

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	2012/08630
Agency reference	2012/04103
Determination	The determination of the agency is varied.

REASONS

Background

1. This determination relates to one of two external reviews concerning Mr Steven Marshall MP's request for documents held by the agency about Nyrstar and the operation of the Port Pirie smelter. I released my determination in respect of the first review (2013/8265) on 16 October 2013. The issues in this review are the same as those in the first review, and my views remain the same.
2. By application under the *Freedom of Information Act 1991* (the FOI Act; the Act) received by the agency on 16 July 2012, the applicant requested access to:

All correspondence from Nyrstar to DMITRE and the Office of the [sic] Minister Koutsantonis from January 2010 to July 2012 inclusive.
3. The agency identified 24 documents, and a schedule numbering and describing these documents was provided to the applicant. There is no need for me to redescribe them.
4. For ease of reference, the procedural steps relating to the application and the external review are set out in the appendix.

Relevant law

5. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
6. 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.

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

7. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'; and 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 which can be released

8. The agency originally released documents numbered 4, 11, 18, 19, 22, 27, 28 and 29 to the applicant.
9. In submissions during the review, Nyrstar advised that it does not object to release of documents 1, 2, 3, 4, 5, 10, 15, 16, 23 and 25; and the agency does not object to release of documents 2, 3, 5, 10, 23 and 25.
10. In light of this, documents 2, 3, 5, 10, 23 and 25 should now be released by the agency to the applicant.

Submissions

The agency's submissions

11. The agency has claimed exemption clauses 9(1), 7(1), and 14 of Schedule 1 to the FOI Act as a basis for refusing access to the remaining documents. Each of these provisions has a public interest component.
12. The Minister for the Public Sector has also advised me of his assessment of the public interest for the purposes of section 39(9) of the Act. 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.

13. The Minister's assessment of the public interest is set out below (**the Minister's assessment**):

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 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.

Nyrstar's submissions

14. Nyrstar has objected to disclosure of documents 6-9, 12, 13, 14, 17, 20, 21, 24 and 26, variously on the basis of exemption clauses 7(1)(c), 9(1), 13(1)(a) or 14 in Schedule 1.

The applicant's submissions

15. The applicant submits that disclosure of the documents is in the public interest:

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.²

16. The applicant has also informed my office that he does not wish to access document 24, which is a copy of a letter (attached to a cover email from Mr Robert Evans of Nyrstar to Mr Peter Hall and Mr Rob Thomas of the agency dated 26 June 2012) from the University of South Australia to the Port Pirie Council regarding a research project of the University. I will therefore not consider the status of this document in the review.

Issues in the review

17. My task is to determine whether the agency may properly withhold access to documents 1, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 20, 21 and 26 (**the documents**) on the basis of at least one of the above claimed exemption provisions in Schedule 1 to the Act.

Consideration

Clause 9(1)

18. Either the agency or Nyrstar claim that the documents are exempt documents under clause 9(1) of Schedule 1. This provides:

- (1) A document is an exempt document if it contains matter—
 (a) that relates to—

² Email from Ms Victoria Brown to Deputy Ombudsman dated 9 October 2013.

- (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.

Clause 9(1)(a)

19. To justify a claim that the first limb of this exemption applies, I must be satisfied that:
- the documents contain information that relates to any opinion, advice, recommendation, consultation or deliberation; and
 - were created in the course of or for the purpose of the decision making functions the government, Minister or an agency.
20. This wording is expansive; and I consider that the documents are captured by clause 9(1)(a).

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

21. In my provisional determination, prior to receiving the Minister's assessment, I informed the agency and Nyrstar of my views about whether disclosure of documents would, on balance, be contrary to the public interest:
73. 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.
74. In my view, there appears to be a 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.
75. 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.
76. 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.
77. 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.
22. Subsequently, my office received the Minister's assessment, and additional written and oral submissions from the agency and the Crown Solicitor's Office, Nyrstar and the applicant. These submissions were provided at the request of my office in light of

intervening developments between the state government and Nyrstar. In February this year, for example, the transformation/upgrade of the smelter was declared a major development under the *Development Act 1993*, at the end of May, Nyrstar released its Public Environmental Report for public comment; and in August, the *Port Pirie Smelting Facility (Lead-In-Air Concentrations) Act 2013* was passed in state parliament. Nyrstar also recently released its pre-feasibility study in relation to the smelter upgrade.

23. Section 39(9) of the FOI Act requires that I uphold the Minister's assessment in the review, 'unless satisfied that there are cogent reasons for not doing so'.
24. In the case of *Registrar of the Veterinary Surgeons Board of SA v Mooney and the Veterinary Surgeons Board of SA*³ the District Court considered the term 'cogent reason' in the context of the *District Court Act 1991*:

The words "cogent reason" 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 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 an example of a cogent reason was when a decision would "work an injustice in a particular case".

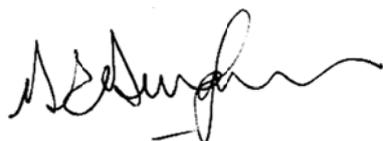
25. I consider that these comments are equally applicable to the meaning of 'cogent reasons' under section 39(9).
26. I maintain my views about the public interest set out above in my provisional determination. But notwithstanding these views, I do not consider they reach the threshold of being 'cogent reasons' to depart from the Minister's assessment in relation to the documents. I recognise the force of the applicant's submissions; but I am particularly mindful of the significance of the Nyrstar project to the South Australian economy;⁴ the desirability of Nyrstar attracting private investors in the project; and the ongoing negotiations between the state government and Nyrstar about the upgrading of the smelter to allow its continued operation. I am persuaded by the agency's and Nyrstar's submissions and the Minister's assessment, such that at this stage, there is a public interest in withholding the documents from disclosure. It is likely that this will change after negotiations in relation to the project have concluded.
27. I am satisfied that the documents are exempt under clause 9(1); and I see no need to address the remaining exemptions claimed by the agency and Nyrstar.

³ [2009] SADC 62 (5 June 2009) (Judge Tilmouth).

⁴ 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.

Determination

28. In light of my views above, pursuant to section 39(11) of the FOI Act, I vary the agency's determination in relation to the documents

A handwritten signature in black ink, appearing to read 'Richard Bingham', with a long, sweeping flourish extending to the right.

Richard Bingham
SA OMBUDSMAN

7 November 2013

Appendix

Date	Event
16 July 2012	Agency received FOI application
26 July 2012	Agency extended date to deal with application to 14 November 2012 - section 14A FOI Act
31 July 2012	Applicant applied to Ombudsman for external review of this extension - parties agree to date (28 September 2012)
5 October 2012	Following the agency's 'deemed refusal' determination, agency received an application for internal review from the applicant
25 October 2013	Applicant requested external review of the agency's determination on the basis that the agency had not responded to his internal review request in time
26 October 2012	<p>Agency purported to determine to give access to 8 documents (4, 11, 18, 19, 22, 27, 28, 29) and refuse access to remainder</p> <p>After receiving the agency's 'determination', the applicant advised he remained aggrieved by the refusal of access</p>
31 October 2012	Ombudsman advised parties of external review
14 November 2012	Agency responded that it would be seeking Ministerial intervention about the public interest
11 December 2012	Ombudsman sought agency permission to consult with Nyrstar in relation to documents
13 December 2012	Agency letter to Ombudsman supporting release of documents 1-3, 5-9, 12, 14, 16, 17, 20, 21 for consultation with Nyrstar
18 December 2012	<p>Ombudsman provided agency and Nyrstar with provisional determination, and advised applicant of same</p> <p>Ombudsman unable to provide the applicant with a copy of the provisional determination as to do so may have revealed exempt matter under the FOI Act</p> <p>Ombudsman invited submissions in response.</p>
20 December 2012	Ombudsman received Minister's assessment of the public interest (section 39(9) FOI Act)
25 January 2012	Agency provided Ombudsman with written submissions
25 January 2012	<p>Ashurst Australia on behalf of Nyrstar advised Ombudsman that Nyrstar did not object to the release of documents 1, 2, 3, 5</p> <p>Claimed that documents 6, 7, 8, 9, and 12 are exempt under clause 7(1)(c) and documents 6, 7, 8, 9, 12, 20, 21 are exempt under clause 9(1)</p>
February and August 2013	Communication between Ombudsman and Crown Solicitor's Office
23 September 2013	Ombudsman meeting with agency and Crown Solicitor's Office
25 September 2012	Letter to applicant regarding Minister's assessment and inviting submissions by 16 October 2013

9 October 2013	Email to Ombudsman from applicant with submissions
11 October 2013	Ombudsman received oral submissions from agency and Crown Solicitor's Office
14 October 2013	<p>Ombudsman provided copies of documents 6, 7, 8, 9, 10, 12, 13, 14, 15, 17, 17 20, 21, 23, 24, 25, 26 to Nyrstar for the purposes of consultation under the FOI Act</p> <p>Ombudsman agreed for Nyrstar to provide submissions in response by 4 November 2013</p>
24 October 2013	Ombudsman consulted applicant about pursuing access to attachment to document 24. Applicant informed Ombudsman that he does not wish to access this attachment
4 November 2013	Ombudsman received submissions from Nyrstar, Nyrstar agreed to release of further documents - 10, 15, 16, 23, 25. Nyrstar objected to release of documents 13, 14, 24 and 26 in addition to documents 6, 7, 8, 9, 12, 17, 20, 21.