

Determination

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

| | |
|---------------------|--|
| Applicant | Mr Blair Boyer MP |
| Agency | Department for Environment and Water |
| Ombudsman reference | 2019/07561 |
| Agency reference | DEW F0002489401 |
| Determination | The determination of the agency 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:
 1.All reports and briefings relating to the current estimated numbers of Koalas in the Adelaide Hills and Mount Lofty Ranges. Timeline 09-05-2019 (including both Great Koala Count in 2012 and Great Koala Count in 2016) to date.
 2. All reports and briefings relating to the current sterilisation plan of Koalas throughout South Australia (specifically Adelaide Hills, Mount Lofty Ranges and Kangaroo Island). Including specific data relating to dates, ear tags, location. Timeline 09-05-2018 - 09-05-2019.
 3. All documents relating to proposed or ongoing koala culling programs (legal or illegal) known to the Agency throughout South Australia. Timeline 09-05-2018 - 09-05-2019.

Background

2. For ease of reference, the procedural steps relating to the application 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 12 October 2019. 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. The agency provided submissions in response, including submissions on behalf of an interested party.

6. In relation to document one, the agency provided explanatory material that it had not previously elaborated on in its determinations.
7. It submitted that the document is a grant application that had previously been unsuccessful, and that the applicant had indicated to the agency that he intended to resubmit it through a second grant application in the near future.
8. The agency further submitted that it was not in the public interest to release this information as it could jeopardise the applicant's chances of success if competitors were to have access to it.
9. Although the agency had relied on clause 9(1) of the FOI Act in withholding access to document 1, I consider it is more appropriately dealt with under clause 8. I have provided my consideration of this document in relation to clause 8 in my report below.
10. In relation to documents 17 and 18, the agency provided compelling reasons as to why the relevant information is personal affairs and therefore exempt under clause 6(1). The agency explained that the interested party had previously expressed views on a certain issue, much to the ire of other interested parties, and had subsequently been subject to criticism that had affected their wellbeing. Accordingly, I have amended my views in relation to these documents below.
11. The agency also submitted that document 23 contains information that I had determined is exempt under clause 6(1) in relation to document 54. I confirm this is the case, and have included document 23 in my consideration of clause 6(1) in my report below.

Relevant law

12. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
13. 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. The following clauses are of relevance to my review:

1—Cabinet documents

- (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.

¹ Freedom of Information Act 1991, section 12.

- (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.

6—Documents affecting personal affairs

- (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

7—Documents affecting business affairs

- (1) A document is an exempt document—
- (a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person; or
 - (b) if it contains matter—
 - (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
 - (B) would, on balance, be contrary to the public interest; or
 - (c) if it contains matter—
 - (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
 - (B) would, on balance, be contrary to the public interest.

- (2) A document is not an exempt document by virtue of this clause merely because it contains matter concerning the business, professional, commercial or financial affairs of the agency or other person by or on whose behalf an application for access to the document is made.
- (3) A document is not an exempt document by virtue of this clause if it is a contract entered into by the Crown or an agency after the commencement of this subclause.

8—Documents affecting the conduct of research

- (1) A document is an exempt document if it contains matter—
 - (a) that relates to the purpose or results of research (other than public opinion polling that does not relate directly to a contract or other commercial transaction that is still being negotiated), including research that is yet to be commenced or yet to be completed; and
 - (b) the disclosure of which—
 - (i) could reasonably be expected to have an adverse effect on the agency or other person by or on whose behalf the research is being, or is intended to be, carried out; and
 - (ii) would, on balance, be contrary to the public interest.
- (2) A document is not an exempt document by virtue of this clause merely because it contains matter concerning research that is being, or is intended to be, carried out by the agency or other person by or on whose behalf an application for access to the document is made.

9—Internal working documents

- (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.
- (2) A document is not an exempt document by virtue of this clause if it merely consists of—
 - (a) matter that appears in an agency's policy document; or
 - (b) factual or statistical material.

14—Documents affecting the economy of the State

A document is an exempt document if it contains matter the disclosure of which—

- (a) could reasonably be expected—
 - (i) to have a substantial adverse effect on the ability of the Government or an agency to manage the economy, or any aspect of the economy, of the State; or
 - (ii) to expose any person or class of persons to an unfair advantage or disadvantage as a result of the premature disclosure of information concerning any proposed action or inaction of the Parliament, the Government or an agency in the course of, or for the purpose of, managing the economy of the State; and

- (b) would, on balance, be contrary to the public interest.

16–Documents concerning operations of agencies

- (1) A document is an exempt document if it contains matter the disclosure of which–
- (a) could reasonably be expected–
- (i) to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency; or
 - (ii) to prejudice on the attainment of the objects of any test, examination or audit conducted by an agency; or
 - (iii) to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or
 - (iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions; or
 - (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.
- (2) A document is an exempt document if–
- (a) it relates to an agency engaged in commercial activities; and
- (b) it contains matter the disclosure of which could prejudice the competitiveness of the agency in carrying on those commercial activities.

14. Also of relevance to this review is section 20(1)(b) of the FOI Act, which sets out that:

20–Refusal of access

- (1) An agency may refuse access to a document–
- (a) if it is an exempt document; or
- (b) if it is a document that is available for inspection at that or some other agency (whether as part of a public register or otherwise) in accordance with Part 2, or in accordance with a legislative instrument other than this Act, whether or not inspection of the document is subject to a fee or charge; or

15. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
16. 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

17. The agency identified 60 documents within the scope of the application.
18. Of those 60 documents, the agency determined that:
- 7 documents are not subject to any exemption clauses under the FOI Act
 - 14 documents are partially exempt under the FOI Act
 - 39 documents are exempt in full under the FOI Act.

Issues in this review

19. The issue for me to consider in this review is whether the agency has justified its determination to refuse full access to all 60 documents.
20. I note that the agency has redacted information in documents 4,5,17 and 54 on the ground that the matter is out of scope. As the FOI Act does not authorise me to consider the issue of scope, I have excluded examination of out of scope matter from this external review.

Consideration

21. From the outset, I note that the agency refused access to documents 19, 20, 30, 45 and 53 pursuant to section 20(1)(b) of the FOI Act on the basis that these documents are publicly available online.
22. The agency provided direct links to this information in a summary document. I am satisfied that the provision of this information in this format is appropriate and in accordance with section 20(1)(b) of the FOI Act.
23. The agency also submitted that documents:
 - 11, 21 and 25 were prepared for submission to a committee of Cabinet and are therefore exempt under clause 1(1) of the FOI Act
 - 17, 18, 22, 27, 29, 35, 46 and 54 would involve the unreasonable disclosure of personal affairs and are therefore exempt in full under clause 6(1) of the FOI Act
 - 2, 5, 13 and 26 are documents affecting business affairs and are therefore exempt under clause 7(1)(c) of the FOI Act
 - 17 is a document affecting the conduct of research and is therefore exempt under clause 8 of the FOI Act
 - 1, 2, 6, 7, 8, 9, 10, 12, 13, 15, 23, 24, 31, 32, 33, 34, 36, 37, 39, 40, 41, 43, 44, 47, 48, 49, 50, 51, 52, 55, 56, 57, 58 and 59 are internal working documents and are therefore exempt under clause 9(1) of the FOI Act
 - 2, 5, 13 and 14 are documents affecting the economy of the State and are therefore exempt under clause 14 of the FOI Act
 - 26 is a document concerning operations of agencies and is therefore exempt under clause 16 of the FOI Act.
24. Although the agency provided public interest considerations both for and against release in relation to clauses 7(1), 9(1), 14 and 16(1), which I will refer to as necessary below, I note that it has failed to provide submissions in relation to the preliminary elements of each exemption clause it has relied upon in justifying its determination.
25. The agency has also failed to set out why disclosure of information that is purported to contain personal affairs would be unreasonable.

Clause 1(1)(a) - Cabinet documents

Documents 11, 21 and 25

26. The agency did not specify which subclause of clause 1(1) it had relied upon in its determination, however, by stating that the documents 'were prepared for submission to a committee of Cabinet' it can be inferred that the agency was relying on clause 1(1)(a) of the FOI Act.

27. Under clause 1(1)(a), a document may be considered exempt if it is a document that has been specifically prepared for submission to Cabinet (whether or not it has been so submitted), and for the purposes of clause 1, a reference to Cabinet includes a reference to a committee of Cabinet. I confirm that the Terms of References for the committees of relevance to these documents are committees of Cabinet.
28. No submissions have been provided by the agency as to how documents 11, 21 and 25 came about, for what purpose they were submitted, or when they were submitted.
29. Document 11 appears to be a set of notes and speaking points prepared for a committee hearing. From the face of the document, it appears highly unlikely that it was prepared for submission to the committee. Rather, it is likely the document was intended for the use of a specific person to discuss issues at the committee hearing.
30. Therefore, I do not consider that document 11 is exempt under clause 1(1)(a), however, I have considered whether it may be exempt under clause 1(1)(e) below.
31. Document 21 is a chain of emails discussing a submission to a Cabinet committee enquiry, but it does not include any actual submissions. Therefore, I also do not consider it to be a document that was 'specifically prepared for submission to Cabinet' in accordance with clause 1(1)(a), however, as with document 11, I have also considered whether it is exempt under clause 1(1)(e) below.
32. Document 25 includes a briefing to the Chief Executive of the agency, with a submission to a Cabinet committee, and cover letter to the committee attached. I am satisfied that the letter to the committee and corresponding submission were prepared specifically for the Cabinet committee, however, I am of the view that the briefing to the Chief Executive (page one), is more appropriately dealt with under clause 1(1)(e).
33. In summary, I am of the view that parts of document 25 are exempt in part under clause 1(1)(a) of the FOI Act, and that documents 11 and 23 are not exempt under clause 1(1)(a).

Clause 1(1)(e) - Cabinet documents

Documents 11, 21 and 25

34. In determining whether a document is exempt pursuant to clause 1(1)(e) of the FOI Act, Executive Senior Member Stevens took the view in *Department of the Premier and Cabinet v Dan van Holst Pellekaan*² (**van Holst Pellekaan**) that there are two questions to consider:
 1. Has there been a relevant deliberation or decision of Cabinet?
 2. If so, do the documents contain matter the disclosure of which would disclose information concerning that deliberation or decision?³
35. The meaning of a 'deliberation...of Cabinet' was considered in *Department of State Development v Pisoni* [2017] SADC 34 (**Pisoni**), and later adopted by Member Stevens in *van Holst Pellekaan*, as follows:

...speaking generally the protection is aimed at preventing the disclosure of documents that shed light on the decision making process in Cabinet⁴ [and] "... "deliberation" is referable to Cabinet's "thinking processes" ... the content of discussions taking place in the Cabinet room ... what Cabinet ministers "had on their minds" ... the content of Cabinet consideration with a view to making a decision..."⁵ (references omitted).

² [2018] SACAT 56.

³ [2018] SACAT 56 at para 81.

⁴ *ibid* at [25]

⁵ *ibid* at [26]

36. In the absence of submissions from the agency, it is difficult to ascertain for what purpose document 11 was created. However, on its face I am inclined to take the view that it is likely to have been created for the purpose of participating in a deliberation of a Cabinet committee, as it appears to have been created for the purpose of participating in the thinking processes of a Cabinet committee meeting. Therefore, I am satisfied there was a relevant deliberation of Cabinet.
37. I am also of the view that document 11 would have the potential to disclose information concerning the deliberations of that meeting. Therefore, I consider that document 11 is exempt under clause 1(1)(e) of the FOI Act.
38. Document 21 is a set of emails that discuss the submissions to the Cabinet committee in document 25. They specifically refer to deliberations that were to take place at the Cabinet committee meeting, and I am satisfied that disclosing document 21 would disclose information concerning those deliberations. Accordingly, I am satisfied that document 21 is exempt under clause 1(1)(e) of the FOI Act.
39. The first page of document 25 is a briefing to the Chief Executive that relates to the submission to a Cabinet committee attached to it, and refers specifically to intended deliberations for which the submission appears to have been created. I am therefore of the view that there is a relevant deliberation, and that disclosure of page 1 of document 25 would disclose information concerning that deliberation.
40. Therefore, I am of the view that page 1 of document 25 is exempt under clause 1(1)(e) of the FOI Act.
41. Although I have reached the view that documents 11, 21 and 25 are exempt under clause 1(1)(a) and (e), I offer my views pursuant to section 39(12) of the FOI Act as to why I consider the agency might provide access to the documents, notwithstanding their exempt status.
42. All three of the documents relate to an inquiry held by a Cabinet committee, which has since made public findings on issues that the documents relate to. Those findings are available on the Parliament of South Australia website, in addition to media articles.
43. Document 25, with the exception of page 1, is also available in full on the South Australian Parliament website in full. Bearing in mind the agency is entitled to refuse access to this document pursuant to section 20(1)(b) of the FOI Act on the ground that it is available online, I consider it would be appropriate for the agency to provide access to this document by providing a website link.
44. As the documents are already in the public domain, or relate to information that is already in the public domain, I am of the view they should be released regardless of their exempt status.

Clause 6(1) - Personal affairs

Documents 17, 18, 22, 23, 27, 29, 35, 46 and 54

45. For a document to be exempt pursuant to clause 6(1):
 - it must contain information concerning the personal affairs of any person (not including the applicant); and
 - the disclosure of that information would be unreasonable.
46. The term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act. It specifically refers to 'personal qualities or attributes'. The term has also been held to

involve 'matters of private concern to an individual'⁶ and the 'composite collection of activities personal to the individual concerned'.⁷

47. The redacted matter in documents 17, 18, 22 and 46 contains the names of individuals acting in their professional capacity (not as public officers), albeit as volunteers. In some instances, the redacted matter contains an outline of their dealings with the agency and/or their contact details.
48. A person's name alone is not in itself their personal affairs, as it is something that they use to identify themselves to the world at large.
49. I also do not consider that that the matter in documents 22 and 46 outlining the interested parties' dealings with the agency is of private concern to the relevant individuals, as they relate to communications made by the interested parties on behalf of non-government organisations (NGOs).
50. The contact details for persons referred to in documents 22 and 46 (where included) are publicly available on the relevant NGO's website.
51. Although the contact details for the interested party referred to in documents 17 and 18 are also publicly available, I am of the view that any identifying information relating to that individual is personal in nature in light of the circumstances highlighted by the agency in its response to my provisional report.
52. The interested party referred to in documents 17 and 18 appears to have views that differ to others within a select community, and I am satisfied that they likely would have expressed their views to the agency with the expectation that those views would remain private. As such, I am satisfied that these documents contain personal affairs.
53. I do not consider that documents 22 and 46 contain personal affairs, and am of the view that they are not exempt under clause 6(1) of the FOI Act.
54. It is also necessary to note that the interested party referred to in document 46 has indicated to my Office that they do not object to the release of this information.
55. Documents 27, 29, 35, 23 and 54 contain the names of individuals acting in their private capacity in the context of correspondence with the agency in regard to a specific issue, in addition to their contact details, and in one instance their age.
56. Ordinarily, I would consider that the names of individuals alone are not their personal affairs as they are used to identify themselves to the world at large. I have, however, considered the names of persons mentioned in documents 27, 29, 35 and 54 in the context of each document as a whole, as revealing their names could infer that they hold certain views in relation to the content of the remainder of the corresponding documents.
57. Documents 27, 29, 35 and 54 appear to concern appeals by members of the public to Members of Parliament to take action on a certain issue, thereby indicating that the interested parties did not intend to keep their views on the relevant issue private. Accordingly, I do not consider the names of persons identified in documents 27, 29, 35 and 54 are their personal affairs.
58. In regard to the age of the individual referred to in document 29, I also do not consider that is their personal affairs. Whilst revealing a person's age may carry a level of

⁶ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625, citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1986) 13 FCR 85 at 88-89.

⁷ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

sensitivity in some circumstances, I do not consider that to be the case in relation to document 29. Further, as with a name, a person's age is also frequently used or discussed in public forums, and I do not consider the age of the person referred to in document 29 carries the necessary quality of being personal or private in nature.

59. I do, however, consider that contact information in documents 27, 29, 35 and 54 is of private concern to the individuals as they are personal emails and addresses that would presumably be intended for viewing by a limited audience.
60. I am therefore of the view that this information concerns the personal affairs of third parties, and I will now consider whether it is unreasonable to disclose this information, in addition to documents 17 and 18.
61. In *Treglown v SA Police* the South Australian District Court said that when interpreting 'unreasonable' in clause 6, a decision maker needs:

... to consider not merely the content of the information which is sought to be disclosed, although in some circumstances that may be sufficient, but, as well, its relationship with other material known to the applicant, its level of sensitivity, the attitude of the person affected by the disclosure, the circumstances in which the information was originally obtained, whether it was already known to the applicant, the nature of the applicant's interest in it and any disclosed intentions with respect to its use.⁸
62. Given that disclosure of documents under the FOI Act must be taken to be to the world at large, and could open individuals to unwanted contact or diminish their privacy, I am of the view that disclosure of contact details in documents 27, 29, 35 and 54 is unreasonable.
63. I am also of the view that disclosure of documents 17 and 18 would be unreasonable, given the interested party has concerns that disclosure may lead to harassment from others.
64. Accordingly, I am satisfied that documents 17, 18, 27, 29, 35 and 54 contain matter that is exempt under clause 6(1) of the FOI Act.

Clause 7(1)(c) - documents affecting business affairs

Documents 2, 5, 13 and 26

65. 'Business affairs' has been held to mean activities carried out with the view to make a profit, and not just affairs derived from or to do with business. The Queensland Information Commissioner commented that:

For a matter to relate to 'business affairs' in the requisite sense, it should ordinarily, in my opinion, relate to the affairs of a business undertaking which is carried on in an organised way (whether full time or only intermittent) with the purpose of obtaining profits or gains (whether or not they actually be obtained).⁹
66. The relevant provision under the now repealed Queensland legislation¹⁰ considered by the Information Commissioner mirrors clause 7(1)(c).
67. The courts in Victoria have also held that for the 'business affairs' exemption to apply, the information must relate to matters of business, commercial or financial nature, and

⁸ *Treglown v SA Police* (2011) 278 LSJS 231, [133], considering *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALD N257, 259 and *Victoria Police v Marke* (2008) 23 VR 223, [18] and [106]-[103].

⁹ *Stewart and Department of Transport* (1993) 1 QAR 227, [103].

¹⁰ Section 45(1)(c) of the *Freedom of Information Act 1992 (Qld)*.

'not merely be derived from a business or concerning it or have some connection with it'.¹¹

68. I adopt these views in considering the meaning of 'business affairs' under clause 7(1)(c).
69. The redacted material in documents 2, 5, 13 and 26 appears to relate to government projects and funding issues surrounding the projects. In the absence of submissions from the agency as to how these documents concern business affairs, it is unclear how this information satisfies the requirements of clause 7(1)(c),
70. As government projects or agencies rarely operate for the purpose of making profits, and it does not appear that these particular projects were intended to make a profit, I do not consider that the relevant matter concerns the business affairs of an agency or any other person. Accordingly, I do not consider the document contains matter that is exempt under clause 7(1)(c) of the FOI Act.

Clause 8 - documents affecting the conduct of research

Documents 1 and 17

71. For a document to be exempt under clause 8 of the FOI Act, it must:
 - relate to the purpose or results of research (other than public opinion polling that does not relate directly to a contract or other commercial transaction that is still being negotiated), including research that is yet to be commenced or yet to be completed; and
 - disclosure of that document could reasonably be expected to have an adverse effect on the agency or other person by or on whose behalf the research is being, or is intended to be, carried out.
72. A document is not merely exempt because it relates to research that is being, or is intended to be carried out by the agency or person seeking access to the document.¹²
73. I am of the view that the relevant matter in document 17 relates to the purpose of research that was underway in 2018. I do not, however, consider that disclosure of this matter would be reasonably expected to have an adverse effect on the agency or other person by or on whose behalf the research is being, or is intended to be, carried out, as this matter appears to be publicly available online.
74. I have also sought the views of the relevant staff at the University of Adelaide, who are responsible for the research referred to in document 17, and they do not object to the release of the relevant matter.
75. Accordingly, I do not consider that document 17 is exempt under clause 8 of the FOI Act.
76. I have also considered document one in light of submissions provided in response to my provisional report. Document one is a research grant proposal, and I am satisfied that it relates to the purpose of research.
77. I am also satisfied that disclosure of document one could reasonably be expected to have an adverse effect on the person who is intending to carry out the research, given

¹¹ *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441; The President's view regarding the interpretation of 'business affairs' was upheld on appeal to the Full Court of the Supreme Court (*Accident Compensation Commission v Croom* [1991] 2 VR 322).

¹² *Freedom of Information Act 1991*, Schedule 1, clause 8(2).

that the grant application is subject to a competitive process and competitors could gain an advantage should the document be disseminated to the broader public.

78. Accordingly, I am satisfied document one is exempt under clause 8 of the FOI Act.

Clause 9(1)(a) - internal working documents

Documents 1, 2, 6, 7, 8, 9, 10, 12, 13, 15, 23, 24, 31, 32, 33, 34, 36, 37, 39, 40, 41, 43, 44, 47, 48, 49, 50, 51, 52, 55, 56, 57, 58 and 59

79. The scope of clause 9(1)(a) is wide, particularly given the words 'that relates to'.

80. The 'opinion, advice or recommendation' must nevertheless have been obtained, prepared or recorded, or the 'consultation or deliberation' must have taken place, 'in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency'.

81. The agency did not provide any explanatory submissions in regard to clause 9(1)(a), and it is unclear:

- what many of the documents are or who their intended audience is
- whether they contain an opinion, advice or recommendations, or consultation or deliberation
- whether they would have been prepared or recorded for the decision-making functions of the Government, a Minister or an agency.

82. Whilst I am inclined to agree that some of the documents quite obviously appear from their face to relate to an opinion, advice or recommendation that was prepared or recorded for the purpose of the decision-making functions of the Government, a Minister or agency, some are less clear. In the absence of any explanatory material from the agency, I am inclined to take the view that many of the documents do not satisfy any of these criteria.

83. I have not taken steps to set out which documents meet the initial criteria of clause 9(1), as I am not of the view that disclosure of any of the documents would, on balance, be contrary to the public interests.

84. I am perplexed by the agency's weighing up of public interest considerations, and the conclusion reached in relation to clause 9(1).

85. The Administrative Appeals Tribunal in *Re Lianos and Secretary to the Department of Social Security* made the following observations in relation to how the public interest for and against disclosure is to be weighed when considering internal working documents:¹³

Relevant considerations include matters such as the age of the documents; the importance of the issues discussed; the continuing relevance of those issues in relation to matters still under consideration; the extent to which premature disclosure may reveal sensitive information that may be "misunderstood or misapplied by an ill-informed public"; the extent to which the subject matter of the documents is already within the public knowledge; the status of the persons between whom and the circumstances in which the communications passed; the need to preserve confidentiality having regard to the subject matter of the communication and the circumstances in which it was made. Underlying all these factors is the need to consider the extent to which disclosure of the documents would be likely to impede or have an adverse effect upon the efficient administration of the agency concerned ...

¹³ *Re Lianos and Secretary to the Department of Social Security* [1985] AATA 38, [81].

86. Firstly, the agency has inexplicably weighed the public interest considerations in relation to clauses 7(1)(c), 9(1), 14(b) and 16(1) collectively, without regard for the possibility that the public interest considerations may be significantly different or of no relevance to each individual clause. This approach by the agency has also resulted in a lengthy list of repetitive and unpersuasive considerations against disclosure. I query whether the agency has actually turned their mind to the public interest considerations in any meaningful way.
87. Essentially, the only public interest consideration against disclosure of these documents put forward by the agency is that it would compromise future agency deliberations and communications. I do not see any logic behind such an assertion, given that the matter contained within these documents is largely already in the public domain and not sensitive in nature.
88. The documents also, for the most part, contain information provided by public officers to other public officers in the ordinary course of their duties as public servants. To suggest that they would no longer perform their roles adequately due to concern that their advice may be made public, is an unlikely outcome in my view.
89. In contrast, as noted by the agency, disclosure of the documents would assist in promoting transparency and accountability across government, particularly in regard to procurement practices and animal welfare. I find this to be a highly persuasive consideration in favour of disclosure.
90. Accordingly, I am of the view that disclosure of documents 1, 2, 6, 7, 8, 9, 10, 12, 13, 15, 23, 24, 31, 32, 33, 34, 36, 37, 39, 40, 41, 43, 44, 47, 48, 49, 50, 51, 52, 55, 56, 57, 58 and 59 is not, on balance, contrary to the public interest.

Clause 14(1)(a) - Documents affecting the economy of the State

Documents 2, 5, 13 and 14

91. The agency has failed to provide any submissions to support its claim that disclosure of documents 2, 5, 13 and 14 ‘could reasonably be expected...to have a substantial adverse effect on the ability of the Government or an agency to manage the economy, or any aspect of the economy, of the State.’
92. The phrase ‘substantial adverse effect’ is not defined in the FOI Act, however, in the decision of *Treglown v SA Police* the South Australian District Court said that the phrase:
- ...should be interpreted as indicating a ‘degree of gravity’ ... or an effect ‘that is “sufficiently serious or significant to cause concern to a properly informed reasonable person” ... (references omitted).¹⁴
93. There is nothing on the face of documents 2, 5, 13 and 14 that would indicate even a remote possibility that disclosure would be likely to have a substantial adverse effect on the ability of the Government or an agency to manage the economy, or any aspect of the economy, of the State. Accordingly, I do not consider that they are exempt under clause 14(1)(a) of the FOI Act.

¹⁴ *Treglown v SA Police* [2011] SADC 139 (Unreported, South Australian District Court, Judge Herriman, 20 December 2011), [203], considering *Harris v ABC* (1983) 50 ALR 551 and *Konieczka v South Australian Police* [2006] SADC 134 (unreported, Judge Boylan, 8 December 2006), following *Thiess and The Department of Aviation* (1986) 9 ALD 454. The comments were made in the context of clause 16(1), but, in my view, apply equally to clause 14.

Clause 16(1)(iv) - Documents affecting the operation of agencies

Document 26

94. The agency has claimed that document 26 contains matter which could reasonably be expected to have a substantial adverse effect on the effective performance by an agency of the agency's functions. Again, it has failed to provide any submissions to support this claim.
95. I do not consider that the relevant matter in document 26 has the potential to have a substantial adverse effect on the effective performance by an agency of the agency's functions.
96. Accordingly, I do not consider that document 26 is exempt under clause 16(1)(iv) of the FOI Act.

Comment

97. It is my view that it is in the public interest to publish my final determination pursuant to section 39(14) of the FOI Act.
98. Further, in light of my decision to publish my determination, and as pre-empted in my provisional determination, I consider it appropriate to comment on what I consider to be unreasonable conduct by the agency, pursuant to section 39(16) of the FOI Act. I emphasize that my view of the agency's conduct is not part of the reasoning for my determination.
99. The agency has failed to provide adequate submissions in regard to many of the exemption clauses it has relied upon in justifying its determination to refuse access to documents. Many exemption clauses appear to have been relied upon with little to no consideration as to whether any, or all, of the criteria for each clause have been met.
100. I remind the agency that under section 48 of the FOI Act, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
101. I can only speculate as to why such inadequate consideration has been given to the exemption clauses referred to under the FOI Act. It is possible there has been an overabundance of caution, an excessively secretive approach, or a lack of understanding of the FOI Act by the agency's FOI officer(s).
102. Regardless of the reasons, I consider it would be appropriate for the agency's FOI officers to undertake further FOI training to prevent further misapplication of the FOI Act in future determinations.
103. As noted above, my comments above in relation to the agency's conduct were pre-empted in my provisional report.
104. I had requested submissions from the parties in relation to publication of my final report, and although neither of the parties provided submissions, the applicant took it upon himself to provide a copy of my provisional report to the media directly. My comments in regard to the agency's conduct were subsequently published by the media.¹⁵
105. Whilst my provisional reports are not subject to any statutory obligation of confidentiality, I consider that the applicant's conduct was unreasonable given that my

¹⁵ The Advertiser, *Are you 'koala-fied'? Questions surrounding marsupial counting*, 17 November 2019.

provisional views are not final, and are subject to the receipt and consideration of submissions from interested parties.

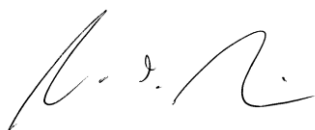
Determination

106. In light of my views above, I vary the agency's determination.

107. I am of the view that:

- document 1 is exempt in full under clause 8 of the FOI Act
- document 25 is exempt in part under clause 1(1)(a) of the FOI Act
- documents 17, 18, 27, 29, 23, 35 and 54 are exempt in part under clause 6(1) of the FOI Act
- documents 11 and 21 are exempt in full under clause 1(1)(e)
- all other documents within the scope of the agency's determination are not exempt and should be released in full.

108. In regard to documents 11, 21 and 25, I have provided my views as to why I consider the agency might provide access to the documents, notwithstanding their exempt status.



Wayne Lines
SA OMBUDSMAN

3 December 2019

APPENDIX 1

Procedural steps

| Date | Event |
|------------|--|
| 9/05/2019 | The agency received the FOI application dated 8 May 2019. |
| 27/05/2019 | The agency notified the applicant in writing that the Principal Officer had made a determination to extend the period of time to deal with the application, nominating 11 July 2019 as the time within which the application would be dealt with. ¹ |
| 11/07/2019 | The agency failed to determine the application within the period of extension as required by the FOI Act, ² and is deemed to have refused access to the documents. ³ |
| 22/07/2019 | The agency received the internal review application dated 22 July 2019. |
| 23/07/2019 | The agency requested that the applicant withdraw the application for an internal review on the basis that it intended to issue a determination pursuant to section 19(2a) of the FOI Act. |
| 23/07/2019 | The applicant declined the agency's request to withdraw the FOI application. |
| 6/08/2019 | The agency varied the deemed refusal by issuing an internal review determination. |
| 16/08/2019 | The Ombudsman received the applicant's request for external review dated 16 August 2019. |
| 26/08/2019 | The Ombudsman advised the agency of the external review and requested submissions and documentation. |
| 12/09/2019 | The agency provided the Ombudsman with its submissions and documentation. |
| 10/10/2019 | The Ombudsman made a provisional determination and sought a response from the interested parties. |

¹ Pursuant to the *Freedom of Information Act 1991*, section 14A.

² Freedom of Information Act 1991, section 14(2)(ii).

³ Freedom of Information Act 1991, section 19(2).