

Determination

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

Applicant	Mr Dennis Hood MLC
Agency	Department of the Premier and Cabinet
Ombudsman reference	2017/10855
Agency reference	DPC17/1633
Applicant reference	17066/2407/17
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:

TIME FRAME: 2014/15, 2015/16 and 2016/17 (to date of this request)
Documents/reports/emails relating to job creation schemes funded by the South Australian Government.

1. **For each job creation scheme announced in each time frame:**
 - a. Name of scheme and date announced (copy of announcement where applicable)
 - b. Budget for each scheme and anticipated number of jobs to be created
 - c. Grant amounts available and criteria for applicant
 - d. Copies of grant applications (including the number of jobs expected to be created under the proposal) and whether the grant was approved or denied
 - e. Follow up reports showing how money was spent and the number of jobs created
2. Research documents/reports/analysis relating to SA Government job creation schemes for each time frame.

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 revised provisional determination dated 6 February 2018. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
5. Neither the applicant nor the agency provided submissions in response. This determination is therefore in the same terms as my revised 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 two documents within the scope of the application.
11. The agency determined to refuse access to both documents on the basis that they were exempt under clause 1(1)(a) of Schedule 1 to the FOI Act. In response to my first provisional determination the agency sought to rely on clauses 1(1)(e) and 1(1)(f) in addition to clause 1(1)(a).
12. Clause 1 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); 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

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

- (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 has 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.

Issues in this review

13. The issue for me to consider is whether the agency's refusal to provide the applicant with access to the documents is justified pursuant to clause 1 of Schedule 1 to the FOI Act.

Consideration

Document 1:

14. Document 1 actually comprises three separate - although related - documents, which I will refer to as Document 1A, Document 1B and Document 1C.
15. In discussing the application of clause 1 to the documents I am mindful of my obligation to avoid disclosing in my determination any matter that the agency claims is exempt.²

Document 1A

16. The agency's primary claim in relation to Document 1A is that it is exempt pursuant to clause 1(1)(f) on the basis that it is a briefing paper specifically prepared for the use of a Minister in relation to a matter that was submitted to Cabinet. Documents 1B and 1C were attached to Document 1A. Document 1A specifically refers to Document 1B. In turn Document 1B specifically refers to Document 1C.
17. Although it takes the form of a minute from the agency's chief executive to a Minister, I am satisfied that Document 1A is in substance a briefing paper falling within clause 1(1)(f) of Schedule 1. It is therefore my view that Document 1A is an exempt document.

Document 1B

18. Submissions made in response to my first provisional determination were made by the Crown Solicitor on the agency's behalf. It was submitted that Document 1B is an earlier version of a Cabinet note that was submitted to Cabinet two days later. On that basis I take the view that it is exempt pursuant to clause 1(1)(b) of Schedule 1.

Document 1C

19. Document 1C is an attachment to Document 1B. It is specifically referred to in that Cabinet note. In its submissions to my first provisional determination, the agency stated:

² Section 39(15) of the *Freedom of Information Act 1991*.

Document 1C, submitted as an attachment to 1B, was specifically prepared for submission to Cabinet in order to assist Cabinet in its deliberations in relation to the matters that are the subject of the Cabinet Note, and should therefore be exempt under clause 1(1)(a). The data contained in 1C was collected, with the specific purpose of submission to Cabinet, from a number of government agencies. As direct consequence, 1C constitutes a custom extract of data that was subsequently inserted into table form before being submitted to Cabinet as an attachment to 1B.

20. Given the agency's submission, I accept that Document 1C was specifically prepared for submission to Cabinet. It is therefore my view that it is exempt pursuant to clause 1(1)(a) of Schedule 1 to the FOI Act.

Document 2:

21. Document 2 comprises a Cabinet submission with seven attachments. I will refer to the submission as Document 2A and to the attachments as Documents 2B, 2C, 2D, 2E, 2F, 2G and 2H.

Document 2A

22. It is my view that Document 2A was specifically prepared for submission to Cabinet and is therefore exempt under clause 1(1)(a).

Document 2B

23. This document comprises a table containing figures. In my first provisional determination, I observed that the figures appeared to be publicly available and I expressed the view that I was not satisfied that the document had been specifically prepared for submission to Cabinet.
24. In response to my first provisional determination the agency submitted that the table in question 'is a customised extract of publicly available data that was prepared specifically for Cabinet's consideration':

The specific data was extracted from a [publicly available] database ... and inserted into a newly-created table, rather than being a direct 'copy' of information published ... on [the] website.

25. As set out above, subparagraph (2)(a) of clause 1 provides that a Cabinet document is not exempt by virtue of clause 1(1) if it merely consists of factual or statistical material that does not disclose information concerning a deliberation or decision of Cabinet.
26. The Crown Solicitor submitted that subparagraph (2)(a) has no application to Document 2B because it

... is not merely an attachment containing statistical data ... and is exempt in its own right, as a document prepared specifically for the purposes of Cabinet decision-making. In this regard, the significance of the preceding words 'merely consists of' has the effect of limiting the operation of clause 1(2) to whole documents that contain nothing but factual or statistical content ... Clause 1(2) does not alter the status of document 2B which is exempt pursuant to cl. 1(1)(a).

27. In *Harris v Australian Broadcasting Corporation*, Beaumont J considered the terms of the former section 36(5) of the *Freedom of Information Act 1982* (CW).³ Section 36(5)

³ *Harris v Australian Broadcasting Corporation* (Unreported judgement of the Federal Court of Australia, 15 September 1983.) See also *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development* [2015] AATA 361.

provided that internal working documents were not exempt if they contained only 'purely factual material'. His Honour cited with approval an extract from a US Supreme Court judgement:

„, the legislative history of Exemption 5[to the US Freedom of Information Act 1966] demonstrates that Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions ... are privileged from inspection' ... (Under discovery law) 'memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government ... Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policymaking process on the one hand, and purely factual, investigative matters on the other.⁴

28. In my view Document 2B consists only of compiled factual material and therefore falls within subparagraph (2)(a) of clause 1 of Schedule 1. I must therefore consider whether disclosure of the document would reveal information concerning any deliberation or decision of Cabinet. The Crown Solicitor submitted that it would do so.
29. I disagree with the Crown Solicitor's submission. Not only does Document 2B consist only of compiled statistical material, it is severable from its context as an attachment to a Cabinet note. Disclosure of Document 2B would not reveal information concerning any deliberation or decision of Cabinet; it would reveal nothing more than the fact that Cabinet had been presented with this particular set of statistics in the course of deliberating upon an unknown topic.
30. In this vein, I refer to the judgement of Tilmouth DCJ in *Department of State Development v Pisoni*. In that case His Honour was considering the application of clause 1(1)(e) of Schedule 1 to the FOI Act and said:

There is highly persuasive, and if not binding authority, to the effect that a document merely revealing a description of an event placed before Cabinet is not protected. Thus, in *Secretary to the Department of Infrastructure v Louise Asher MP*, Buchanan J wrote:

'That is not to say that a document supplied to Cabinet for its consideration could never be exempt as disclosing a deliberation of Cabinet. It all depends upon the terms of the document. At one end of the spectrum, a document may reveal no more than that a statistic or description of any event was placed before Cabinet. At the other end, a document on its face may disclose that Cabinet required information of a particular point of view. The former would say nothing as to Cabinet's deliberation; the later might say a great deal. In my view, in the present case the reports were in the former, rather than the latter, category. The reports revealed information about the performance and requirements of government departments, but said nothing about the deliberations of Cabinet.'

Vincent JA considered the question is 'what the document itself would convey in the circumstances', and providing that there is nothing in the document enabling one to 'draw any inference as to what may have been the subject of deliberation or decision', the document is unprotected.⁵

31. While I accept that Document 2B is not a direct copy of publicly available material I take the view that the figures in that document answer the description of mere factual or statistical material that was placed before Cabinet. As such Document 2B says nothing as to Cabinet's deliberation. I conclude that it is not exempt under clause 1(1)(a) or 1(1)(e) of Schedule 1.

⁴ *Environmental Protection Agency v Mink* 410 US 73 (1973).

⁵ *Department of State Development v Pisoni* [2017] SADC 34 at [20]-[21] citing *Secretary to the Department of Infrastructure v Louise Asher MP* (2007) 19 VR 17.

Document 2C

32. Document 2C is a Public Value Account. All Cabinet submissions require an evaluation of their public value.⁶ It is my view that Document 2C was specifically prepared for submission to Cabinet and is therefore exempt under clause 1(1)(a).

Document 2D

33. It is my view that Document 2D (Attachment 3 to the Cabinet Note) was specifically prepared for submission to Cabinet and is therefore exempt under clause 1(1)(a) of Schedule 1.

Document 2E

34. Document 2E takes the form of a minute to an agency office-holder from another government department. In its submissions in response to my first provisional determination, the agency stated that Document 2E was specifically prepared for submission to Cabinet and is therefore exempt pursuant to clause 1(1)(a) of Schedule 1. The agency provided me with a link to 'Cabinet Guide 5: How to write Cabinet submissions', which states that all Cabinet submissions require preparation of a costing comment by the Department of Treasury and Finance before they are lodged.⁷
35. It is therefore my view that Document 2E was specifically prepared for submission to Cabinet and is thus exempt under clause 1(1)(a).

Document 2F

36. Document 2F also takes the form of a minute to an agency office-holder. In its submissions to my first provisional determination, the agency stated that Document 2F was specifically prepared for submission to Cabinet and is therefore exempt pursuant to clause 1(1)(a) of Schedule 1. Cabinet Guide 5 referred to above states that all Cabinet submissions require preparation of a Cabinet office comment before they are lodged.
37. It is therefore my view that Document 2F was specifically prepared for submission to Cabinet and is therefore exempt under clause 1(1)(a).

Documents 2G and 2H

38. Document 2G is in table format and sets out a communication plan. Document 2H is a summary of that plan.
39. In its response to my first provisional determination the agency referred me to a document on its website titled 'Cabinet submission template - abridged guidance.doc'.⁸ This document states:

For new or major projects, a communications plan summary must be lodged with the Cabinet submission and be underpinned by an existing full communications plan.

40. It is therefore my view that both Documents 2G and 2H were specifically prepared for submission to Cabinet and are therefore exempt pursuant to clause 1(1)(a) of Schedule 1 to the FOI Act.

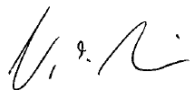
⁶ See <http://dpc.sa.gov.au/what-we-do/services-for-government/public-value> last accessed 26 February 2018.

⁷ See http://dpc.sa.gov.au/data/assets/pdf_file/0011/16877/How-to-write-Cabinet-submissions-Guide-5.pdf last accessed 26 February 2018.

⁸ See <http://dpc.sa.gov.au/what-we-do/services-for-government/cabinet-office-and-public-value-online/templates> last accessed 26 February 2018.

Determination

41. In light of my views above, I vary the agency's determination by determining that Document 2B is not exempt and should be released.



Wayne Lines
SA OMBUDSMAN

27 February 2018

APPENDIX

Procedural steps

Date	Event
24 July 2017	The agency received the FOI application dated 24 July 2017.
13 September 2017	The agency determined the application.
14 September 2017	The agency received the internal review application dated 14 September 2017.
28 September 2017	The agency confirmed the determination.
26 October 2017	The Ombudsman received the applicant's request for external review dated 26 October 2017.
27 October 2017	The Ombudsman advised the agency of the external review and requested submissions and documentation.
28 November 2017	The agency provided the Ombudsman with its submissions and documentation.
4 December 2017	The Ombudsman issued his provisional determination and invited submissions from the parties.
19 January 2018	The agency provided the Ombudsman with its submissions.
6 February 2018	The Ombudsman issued his revised provisional determination and invited submissions from the parties.