

Determination

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

Applicant	Hon Mark Parnell MLC
Agency	Environment Protection Authority
Ombudsman reference	2012/08071
Agency reference	EPA/20538
Provisional determination	The determination of the agency is varied.

REASONS

Background

1. By application under the *Freedom of Information Act 1991 (the FOI Act)* the agency on 16 July 2012, the applicant requested access to:

... a copy of all correspondence and communication to and from the EPA and the Department of Health regarding the alleged breach by Nystar [sic] of Serious Environmental Harm provisions under the Environment Protection Act arising from high emissions of lead in Port Pirie between August 2009 and May 2010.
2. The agency failed to make a determination within the 30 day statutory timeframe, and was therefore deemed to have refused access to the requested documents.
3. By application received by the agency on 21 August 2012, the applicant applied for internal review of the agency's 'deemed refusal'.
4. The agency failed to make an internal review determination within the 14 day statutory timeframe, and thus was taken to have confirmed its 'deemed refusal'.
5. Despite this, by letter to the applicant dated 25 September 2012, the agency's accredited FOI officer purported to determine to grant full access to one document, partial access to one document and refuse access to five documents.¹

External review

6. By letter dated 5 October 2012, the applicant requested my external review of the agency's determination under section 39 of the FOI Act. I decided to treat the agency's letter of 25 September 2012 as the 'agency's determination' for the purposes of my review.
7. By letter dated 22 October 2012, I notified the agency of my review. I requested all relevant documents, including additional evidence and argument which the agency

¹ I note that the agency's purported determination was made outside the statutory timeframe and is therefore, not a 'determination' at law.

considered justified its determination, in light of the provisions of section 48 of the FOI Act.

Provisional determination

8. I provided my tentative view about the agency's determination to the applicant and agency by my provisional determination dated 6 February 2013. I provided my provisional determination to an interested party (**Nyrstar Port Pirie Pty Ltd**) by consultation dated 3 June 2013. I informed the parties that subject to my receipt and consideration of submissions from the parties, I proposed to reverse the agency's determination pursuant to section 39(11) of the FOI Act.
9. By letter dated 30 April 2013, the agency provided submissions in response to my provisional determination and made additional claims.
10. By letter dated 12 July 2013, Nyrstar, through its representatives, provided submissions in response to my provisional determination and consultation.

Relevant provisions of the FOI Act

11. The objects of the FOI 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'.
12. The FOI 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.'² Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access.
13. Under section 48 of the FOI Act, the onus is on the agency to justify its determination 'in any proceedings'. In my opinion, this includes the external review process.
14. Section 39(11) of the FOI Act provides that I may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

The documents

15. The agency identified 22 documents as falling within the scope of the application. All are either letters or emails, including attachments, between the agency and the Department for Health and Ageing (**the department**).

The agency's submissions

16. The agency determined to refuse access to all 22 of the documents on the basis that they are exempt under clauses 4(2)(a)(i) and (b) and 10(1) of Schedule 1 to the FOI Act. The agency submitted that the documents contain 'communications by and to the EPA concerning the sourcing of evidence to progress legal action' by the EPA against Nyrstar and that disclosure of these documents could prejudice that investigation.
17. In response to my provisional determination, the agency made additional claims, which I set out below.

² See *Freedom of Information Act 1991*, sections 4 and 20(1)(a).

Clause 4(2)(a)(i) and (b)

18. In relation to its claim that all of the documents are exempt under clause 4(2)(a)(i) and (b), the agency has submitted that its investigation is ongoing. To demonstrate how the release of the documents would 'prejudice the investigation' under clause 4(2)(a)(i), the agency submitted that:

- there is a risk that releasing a variety of seemingly innocuous documents gained as part of the investigative process may together build a more significant overall picture of the direction and emphasis of the investigation which would undermine its effectiveness and efficiency
- some of the information includes statements from individuals or documents listing individuals. There is a risk that if this is known to others, they may attempt to influence how these people respond to the agency's investigation, therefore prejudicing the investigation
- if interested parties were to become aware of the specific focus of the agency's investigation they could attempt to influence or affect evidence that may become relevant to the investigation.

19. The agency previously submitted, by letter dated 9 November 2012, that the public interest consideration in clause 4(2)(b) is satisfied by the following reasons:

On balance the EPA considers that the public interest factors supporting release of this information are outweighed by the public interest factors of not releasing it. While the public interest is served by providing access to government held information and the public benefit of releasing that information, in this instance, this is outweighed by the significant public interest in a regulator being able to carry out its legislative functions (and particularly its ability to investigate matters that may lead to legal action being taken if, and as, required).

Clause 6(2)

20. The agency has noted that under section 129 of the *Environment Protection Act 1993* (the EP Act), where a body corporate contravenes a provision of the Act a person who is an officer of the body corporate is liable to the same penalty as may be imposed for the contravention when committed by a natural person. The definition of an officer in the EP Act includes a director, chief executive, receiver, manager or liquidator or employee with management responsibilities in respect of the matters to which the contravention or alleged contravention is related.

21. The agency submits that the effect of this provision is that any allegations made in respect of a body corporate are also allegations against the relevant officers of that company as individuals. Accordingly, the agency submits that any documents which contain express and implied allegations of wrongdoing, within the meaning of clause 6(2), is exempt.

Clause 9(1)

22. The agency also asserts that all of the documents would be exempt as 'internal working documents' under clause 9(1):

These documents also record opinions and advice of the Investigations Unit and others that are relevant to decisions to be made in respect of this investigation and prosecution.

Clause 10(1)

23. By letter dated 9 November 2012, the agency initially claimed that all of the documents are exempt under clause 10(1). In response to my provisional determination, the Chief Executive of the agency advised that he no longer makes the claim in respect of all of the documents.
24. The agency maintains, however, that clause 10(1) applies to:
 - documents that refer to advice received or instructions given to the Crown Solicitor's Office
 - documents that involve the agency seeking expert evidence for the purposes of use in any subsequent prosecution.

Clause 16(1)(a)(iv) and (b)

25. In response to my provisional determination, the agency also submitted that many of the documents are exempt under clause 16(1)(a)(iv). To justify this claim, the agency stated:

Investigation and prosecution of breaches of the EP Act is a core function of the EPA. As indicated above, it is the view of the agency...that the release of the investigation documents, is likely to impact upon the ability of the EPA to effectively and successfully undertake these functions, not only in this particular instance but generally.

Release of this type of document could not only disclose the processes, procedures and tactics adopted by the [agency's investigation] unit, it could impact on its ability to obtain complete, reliable and relevant evidence in a timely way in the future.

26. The public interest considerations under clause 16(1)(b) put forward by the agency mirror those outlined in respect of its claims under clause 4(2)(b), detailed above.

Attachments within the scope of the application

27. Following my provisional determination, it came to my attention that there were a number of attachments to the documents that had not been provided to my office by the agency. The agency claimed that the attachments fall outside of the scope of the application for access, on the basis that they are 'compliance' rather than 'investigation' documents.
28. In my view, where compliance data is used in the documents, it is being used for the purposes of investigating an alleged breach by Nyrstar. I therefore consider that the documents and attachments fall within the scope of the application.
29. I have received and considered the attachments as part of my consideration of the documents below.

The interested party's submissions

30. Nyrstar has claimed that the documents are exempt from release under clauses 4(1)(b), 4(2)(a)(i), 6(1), 7(1)(b), 9(1) and 12(1) of Schedule 1 to the FOI Act.
31. Nyrstar's exemption claim of clause 12(1) was made by virtue of section 121 of the EP Act.

Consideration of the submissions and the agency's determination

32. I have considered the most salient arguments put forward by the agency and Nyrstar below.

Clause 1(1)(f)

33. Clause 1(1)(f) states:

1–Cabinet documents

- (1) A document is an exempt document–
- (f) if it is a briefing paper specially prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet.

34. Document 16 is a 'final draft' of a briefing to the Minister for Health and Ageing regarding Nyrstar's Port Pirie smelter. I am satisfied that it is exempt under clause 1(1)(f).

Clause 4(1)(b)

35. Nyrstar has made broad claims that the documents are exempt under clause 4(1)(b).

36. Clause 4(1)(b) states:

- (1) A document is an exempt document if it contains matter the disclosure of which could reasonably be expected–
- (b) to prejudice the fair trial of any person or the impartial adjudication of any case;

37. The documents are communications between the agency and the department about potential legal action under the EP Act. The parties have not identified with specificity what information, if disclosed, could reasonably be expected to prejudice a fair trial or impartial adjudication. Having considered the information within the documents, I am not satisfied that it is exempt under clause 4(1)(b).

Clause 4(2)(a)(i) and (b)

38. The agency has claimed that all of the documents, with the exception of Document 16, are exempt under clause 4(2)(a)(i) and (b).

39. Clause 4(2)(a)(i) and (b) state:

- (2) A document is an exempt document if it contains matter the disclosure of which–
- (a) could reasonably be expected -
- (i) to prejudice the investigation of any contravention or possible contravention of the law (including any revenue law) whether generally or in a particular case;... and
- (b) would, on balance be contrary to the public interest.

40. While I accept that the agency's investigation is ongoing, the agency has not provided me with information to satisfy me that the disclosure of each of the documents could reasonably be expected to prejudice the investigation of Nyrstar's compliance with the EP Act.

41. In relation to the agency's assertion that the release of the documents would prejudice its investigation, I note the following:
- Nyrstar is fully aware of the agency's investigation, having received notice by letter dated 29 June 2010, that set out the legislative requirement of Nyrstar to cooperate with the agency's investigation and provide requested evidence³
 - there is media coverage which indicates that the agency was considering Nyrstar's licence conditions, and the South Australian Government has utilised the services of Professor Mark Taylor to review lead emission data⁴
 - the agency published a media release on 27 July 2012 relating to variations of Nyrstar's licence conditions⁵
 - the investigation has been 'ongoing' since mid-2010; and
 - it remains unclear whether or not any prosecution will be initiated by the agency.
42. Having considered the contents of the documents, I am not persuaded that disclosure could reasonably be expected to prejudice the agency's investigation. Even if I am wrong in this, I note that clause 4(2)(b) requires that disclosure would, on balance be contrary to the public interest.
43. The agency has submitted that there is a public interest in it being able to successfully investigate and prosecute breaches of the EP Act. While I accept this submission, in my view, there are countervailing public interest arguments which I consider persuasive including:
- the extent to which the information is already in the public domain
 - disclosure may contribute to public debate on an ongoing significant public health issue
 - disclosure may enhance scrutiny of the agency's or the government's decision-making processes and improve government
44. I am not satisfied that any of the documents are exempt under clause 4(2)(a) and (b).

Clause 6(1)

45. In order for a document to be considered exempt under clause 6(1), the following elements must be established:
- a. the document contains information concerning the personal affairs of someone other than merely the applicant's (the term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act); and
 - b. it would be unreasonable to release it
46. I am satisfied that certain information in document 7 concerns the personal affairs of a third party, and that it would be unreasonable to release it. I have provided the agency with a copy of document 7 with the information I consider to be exempt highlighted. This information should be deleted before the remainder of document 7 is released to the applicant, in accordance with section 20(4) of the FOI Act.

³ See document 1a from my external review file reference 2012/08076.

⁴ See for example, Martin, Sarah., "Urgent Action needed as smelter 'poisons kids'", *The Australian*, 16 July 2012, <<http://www.theaustralian.com.au/national-affairs/state-politics/urgent-action-needed-as-smelter-poisons-kids/story-e6frgczx-1226426658637>> (accessed 4 February 2013).

⁵ EPA, Nyrstar Licence conditions, 27 July 2012.

Clause 6(2)

47. Clause 6(2) provides that a document is exempt if it contains allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead) the truth of which has not been established by judicial process, and the disclosure of which would be unreasonable.
48. While section 4 of the FOI Act defines 'personal affairs' as not including 'the personal affairs of a body corporate', I note that clause 6(2) does not use the term, and refers only to the 'improper conduct on the part of a person'. In my view, by virtue of the *Acts interpretation Act 1915*, clause 6(2) covers allegations or suggestions of criminal or other improper conduct on the part of a body corporate.
49. The documents reveal that the agency is investigating Nyrstar for a potential breach of the EP Act, and therefore implicitly suggest 'criminal or other improper conduct'. However, for clause 6(2) to apply, disclosure must also be unreasonable. I am not satisfied that this element is made out.
50. Unreasonableness has 'at its core, public interest considerations',⁶ and in my view, in light of the public interest consideration outlined above, it would not be unreasonable to release the documents.

Clause 10(1)

51. I note that the agency no longer claims that all 22 documents are exempt under clause 10(1), but maintains that the following documents are:

2	3	4	5	8	9	10	11	12	13
14	16	17	18	19	20	21	22		

52. Clause 10(1) states:

10—Documents subject to legal professional privilege

- (1) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.

53. Clause 10(1) allows an agency to refuse an applicant access to a document where the document would be able to be withheld from disclosure in any hypothetical legal proceedings on the grounds of legal professional privilege.
54. In *Esso Australia Resources Limited v The Commissioner of Taxation*, the High Court decided that a document is privileged from production in legal proceedings if it is a confidential communication between a client and their solicitor that was created for the dominant purpose of obtaining or giving legal advice; or if it is a confidential communication made for the dominant purpose of use, or obtaining material for use in, pending or anticipated legal proceedings.⁷
55. Document 13 is an email which attaches the draft of a report by an expert which I have previously found to be exempt under clause 10(1) in my determination, file reference 2012/07146.
56. Document 20 is an email chain between the agency and the department, which includes the agency's legal advisers. One of the emails in the chain includes a solicitor and discloses advice from the solicitor and information sought by the solicitor.

⁶ *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429 per Lockhart J at 438.

⁷ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

57. Document 22 is an email between the agency and the department, which includes the agency's legal advisers. The agency has submitted that the email 'concerns information to be provided to a proposed expert to be engaged to provide a report for the purposes of any anticipated proceedings. It discloses discussion between [its lawyer] and that expert and advice from [its lawyer]'.
58. I am satisfied that documents 13 (and the attached draft report), 20 and 22 attract legal professional privilege, and are therefore exempt under clause 10(1).
59. I am not satisfied that the remainder of the documents were created for the dominant purpose of use in, or obtaining material for use in pending or anticipated legal proceedings.
60. I note that the remainder of the documents appear to have been created for a range of purposes. In relation to documents created for multiple purposes, for legal professional privilege to apply, the onus is on the agency to establish that the privileged purpose was the dominant purpose for the creation of the document.⁸ While the agency claims that the purpose was to obtain legal advice, it has not provided any evidence to support this assertion. In the absence of any such evidence, it is difficult to conclude that the dominant purpose was to obtain legal advice.⁹
61. In my view, the following documents are not exempt under clause 10(1):

2	3	4	5	8	9	10	11	12	14
16	17	18	19	21					

Clause 12(1)

62. Nyrstar has provided submissions to the effect that the documents are exempt under clause 12(1) by virtue of section 121 of the EP Act.
63. Clause 12(1) states:
- 12—Documents the subject of secrecy provisions**
- (1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act.
64. Clause 12(1) enables an agency to refuse access to documents which are the subject of secrecy provisions in other legislation.
65. Section 121 of the EP Act states:

121 - Confidentiality

A person must not divulge any information relating to trade processes or financial information obtained (whether by that person or some other person) in the administration or enforcement of this Act except—

- (a) as authorised by or under this Act; or
- (b) with the consent of the person from whom the information was obtained or to whom the information relates; or
- (c) in connection with the administration or enforcement of this Act; or
- (d) for the purpose of any legal proceedings arising out of the administration or enforcement of this Act.

Penalty: Division 5 fine.

⁸ *Pratt Holdings Pty Ltd v The Commissioner of Taxation* (2004) 207 ALR 217.

⁹ *Pratt Holdings Pty Ltd v The Commissioner of Taxation* (2004) 207 ALR 217.

66. Having considered the contents of the documents, I am not satisfied that they contain information obtained in the administration of the EP Act, and therefore, that the confidentiality provision applies.

67. In my view, the documents are not exempt under clause 12(1).

Clause 16(1)(a)(iv) and (b)

68. To justify that a document is exempt under clause 16(1)(a)(iv), it must be shown that the document contains matter the disclosure of which could reasonably be expected to have a substantial adverse effect on the effective performance by an agency of the agency's functions. The District Court of South Australia has indicated that the 'substantial adverse effect' test is a high test.¹⁰ It is higher, for example, than the 'adverse effect' test set out in clause 4 or 7 of Schedule 1.

69. I am not satisfied that disclosure of the documents could have a 'substantial adverse effect' on the functions of the agency. The agency has asserted that 'release of this type of document could not only disclose the processes, procedures and tactics adopted by the unit, it could impact on its ability to obtain complete, reliable and relevant evidence in a timely way in the future'. In the absence of any substantiating evidence for these assertions I do not accept this argument.

70. Further, clause 16(1)(b) requires that disclosure would, on balance be contrary to the public interest. In my view the public interest factors in favour of disclosure outweigh those against. I refer to my views on the public interest as outlined above.

Clauses 7(1)(b) and 9(1)

71. Finally, I note that the agency and Nyrstar put forward broad submissions that the documents are also exempt under clause 7(1)(b) and 9(1). In light of the fact that I do not consider that it would, on balance, be contrary to the public interest to release the documents (as discussed in relation to clause 4 above), I do not consider any of the documents to be exempt under clauses 7(1) or 9(1).

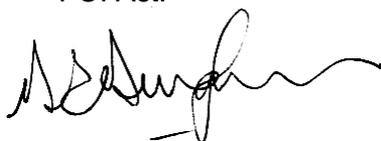
Determination

72. In summary, I consider that:

- document 16 is exempt in full under clause 1(1)(f)
- document 7 contains some exempt information under clause 6(1)
- documents 13, 20 and 22 are exempt in full under clause 10(1).

73. In my view, the remainder of the documents should be released to the applicant.

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



Richard Bingham
SA OMBUDSMAN

9 August 2013

¹⁰ *Konieczka v South Australian Police* [2006] SADC 134, [18] (Boylan J).