents consistent with the public interest.

I have balanced the public's interest in being informed of discussions between the Government and Nyrstar regarding their Port Pirie operations and the decision

² A copy of Schedule 1 and the FOI Act can be found at:
<http://www.legislation.sa.gov.au/LZ/C/A/FREEDOM%20OF%20INFORMATION%20ACT%201991.aspx>.

making processes of Government in relation to this matter, against the impacts that I have identified above.

In doing so, I have formed the view that the public interest in these applications is best served by not releasing those documents determined by the agency to be exempt.

The applicant's submissions

12. The applicant has submitted that disclosure of the documents is in the public interest. He submits:

Due to the large amount of state tax-payers' money used to ensure the future of the Nyrstar smelter in Port Pirie, we believe it is the public's right to have full public disclosure regarding this agreement. We also believe that this negates the traditional commercial in confidence arguments;

Also, the economic future of the Port Pirie region is of great interest to the South Australian public, and any decisions which impact upon the viability of this region should be made public;

Further, without the release of documents to the Ombudsman's office, there is no way to ensure that the documents do contain sensitive information as stated by DMITRE.³

13. In response to the applicant's submission in the preceding paragraph, I comment that agency has provided me with a copy of all of the documents which are the subject of review. (This is the usual practice in the conduct of my reviews under the Act.)

Issues in this review

14. My task in this review is to consider the documents; the merit of the agency's and the applicant's submissions; Nyrstar's submissions; and the agency's claims of exemption.
15. In relation to the exemption clauses claimed by the agency which have a public interest component, under section 39(9) of the Act I must also uphold the Minister's assessment unless there are cogent reasons for not doing so.

Consideration - documents 1, 5, and the last point in document 4 - clause 1

16. In my provisional determination, I advised the parties that I was satisfied that documents 1, 5 and the last point of document 4 are exempt by virtue of clause 1 of Schedule 1 to the Act. The question of 'public interest' does not arise for consideration in the application of clause 1.
17. Document 1 is a briefing note and an attached Cabinet note. I am satisfied that the briefing note was specifically prepared for use of the Minister in relation to a matter submitted, or proposed to be submitted to Cabinet, and hence is exempt pursuant to clause 1(1)(f) of Schedule 1. I accept that the Cabinet note has was specifically prepared for submission to Cabinet within the meaning of clause1(1)(a).
18. In relation to document 4, the final dot point under the subheading 'key points' in the briefing paper is exempt under clause 1(1)(e). That paragraph discusses a Cabinet note, and contains matter concerning a deliberation or decision of Cabinet.
19. Document 5 is a briefing paper with a draft minute to the Premier, Minister for Health and Minister for Environment and Conservation attached. I accept that they contain matter concerning a deliberation or decision of Cabinet and are exempt by virtue of clause 1(1)(e).

³ Email from Ms Victoria Brown to Deputy Ombudsman dated 9 October 2013.

20. In light of my views, there is no reason for me to consider the applicability or otherwise of the other exemptions claimed by the agency; and I confirm the view expressed in my provisional determination.

Consideration - attachment to document 3 and remainder of document 4

21. During submissions, the agency advised my office that it no longer maintains its claim of exemption over an attachment to document 3 (letter from Nyrstar to the Premier dated 13 February 2012) and document 4 (excluding the final dot point referred to above). Nyrstar agreed to the release of the attachment to document 3 in my review 2012/8630; and after consultation, Nyrstar agreed to the release of an attachment to document 4 which is an undated letter from Nyrstar to the Hon Tom Koutsantonis MP.⁴
22. An undated letter from Nyrstar to the state government comprises part of document 4, and contains information concerning Nyrstar's business affairs. My office consulted with Nyrstar about this document; and Nyrstar has advised that it has no objections to release of the letter.
23. The agency should now release the attachment to document 3. I also consider it is practicable for the agency to delete the final dot point in document 4 (as exempt matter under clause 1) and release a copy of the document to the applicant under section 20(4) of the Act. This includes the attached letter from Nyrstar.

Consideration - documents 2, document 3 (excluding the attached letter above), 6, 7 - clause 9(1) of Schedule 1

24. The agency submits that these documents are exempt under clause 9(1) of Schedule 1, which provides:
- (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.
25. Clause 9(1) is designed to preserve the integrity of the decision-making process of the government, a Minister or an agency.

Clause 9(1)(a)

26. To justify a claim that the first limb of this exemption applies, I must be satisfied that:
- the document contains information that relates to any opinion, advice, recommendation, consultation or deliberation; and
 - was created in the course of or for the purpose of the decision making functions the government, Minister or an agency.
27. This wording is expansive; and I consider that documents 2, 3, 4, 6 and 7 can be captured under clause 9(1)(a).

⁴ Email to Deputy Ombudsman from Nyrstar dated 8 October 2013. This letter concerns the business affairs of Nyrstar.

Clause 9(1)(b) and the Minister's assessment

28. In my provisional determination, I was not persuaded that the agency had justified its determination in respect of the public interest limb of clause 9(1) and the other clauses, namely that disclosure of the relevant documents would, on balance, be contrary to the public interest. I made the following comments:
77. In considering whether disclosure of the documents would, on balance be contrary to the public interest, I have taken into account the fact that negotiations between the government and private organisations take place against the setting of the FOI Act, which has the objects of promoting openness and accountability of Ministers and government agencies.
78. In my view, there appears to be number of persuasive arguments which suggest that there is a public interest in disclosure of the documents. Disclosure of the documents may allow public scrutiny of the government's spending of public monies and decision-making in relation to the smelter. This may further public debate in relation to the future of the Nyrstar smelter. The operations of the smelter impact on economic, environmental, health and employment issues, which are of significant public interest.
79. The Nyrstar Port Pirie smelter operations have been the subject of significant media attention in the past 12 months or more, particularly in relation to concerns about the smelter's impact on environmental and health issues in the region, and the tightening of licence conditions regarding emissions from the smelter. This is an indication of the issues being of public interest.
80. I also note that many of the issues detailed in the documents have already been raised in the media ... The currency of these issues and the fact that many of the issues canvassed in the documents have already been aired in public are further arguments indicating that there is a public interest in disclosure.
81. In considering the agency's arguments against disclosure, I note that the agency has not made out any case explaining how disclosure would have a negative impact on the company and its supply chains and markets. Nor has the agency explained how disclosure of the documents would have the capacity to prejudice negotiations currently being undertaken with Nyrstar on behalf of the State publicity already given to the issues referred to in the documents.
82. Accordingly, my provisional view is that I am not persuaded that the disclosure of the documents would, on balance, be contrary to the public interest.
29. My office then received the agency's submissions and the Minister's assessment under section 39(9) of the Act. Significantly, section 39(9) requires that I uphold the Minister's assessment 'unless satisfied that there are cogent reasons for doing so'. The Act does not define the meaning of 'cogent reasons'. In the case of *Registrar of the Veterinary Surgeons Board of SA v Mooney and the Veterinary Surgeons Board of SA*⁵ the District Court considered the words in the context of the *District Court Act 1991*:

The words "cogent reason" [sic] circumscribing the power of intervention in s 42E(3), are unique to South Australia. They later appear in the *Dental Practice Act 2001* (SA) s 66(5) and the *Medical Practice Act 2004* (SA) s 65(6),

...

The adjective "cogent" describes an argument or reason clearly expressed and persuasive, compelling or convincing. There is no reason to read into the statute any more or less than it prescribes. In *Project Blue Sky Inc v Australian Broadcasting Authority* McHugh, Gummow, Kirby and Hayne JJ remind us that "the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have".

Obviously, then something more than mere disagreement with the decision below is required. Likewise unconstrained merits review would not be authorised. However

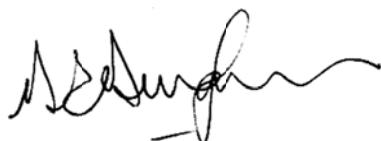
⁵ [2009] SADC 62 (5 June 2009) (Judge Tilmouth).

providing “cogent reason” exists, the power to interfere is engaged. There is no threshold requirement to detect error, or to conclude the decision below was “unreasonable or plainly unjust... or that... a substantial wrong has in fact occurred”: *House v The King*, before intervention is justified. In *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* Brennan J suggested on example of a cogent reason was when a decision would “work an injustice in a particular case”.

30. In my view, these comments are a proper guide for interpreting the meaning of ‘cogent reasons’ in section 39(9).
31. My office subsequently sought oral submissions from the agency about the Minister’s assessment in light of developments between the state government and Nyrstar. For example, in February this year, the Nyrstar transformation/upgrade was declared a major development under the *Development Act 1993*; at the end of May, Nyrstar released its Public Environmental Report for public comment. Further, in August, the *Port Pirie Smelting Facility (Lead-In-Air Concentrations) Act 2013* was passed in the parliament (thereby offering certainty of regulation for Nyrstar).
32. I am prevented by the Act from recounting these submissions to the applicant or in my determination, because they contain claimed exempt information.⁶
33. I have reflected on the agency’s submissions and the documents. While I do not resile from the thrust of my views about the public interest set out in my provisional determination above, I do not consider they reach the threshold of being ‘cogent reasons’ not to uphold the Minister’s assessment. In reaching this conclusion, I especially note the well-documented significance of the Nyrstar project to the South Australian economy,⁷ and the fact that negotiations between Nyrstar and the state government for the upgrading of the smelter have not been finalised. Finalisation of these negotiations is not expected until March 2014. At that time, and as conceded by the agency during oral submissions, the public interest in accessibility of the documents may well have changed.
34. I am therefore satisfied that these documents are exempt under clause 9(1) of Schedule 1 to the Act. There is no need for me to address the remaining exemptions claimed by the agency.

Determination

35. In light of the above, I vary the agency’s determination pursuant to section 39(11) of the FOI Act.



Richard Bingham
SA OMBUDSMAN

18 October 2013

Encl

⁶ Section 39(15) of the FOI Act provides that a relevant review authority should avoid disclosing in its reasons for a determination any matter that the agency claims is exempt matter (whether or not the relevant review authority agrees with that claim).

⁷ Report of the Select Committee on the Port Pirie Smelting Facility (Lead-in-air Concentrations) Bill July 2013. Tabled in the House of Assembly, published pursuant to Standing Order 346, 25 July 2013.