

Determination

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

| | |
|---------------------------|--|
| Applicant | Hon Robert Brokenshire MLC |
| Agency | Attorney-General's Department |
| Ombudsman reference | 2014/01145 |
| Agency reference | CEO\14/0035 |
| Applicant reference | 13044 |
| Provisional determination | The determination of the agency is varied. |

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant requested access from the agency to:

All final versions of reports held or possessed by the Chief Executive (or equivalent head of the Department) which has been produced by Consultants to any part of the Department, including, if complete at the time of the Request, the sum paid for the work leading to the report by the Consultant. *Only Consultant projects costing over \$10,000 are within the scope of this Request.*

NOTE: reports that have been published on a website or tabled in Parliament may be excluded, with links provided to where that information is available

TIMEFRAME: 26 February 2013 to the date of this Request [9 December 2013].

Background

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

Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 15 April 2014. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination. I also asked the agency to 'provide details of any further developments that may impact on my determination'.

5. By letter dated 6 May 2014, the agency advised that it had no further submissions to make in response to my provisional determination. To date I have not received a response from the applicant. In light of this, I have made this (my final) determination in the same terms as my provisional determination.

Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
7. 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.
8. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
9. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Documents in issue

10. The agency identified three reports within the scope of the application (**the documents**). I have included a schedule of documents prepared by the agency in appendix 2.²
11. Following internal review, the agency claimed that the documents are exempt as either:
 - Cabinet documents (clause 1(1)(a), Schedule 1)
 - internal working documents (clause 9(1), Schedule 1)
 - documents concerning the operations of agencies (clause 16(1)(a)(v), with clause 16(1)(b), Schedule 1).³
12. The documents in their entirety are in issue in my review.
13. Part of the application for access was for 'the sum paid for the work leading to the report [if complete] by the Consultant'. The agency disclosed the sum paid for the work involved in producing document 1 in the schedule of documents, but advised that the costs to prepare documents 2 and 3 had not been finalised. The agency has provided some invoices to my office,⁴ but does not appear to have released any to the applicant. The applicant did not take issue with the form or extent of the agency's disclosure with respect to costs when applying for internal or external review. Accordingly, I do not intend to consider the invoices further.

Issues in this review

14. I must consider whether the agency has justified its determination to refuse access to the documents. The clauses relied on by the agency are set out below.

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

² It is a copy of the schedule attached to the agency's initial determination.

³ In its original determination, the agency relied on clauses 1(1)(e), 1(1)(f), 9(1) and 16(1)(a), with 16(1)(b).

⁴ Invoices from the Hon David Bleby QC dated 30 May, 3 August, 10 September, 8 October and 8 November 2013; Momentum Partners dated 31 May, 16 August and 15 November 2013; and Ernst & Young dated 19 November 2013.

15. Clause 1(1)(a) provides:

- (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)...
- (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.

16. Clause 9(1) 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) would, on balance, be contrary to the public interest.

17. Clause 16(1)(a)(v), with clause 16(1)(b) provide:

- (1) A document is an exempt document if it contains matter the disclosure of which—
 - (a) could reasonably be expected—
 - ...
 - (v) to have a substantial adverse effect on the conduct of industrial relations by an agency; and
 - (b) would, on balance, be contrary to the public interest.

18. When applying for external review, the applicant commented that the agency's decision to rely on some new clauses following internal review appeared to lack procedural fairness or infringe on due process under the FOI Act. I accept that the agency is entitled to rely on new clauses following internal review, and subsequently. Furthermore, I have the discretion to consider exemptions not relied upon by the agency.⁵

⁵ *Department of the Premier & Cabinet v Redford* (2005) 240 LSJS 171 [29].

Consideration

Applicant's submissions

19. When applying for internal review, the applicant questioned whether the documents were Cabinet documents, or only 'documents informing the proposals that have been made to Cabinet'. He also included the following submission:

I believe the principle of open and transparent operations of Government and to inform the public as to the options being considered within the portfolio to improve the efficiency and effectiveness of the justice system.

20. In his application for external review, the applicant reiterated the above points and added the following:

... I believe proposals, whether further developed or costed or not, are in the public interest and it is possible for the public to be informed and forewarned as to the preliminary nature of those deliberations.

Document 1

21. Following internal review, the agency claimed that document 1 is exempt under clauses 1(1)(a) and 9(1).
22. In its submissions to my office, the agency noted that the document does not expressly state that it was prepared for Cabinet. Nevertheless, the agency claimed that when the document was commissioned, the intention was that Cabinet 'would make decisions on the future of the State's industrial relations system' and would use the document 'as the basis for its deliberations'. The agency advised that as at 4 March 2014 a submission to Cabinet attaching a copy of the document and discussing the recommendations had been prepared but not submitted to Cabinet due to the election period.
23. In support of its claim, the agency provided my office with an unsigned document dated May 2013. It is marked 'sensitive: SA Cabinet' and 'for Cabinet to note'. The agency also provided a letter from Ms Ingrid Norman of the Crown Solicitor's Office dated 22 January 2014 detailing relevant background to the creation of the document obtained from agency staff.
24. I consider that in the context of clause 1(1)(a) the word 'specifically' means 'specially' prepared for submission to Cabinet. 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.⁶
25. I have had regard to the contents of document 1 and the supporting documents, as well as the agency's submissions. I am satisfied that document 1 was specifically prepared for submission to Cabinet.
26. In my view, none of the exceptions in clauses 1(2) and 1(2a) apply. The document does not merely consist of factual or statistical information for the purposes of clause 1(2)(a)(i).
27. I am satisfied that document 1 is exempt under clause 1(1)(a).

⁶ *Re Fisse and Department of Treasury* (2008) 101 ALD 424, 434.

28. In my view, section 20(4) of the FOI Act has no application in this instance, because of the way that clause 1(1)(a) is worded.⁷

29. Given this, I see no reason to consider the agency's claim under clause 9(1).

Document 2

30. Following internal review, the agency claimed that document 2 is exempt under clause 9(1).

31. To justify a claim that a document is exempt pursuant to clause 9(1), it must be shown that it 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 scope of clause 9(1)(a).

32. The agency submitted to my office that document 2 is an internal working document as it contains 'opinion[s], advice or recommendations that ha[ve] been obtained ... for the purpose of the decision-making functions of the Government ...' as required by clause 9(1)(a). I accept the agency's submission.

33. The agency accepts that there is 'public interest in proposals to reform the criminal justice sector'; promoting openness in government; and facilitating more effective participation in government decision making.⁸ That said, in submissions to my office, the agency submitted that disclosure would be contrary to the public interest due to the following factors:

- the report contains very preliminary and sensitive policy ideas and has not been properly considered by the very senior members of the State's criminal justice sector who form the Criminal Justice Sector Reform Council (CJSRC) or the Government;
- it is based ... on anecdotal information only;
- no decision has yet been made whether to adopt ... any or all of the possible projects;
- if any of the proposals are adopted, significant further work would be required to expand upon them and factual information from relevant databases and verified sources will need [to] be incorporated into any proposal;
- on the basis that disclosure under the FOI Act can be assumed to be disclosure to the public at large, release of Document 2 would be premature and may lead to confusion and unnecessary debate resulting from the disclosure of possibilities that are being considered.⁹

34. I am not satisfied that disclosure would, on balance, be contrary to the public interest. In saying this, I have had regard to the following factors:

- the document clearly indicates that it is an initial scoping study. It is apparent from this that the ideas it contains are preliminary in nature. I accept that none of the proposed initiatives have been adopted and further work would be required in the event that any are
- the individuals consulted appear to either be the head of, or very senior within, their organisations; I consider any risks associated with the use of anecdotal evidence received from them to be slight given their seniority and likely knowledge of the relevant issues
- the information is based on a point in time and the date that the document was created is clearly identified on page 2

⁷ 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 matter* ...' [my emphasis].

⁸ The notices of determination and determination following internal review.

⁹ A number of these points were also set out in the agency's notices of determination.

- some of the information in the document appears to be in the public domain or accessible by agency staff (for example, membership;¹⁰ terms of reference;¹¹ statistics; and current initiatives¹²)
 - the document contains its own qualifications (see page 2) and identifies gaps in some areas (for example, see page 25)
 - given the tight economic times and ongoing budget reductions, it is generally accepted that organisations will explore ways to improve efficiency and reduce costs, not all of which will be adopted
 - there is clearly a public interest in fulfilling the objects of the FOI Act, in particular promoting openness; facilitating debate about criminal justice sector reform; and enhancing public participation in the reform process
 - Parliament intended discretions under the FOI Act to be exercised, as far as possible, in a way that favours disclosure without infringing personal privacy.¹³
35. The agency has categorised policy ideas within the document as sensitive. The basis for this claim is unclear.
36. I am not persuaded that the agency's claims that 'release of Document 2 would be premature and may lead to confusion and unnecessary debate' are relevant factors.¹⁴ I note that the document itself is described as an 'initial scoping study' based on information at a particular point in time. It includes qualifications and identifies gaps in the available information. To the extent that there may be confusion regarding the contents of the document if released, the agency would be at liberty to clarify the situation, and provide further information or explanation.
37. I am not satisfied that document 2 is exempt under clause 9(1).

Document 3

38. Following internal review, the agency claimed that document 3 is exempt under clauses 16(1)(a)(v) with 16(1)(b), and 9(1).
39. In concluding that disclosure of the document would, on balance, be contrary to the public interest, the agency had regard to the following factors:
- promoting openness in government
 - facilitating more effective participation in government decision making
 - the review 'discusses options to make savings, that will impact upon individual employees' that are still being considered by the Chief Executive, and staff who may be affected have not had an opportunity to view it.¹⁵
40. Following internal review, the agency reiterated the above points and added that disclosure of the document:

before a decision has been made whether to seek to implement any part of it, would be premature and may lead to confusion and unnecessary debate. It would disclose possibilities that are being considered and would, where staff who are directly concerned

¹⁰ Available via the agency's intranet as at 14 April 2014: http://intraagd.agd.sa.gov.au/Home/SearchResults.aspx?sb-search=%22criminal+justice+sector+reform+council%22&sb-inst=0_dnn_avtSearch&sb-logid=15476-e8pe96xzmfgaf4en.

¹¹ Available via the agency's intranet as at 14 April 2014: http://intraagd.agd.sa.gov.au/Home/SearchResults.aspx?sb-search=CJSRC&sb-inst=0_dnn_avtSearch&sb-logid=15482-prd401oknrfd40nq.

¹² Available as at 14 April 2014 via: <http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives%20Announcements%20and%20News/2012-smart-justice-peggy-hora.pdf>.

¹³ *Freedom of Information Act 1991*, section 3A(1)(b). I do not consider that release of document 2 would infringe personal privacy.

¹⁴ *Re Chapman & Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 43 ALD 139, 152. See also *Eccleston and Department of Family Services* (1993) 1 QAR 60, [177].

¹⁵ Notice of determination dated 8 January 2014.

with it have not been consulted as required, be likely to create unnecessary anxiety and consequent industrial disruption.

41. In its submissions to my office, the agency referred specifically to the number of full time equivalent (FTEs) positions set out in the document, being the current number and the number proposed to achieve the recommended model. The agency also referred to an email from the agency's Chief Executive to departmental staff dated 18 February 2014¹⁶ setting out proposed changes to corporate services and, in particular:
- that I [the Chief Executive] had decided on a new functional and organisational structure for corporate services [to] reduce overlapping services and duplicated effort, and reduce the corporate services budget, providing a saving of over \$1 million per year towards the overall savings challenge;
 - that the restructure will improve corporate service delivery through streamlining and integrating functions, and will achieve savings with an emphasis on fewer executives and senior officers;
 - that the leaders of each of the three new divisions will be responsible for determining the workforce structure within their division and improving process and service delivery;
 - that the Executive Directors will consult staff in affected areas to determine the structure of the units within these divisions.
42. On 9 April 2014, the agency's Chief Executive sent an email to all agency staff advising of the new Central Corporate Services Organisation Structure to take effect on 14 April 2014. It describes the structure as 'the culmination of consultation with affected management and staff'; includes points about how the new structure meets the objectives of the review;¹⁷ and foreshadows the loss of some staff. The 'leads of each area' are now responsible for progressing 'structural changes' and working 'with business units to determine how they can best integrate'.
43. In my view, disclosure of the proposed numbers of FTEs in various divisions (as opposed to the total number), along with comparisons to benchmarks, could reasonably be expected to have a substantial adverse effect on the conduct of industrial relations by the agency. In saying this, I note that the document refers to the number of FTEs proposed for each division. The numbers vary significantly between divisions. Although the review process has advanced since 4 March 2014, these numbers do not appear to have been disclosed. In addition, I am mindful that the process appears to be ongoing. I therefore accept that disclosure of the proposed numbers of FTEs could cause affected staff considerable anxiety. In my view, comparisons to benchmarks reveal how various divisions may be affected.
44. In my view, the following information is exempt:
- FTE numbers in the chart - page 11
 - FTE numbers in 'future state' section of the second table (excluding the total number on the last row) - page 14
 - comparison to benchmarks - page 29, item 3.2.2
 - comparison to benchmarks - page 35, item 3.3.2
 - comparison to benchmarks - page 40, item 3.4.2
 - comparison to benchmarks - page 45, item 3.5.2
 - FTE numbers in the charts - items 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, and 5.8
 - table (excluding the first two rows containing the names of the divisions and current FTE numbers, and the first and final columns of the last row containing the description and the total figure) - page 85

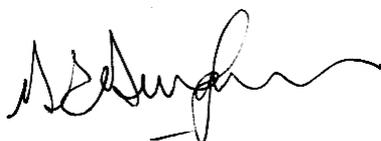
¹⁶ The email is available via the agency's intranet as at 14 April 2014:
<http://intraagd.agd.sa.gov.au/corporatefunctions/continuousimprovement/corporateservicesreview.aspx>.

¹⁷ These points also appear on the agency's intranet as at 14 April 2014:
<http://intraagd.agd.sa.gov.au/corporatefunctions/continuousimprovement/corporateservicesreview.aspx>.

- FTE numbers in 'future state' section (excluding the total number on the last row on page 102) - pages 99 to 102.
45. I am not satisfied that disclosure of the remainder of the information in the document could reasonably be expected to have a substantial adverse effect on the conduct of industrial relations by the agency. I have formed this view having particular regard to the contents of the document; information available to agency staff; and the current economic climate, including budget forecasts. These factors are also relevant to my assessment of the public interest below.
46. I accept that the document contains opinions, advice and recommendations obtained to assist the agency to make decisions about its future structure, and therefore satisfies clause 9(1)(a).
47. I am not satisfied that after deleting the information described in paragraph 44 above, disclosure of document 3 would, on balance, be contrary to the public interest. In reaching this conclusion I have considered the following factors:
- there is clearly a public interest in fulfilling the objects of the FOI Act, in particular promoting openness; facilitating debate about departmental restructuring; and enhancing staff and public participation in the process
 - some of the information in the document appears to be in the public domain or accessible to employees (for example, current FTE numbers and the agency's intention to restructure, with a reduction in staff numbers as a result)
 - given the tight economic times and ongoing budget reductions it is generally accepted that organisations will explore ways to improve efficiency and reduce costs.
48. In my view, document 3 is exempt under clause 16(1)(a)(v) with clause 16(1)(b).
49. Nevertheless, I consider that it would be practicable to release the document after deleting the information described in paragraph 44 above, in accordance with section 20(4).

Determination

50. In light of my views above, I vary the agency's determination to enable document 2 and document 3 (after deleting the information described in paragraph 44 above) to be released.



Richard Bingham
SA OMBUDSMAN

13 May 2014

APPENDIX 1 - 2014/01145

Procedural steps

| Date | Event |
|------------------|--|
| 9 December 2013 | The agency received the FOI application dated 9 December 2013. |
| 10 December 2013 | The agency acknowledged the application. |
| 8 January 2014 | The agency determined the application. |
| 9 January 2014 | The agency received the internal review application dated 9 January 2014. |
| 10 January 2014 | The agency acknowledged the internal review application. |
| 23 January 2014 | The agency confirmed the determination. |
| 3 February 2014 | The Ombudsman received the applicant's request for external review by email. |
| 10 February 2014 | The Ombudsman advised the agency of the external review and requested submissions and documentation. |
| | The Ombudsman acknowledged the application for external review. |
| 26 February 2014 | The agency provided the Ombudsman with its documentation. |
| 5 March 2014 | The agency provided the Ombudsman with its submissions by letter dated 4 March 2014. |
| 15 April 2014 | The Ombudsman issued his provisional determination. |
| 13 May 2014 | Ombudsman SA received the agency's response to the Ombudsman's provisional determination dated 6 May 2014. |

APPENDIX 2 - 2014/01145

| SCHEDULE OF DOCUMENTS | | | | | | | |
|-----------------------|------------|-----------------------------------|---|-------------|-----------------------|----------------|--|
| No | Date | Author | Description | No of Pages | Total Cost ex GST | Determination | Reason |
| | | | | 288 | | | |
| 1 | 7/11/2013 | David Bleby QC, Momentum Partners | Review of the Industrial Relations Court and Commission | 143 | \$118,945.80 | Refused Access | Schedule 1 Clause 1(1)(e) |
| 2 | Nov 2013 | KPMG | Criminal Justice Sector Reform Council Report | 43 | Costs not finalised | Refused Access | Schedule 1 Clause 1(1)(f) Schedule 1 Clause 9 |
| 3 | 27/11/2013 | Ernst & Young | Corporate Services Review | 102 | No final cost to date | Refused Access | Schedule 1 Clause 16 |