

## Determination

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

Applicant	Mr Trevor Adamson
Agency	Anangu Pitjantjatjara Yankunytjatjara Executive Board
Ombudsman reference	2020/00894
Determination	The determination of the agency is confirmed.

## 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:

Documents relating to the APY Executive board meetings of October 9<sup>th</sup> 2019 and November 18<sup>th</sup> and 19<sup>th</sup> 2019.

The documents I request are copies of the handwritten meeting notes, copies of the minutes or the draft minutes, and copies of the meeting audio recordings of the three meetings defined above.

### Background

2. For ease of reference, the procedural steps relating to the application and the external review are set out in Appendix 1.

### Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.
4. The applicant lodged his application for external review beyond the 30 day statutory period. In assessing this matter, my delegate exercised their discretion to grant an extension, on the basis that the applicant was not advised of his rights for review in the initial FOI determination made by Mr King on 28 November 2019, and that it did not appear that the agency would in any way be prejudiced by a grant of extension.
5. The agency was invited to make submissions on this point by email of 9 April 2020, and to identify whether it was in fact prejudiced by the decision to grant this extension. It did not provide any such submission. I proceeded with this external review on the basis that the agency did not intend to take this jurisdictional point.

### Provisional determination

6. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 22 September 2020. I informed the parties that subject

to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.

7. Neither the applicant nor the agency provided submissions in response to my provisional determination.

### Relevant law

8. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.<sup>1</sup>
9. 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 that may be claimed by an agency as a basis for refusing access. Clauses 7, 9, and 10 of Schedule 1 are relevant to my review. I set them out below:

#### 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.

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<sup>1</sup> *Freedom of Information Act 1991*, section 12.

## 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.

## 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.
- (2) A document is not an exempt document by virtue of this clause merely because it contains matter that appears in an agency's policy document.
10. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
11. 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

12. The agency identified nine documents within the scope of the application. These consist of the minutes for Anangu Pitjantjatjara Yankunytjatjara (APY) Executive Board meetings on 9 October, 18 November, and 19 November 2019 (Documents 1-3), the audio recordings for these meetings (Documents 4-6), and the handwritten notes for these meetings (Documents 7-9).
13. I am advised by the agency that it has provided Documents 1-3 to the applicant. The minutes of the APY Executive Board meeting of 9 October 2019 were provided by registered post, on 12 December 2019; the minutes of the 18 November and 19 November 2019 meetings were sent by registered post on 7 March 2020. Both sets of minutes were provided to the applicant after they had been approved by the APY Executive Board.
14. The agency, in its response to the applicant dated 28 November 2019, advised the applicant that it was of the opinion that the audio recordings of the relevant meetings (that is, Documents 4-6), were not exempt under the FOI Act. The agency advised the applicant that he could 'attend at the APY office at Umuwa to hear the audio recording

of the Executive Board meetings on 9 October and 18 and 19 November 2019, upon him giving not less than 24 hours' notice to APY of the date and time of his attendance'.

15. I note that the applicant requested that material be provided to him by email, rather than by Australia Post, and that the agency has expressed concern that the email address provided is not the applicant's. The applicant has argued that these concerns are unwarranted.
16. I note that under section 39(2) of the FOI Act only a person who is aggrieved by a determination of an agency may apply to the Ombudsman for an external review. Decisions made under section 22 of the FOI Act as to the form in which documents are provided are not subject to external review, as they are not determinations under the FOI Act. I will therefore not consider the concerns that the applicant has raised about the form in which Documents 1-6 have been provided to him as a part of this external review.
17. The agency determined to refuse access to Documents 7-9, the handwritten notes from the meetings. The reasons for this were given as follows:
  - initially, by letter of 28 November 2019, the agency argued that the documents are exempt as they are internal working documents relating to deliberations that took place in the course of the decision-making functions of APY
  - by letter of 24 April 2020, the agency advised this Office that the documents were exempt pursuant to clauses 7, 9, and 10 of Schedule 1 of the FOI Act (that is, documents affecting business affairs (clause 7), internal working documents (clause 9), and documents subject to legal professional privilege (clause 10)).
18. I further note from the agency's email correspondence of 24 April 2020, that the agency stated there were no internal communications or communications between the agency and any other party relevant to the application.

### Issues in this review

19. Having regard to the agency's determination and submissions, and the exemption clauses provided in Schedule 1 of the FOI Act, it is for me to determine whether to confirm, vary or reverse the agency's determination in regards to the 3 documents in issue.

### Consideration

20. The applicant has sought review of the agency's claim that Documents 7, 8, and 9 are exempt under clauses 7, 9, and 10 of Schedule 1 of the FOI Act.
21. The agency initially advised the applicant (by letter of 28 November 2019) that the handwritten meeting notes of the 9 October 2019 and 18 and 19 November 2019 APY Executive Board meetings (Documents 7, 8, and 9) were internal working documents of APY, 'for reason that they are documents that relate to deliberations that have taken place in the course of the decision-making functions of APY'. The agency refused access, in this correspondence, on the following basis:

These documents are exempt documents under the FOI Act if their disclosure would, on balance, be contrary to the public interest.

I am of the opinion that these documents are exempt documents, because on balance their disclosure would be contrary to the public interest, and accordingly, refuse access to these documents for the following reasons:

1. It is in the public interest that handwritten notes of the conduct of Executive Board meetings be taken by a note-taker in aid of preparation of accurate Minutes of meeting.
  2. The author of the handwritten notes may be a junior employee, or outside contractor engaged by APY for the purpose.
  3. The taking and maintaining of handwritten notes is a particularly difficult task, for reason that at times discussions by Executive Board members occur in the Pitjantjatjara language, and meetings extend over a number of hours.
  4. It is in the public interest that the author of such handwritten notes not be subject to scrutiny or criticism by way of the FOI process, as if this occurred it may be difficult to retain and maintain the services of appropriate persons to perform this task.
  5. Actual Minutes of the 9 October and 18 and 19 November 2019 Executive Board meetings, as confirmed, will be provided to the FOI applicant.
  6. Insofar as the FOI applicant may wish to check the accuracy of the confirmed Minutes of meeting, an audio tape recording of the meeting is kept by APY and will be made available to the FOI applicant should he request the opportunity to hear the tape recording.
22. The applicant has sought review of the agency's claim that Documents 7, 8, and 9 are exempt under clauses 7, 9, and 10 of Schedule 1 of the FOI Act.
23. In its response to my Office of 24 April 2020, the agency reaffirmed the grounds for Documents 7, 8, and 9 being exempt as claimed in its initial determination. In this letter, the agency went on to make further claims that the documents were exempt pursuant to clauses 7, 9, and 10 of Schedule 1 of the FOI Act. The agency also stated:

It is contrary to the public interest that these documents be disclosed - particularly in circumstances where the actual Minutes of the relevant meetings are provided to the Applicant, and the Applicant is also afforded access to the original audio records, should he seek to verify the accuracy of the Minutes. The Handwritten notes contain reference to confidential legal advice given to Executive Board members at the meeting, as do the audio recordings.

#### Clause 9 - Internal working documents

24. The scope of clause 9 is wide, particularly given the words 'that relates to' in clause 9(1)(a). 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... an agency', for it to be within the scope of this clause. Further, I must consider whether disclosure of the information would, on balance, be contrary to the public interest.
25. In order to understand the meaning and intended operation of clause 9, I note that in *Re Waterford and Department of Treasury (No 2)* (1985) the Commonwealth Administrative Appeals Tribunal stated:

[t]he deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.<sup>2</sup>

<sup>2</sup> *Re Waterford and Department of Treasury (No 2)* (1985) 5 ALD 588, at 606-7.

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26. The handwritten notes of APY Executive Board meetings on 9 October 2019, 18 November 2019, and 19 November 2019 (that is, Documents 7, 8, and 9) are a record of the Board's meetings on these dates. They describe matters discussed in the process of reaching a decision of the Board and, at points, consultations and deliberations undertaken by the APY Executive Board in its decision-making processes. I am satisfied that Documents 7, 8, and 9 constitute internal working documents for the purposes of clause 9.
27. I now turn to consider the public interest test enumerated in clause 9(1), and whether the disclosure of these documents would be, on balance, contrary to the public interest.
28. The Administrative Appeals Tribunal in *Re Lianos and Secretary to the Department of Social Security* describes the public interest for and against disclosure to be weighed when considering internal working documents:
- 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.<sup>3</sup>
29. Having regard to the factors identified above, as well as the public interest submissions provided by the agency, I have identified the following factors in favour of disclosure:
- meeting the objects of the FOI Act favouring access to documents
  - the importance of transparency and accountability in the agency's decision making
  - promoting the openness and accountability of the agency
  - facilitating more effective participation in, and scrutiny of, the agency's decision-making processes
  - that much of the information in the handwritten notes is available in the published minutes.
30. I have also identified the following factors contrary to disclosure:
- the likelihood that disclosure could inhibit frank and open discussion, both internally and between the agency and other agencies
  - the possibility that disclosure could adversely affect the efficient administration of the agency
  - the agency's objections to disclosure, noting its concerns about the difficulty of retaining administrative support to record APY Executive Board meetings
  - that certain of the discussions and information recorded in the handwritten notes are potentially confidential
  - that the approved minutes of the meetings in question are publicly available, and have been made available to the applicant
  - that the applicant has access to the audio recordings of the relevant meetings should he wish to check the accuracy of the approved minutes.
31. In light of the above factors, it is my view that the factors contrary to disclosure outweigh those in favour of disclosure and that documents 7, 8, and 9 are therefore

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<sup>3</sup> *Re Lianos and Secretary to the Department of Social Security* [1985] AATA 38, [81].

exempt pursuant to clause 9(1). In particular, I consider that members of the APY Executive Board ought to be able to have full and frank discussions, whether with each other, APY staff, or in consultation with representatives of other agencies or organisations, in the course of their decision-making functions. In regard to this consideration it is highly relevant that the applicant is not a member of the APY Executive Board.

32. Given my view that documents 7, 8, and 9 are exempt under clause 9(1), I do not consider it necessary to consider whether they are additionally exempt under clauses 7 and/or 10.

#### **Determination**

33. In light of my views above, I confirm the agency's determination in the manner set out in Appendix 2.

A handwritten signature in black ink, appearing to read 'W. J. Lines', written in a cursive style.

Wayne Lines  
**SA OMBUDSMAN**

5 November 2020

## APPENDIX 1

### Procedural steps

Date	Event
21 November 2019	The agency received the FOI application dated 21 November 2019.
28 November 2019	The agency determined the application.
12 December 2019	The agency sent its determination by registered post.
14 January 2020	The agency received the internal review application dated 14 January 2020. The applicant sought internal review of what he claimed was a deemed refusal, stating that he had received no response concerning the application of 21 November 2019 (the agency had sent its response by post on 12 December 2019). The applicant stated in correspondence with my Office that he had been travelling, and that he had received the agency's response on 27 January 2020.
23 January 2020	The agency advised the applicant that his application was not subject to external review under section 29 of the FOI Act as the matter was determined by the APY General Manager, Mr Richard King, and that as a result no internal review is available, as per section 29(6).
27 January 2020	The date on which the applicant states he received the agency's determination (dated 28 November 2019).
4 February 2020	The Ombudsman received the applicant's request for external review dated 4 February 2020.
12 and 13 February 2020	The agency provided the Ombudsman with its initial response and documents.
5 March 2020	The Ombudsman advised the agency of the external review and requested submissions and documentation.
7, 8, and 24 April 2020	The agency provided the Ombudsman with its submissions and further documentation.
9 April 2020	The agency was invited to make submissions on an extension of time being granted to the applicant. The agency did not provide any submissions.
22 September 2020	The Ombudsman issued his provisional determination and invited submissions from the parties.



## APPENDIX 2

Document in issue	Description	Agency's determination	Ombudsman's determination	Information to be released
1	Minutes of the APY Executive Board meeting of 9 October 2019	Released, and sent to the applicant by post	n/a	Already released
2	Minutes of the APY Executive Board meeting of 18 November 2019	Released, and sent to the applicant by post	n/a	Already released
3	Minutes of the APY Executive Board meeting of 19 November 2019	Released, and sent to the applicant by post	n/a	Already released
4	Audio recordings of the APY Executive Board meeting of 9 October 2019	Released, and made available to the applicant at the APY office at Umuwa	n/a	Already released
5	Audio recordings of the APY Executive Board meeting of 18 November 2019	Released, and made available to the applicant at the APY office at Umuwa	n/a	Already released
6	Audio recordings of the APY Executive Board meeting of 19 November 2019	Released, and made available to the applicant at the APY office at Umuwa	n/a	Already released
7	Handwritten notes of the APY Executive Board meeting of 9 October 2019	Fully exempt on the basis of clause 9(1)	Fully exempt on the basis of clause 9(1)	none
8	Handwritten notes of the APY Executive Board meeting of 18 November 2019	Fully exempt on the basis of clause 9(1)	Fully exempt on the basis of clause 9(1)	none
9	Handwritten notes of the APY Executive Board meeting of 19 November 2019	Fully exempt on the basis of clause 9(1)	Fully exempt on the basis of clause 9(1)	none