

Determination

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

Applicant	Mr Chris Picton MP
Agency	Minister for Health and Wellbeing
Ombudsman reference	2019/10282
Agency reference	MHW-H19-4569
Determination	The determination of the agency is reversed.

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:

Any and all documents (including but not limited to emails, briefings, minutes, agendas, letters, notes, contracts, memos, proposals) to and/or from the Minister and/or a member of the Minister's Office regarding the new Women's and Children's Hospital.

Background

2. For ease of reference, 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. I exercise my discretion under section 39(4) to extend the time for making the application.
5. I note that the applicant and agency agreed to informally extend the time for the agency to provide its internal review determination. The applicant's external review application was lodged within 30 days of the informal extension lapsing.
6. Having regard to the informal extension which the applicant had agreed to in good faith, it is my view that were I not to exercise my discretion to extend the time for making the external review application, the applicant would be unfairly prejudiced.

Provisional determination

7. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 12 August 2020. I informed the parties that subject to

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

8. Neither of the parties provided submissions in response. Accordingly, this determination is in the same terms as my provisional determination.

Relevant law

9. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
10. 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.
11. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
12. 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.
13. Clauses 1(1) and 9(1) of Schedule 1 of the FOI Act are relevant to my review. I set those clauses out in full:

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.

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.

Documents in issue

14. The agency failed to make a determination or internal review determination within either of the legislated timeframes, but purported to issue a belated determination after the expiry of both deadlines.
15. Section 14(2) of the FOI Act requires agencies to deal with applications within 30 days after they are received. Section 19(2)(b) provides that if an agency fails to determine an application within 30 days after receiving it, it is to be taken to have determined the

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

application by refusing access to the documents sought. However, section 19(2a) of the FOI Act provides that 'nothing prevents an agency from making a determination to give access to a document on an application after the period within which it was required to deal with the application (and such a determination is to be taken to have been made under this Act)'. In my view, section 19(2a) only has operation when an agency fails to determine an application within 30 days after it is received and has no operation once an applicant has sought an internal review. It should also be noted that section 19(2a) only permits agencies to make belated determinations 'to give access to a document' and cannot be utilised to refuse access. I have therefore treated the agency's purported determination on internal review as further submissions from the agency.

16. The agency identified 24 documents within the scope of the application and submitted that it considered 3 documents to be exempt in full, 18 documents to be partially exempt and 3 documents not to be exempt.
17. The applicant advised in his application that he is seeking an external review of the agency's claim that documents 1 and 2 are exempt on the basis of clause 1(1) and document 21 is exempt on the basis of clause 9(1).
18. Accordingly, only documents 1, 2 and 21 are the subject of this external review.

Issues in this review

19. Having regard to the agency's 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 deemed refusal in regards to documents 1, 2 and 21.

Consideration

Document 1

20. Document 1 is a Minute to the agency which the agency has claimed to be exempt pursuant to clause 1. Although the agency has neglected to specify a sub-clause, I note that the internal review determination states:

I have determined that two documents are exempt pursuant to Schedule 1, Clause 1, as the documents contain information that if released could disclose information concerning deliberations or decisions of Cabinet.

21. This seems to indicate that the agency has intended to rely upon clause 1(1)(e), although this is speculation as the agency has not provided any further explanation as to how any part of clause 1(1) applies. I have therefore considered each sub-clause of clause 1.
22. As stated, document 1 is a Minute to the agency. From the contents of the document, it appears that the purpose of the Minute was to provide the agency with a status update regarding the new Women's and Children's Hospital (nWCH) in anticipation of an upcoming meeting.
23. Noting that there is nothing contained within the document that indicates any intention that the document be submitted to Cabinet, and absent any explanation from the agency, I am not satisfied that clauses 1(1)(a), 1(1)(b) or 1(1)(c) are applicable.
24. Although document 1 is a briefing paper which was prepared for the use of a Minister, noting the purpose of the paper, as specified above, it does not appear that the document was specifically prepared for the use of a Minister in relation to a matter

submitted, or proposed to be submitted to Cabinet [emphasis added]. I am therefore not satisfied that clause 1(1)(f) is applicable.

25. Clause 1(1)(e) poses a broad test, namely whether disclosure would disclose information concerning any deliberation or decision of Cabinet. The wording of ‘information concerning any’ has the effect of making clause 1(1)(e) broader than any current equivalent provisions in other Australian jurisdictions.² It captures any information which may be considered to be ‘regarding’ or ‘about’ any deliberation or decision of Cabinet.³

26. In the matter of *Department of the Premier and Cabinet v van Holst Pellekaan*,⁴ Executive Senior Member Stevens observed the following:

Adopting citations collated by Tilmouth J in *Department of State Development v Pisoni*, the concept of “*deliberation*” has been described in other jurisdictions as relating 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, or “*the disclosure of contents...concerning the process of deliberation or decision-making*”

27. There are two questions to be addressed in the application of clause 1(1)(e):

- has there been a relevant deliberation or decision of Cabinet?
- if so, do the documents contain matter the disclosure of which would disclose information concerning that deliberation or disclosure?⁵

28. Document 1 appears to pre-date any Cabinet discussions that may have been had about the nWCH, although this is not fatal to the application of clause 1(1)(e).⁶

29. I note a particular statement within document 1 which specifies that a Cabinet Submission was proposed to be submitted which would ask Cabinet to note some of the contents of document 1. I am unsure whether this in fact eventuated, however I am not satisfied that ‘noting’ something can constitute deliberation or a decision.

30. I acknowledge that the topic of the nWCH may have been brought up in Cabinet, however, to be exempt under clause 1(1)(e) it is not sufficient that document 1 merely contain topics that were eventually discussed in Cabinet. As mentioned above, the information should speak to Cabinet’s thinking processes. Absent any contextual information from the agency and based solely on the contents of the document, I cannot conclude that this is the case.

31. I also note the following statement made by the Premier in Parliament on 20 June 2019 regarding the nWCN:

No final cost has been received by the government, and I make that point very clearly. Cabinet has not considered any final costing from the task force that has been charged with the responsibility for developing the new hospital and the proposal to the government.

32. It is my view that document 1 is not exempt pursuant to any part of clause 1.

² *Department of the Premier and Cabinet v van Holst Pellekaan* [2018] SACAT 56, [66].

³ *O’Connor v Leaw Pty Ltd* (1994) 42 NSWLR 285 per Rolfe J at page 303.

⁴ [2018] SACAT 56 at [70].

⁵ [2018] SACAT 56, [81].

⁶ [2018] SACAT 56, [74] citing *McGuirke v Director General, the Cabinet Office* [2007] NSWADT 9, [35]-[37].

Document 2

33. Document 2 comprises two emails. As with document 1, the agency has not specified which part of clause 1 it has relied upon.
34. I do not consider it likely that the emails were prepared for submission to Cabinet and therefore do not consider clauses 1(1)(a), 1(1)(b) or 1(1)(c) to be applicable.
35. I note that the first email contains an extract from a briefing document, however there is no evidence that the briefing document was specifically prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet. I do not consider document 2 to be exempt pursuant to clause 1(1)(f).
36. The emails discuss whether a particular cost associated with nWCH should be included in the briefing. I again note the statement made by the Premier on 20 June 2019, which postdates document 2.
37. As with document 1, the contents of document 2 alone are not sufficient to conclude that the contents contained therein reveal a deliberation or decision of Cabinet.
38. It is therefore my view that document 2 is not exempt pursuant to any part of clause 1.

Document 21

39. Document 21 is a briefing which annexes two documents regarding the nWCH project.
40. The scope of clause 9(1)(a) is wide, particularly given the words 'that relates to'. 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'.
41. I am satisfied that document 21 meets the requirements of clause 9(1)(a). I now turn to consider the public interest test.
42. The Administrative Appeals Tribunal in *Re Lianos and Secretary to the Department of Social Security* made the following observations, with which I agree, in relation to how the public interest for and against disclosure is to be weighed when considering internal working documents:⁷

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 ...

43. The agency has stated only that:

⁷ *Re Lianos and Secretary to the Department of Social Security* [1985] AATA 38, [81].

The disclosure of which would be contrary to the public [sic] as disclosure of the information has the potential to mislead the public into believing this was the final decision considered by the Government and could create unnecessary debate

44. I remind the agency that it must engage in a 'public interest balancing process' in applying the public interest test.⁸ It is not sufficient to merely identify one factor contrary to disclosure and subsequently draw the conclusion that the information is exempt.
45. Additionally, I do not agree with the factor identified by the agency. I consider that any person with an interest in the contents of document 21 would be sufficiently informed on the topic of the nWCHN such that the information would not be misleading.
46. I also note that the annexed project documents appear to be final versions. This is evident from the polished nature of the documents and the 'version control' table contained within the first annexure. I acknowledge that in regards to internal working documents there is generally public interest in promoting frank and candid discussion of options within an agency, however in my view this is far less relevant to a polished and finalised document.
47. Having reviewed document 21 and the submissions from the agency and applicant, I have identified the following public interest factors:

In favour of disclosure:

- furthering the objects of the FOI Act
- the importance of transparency and accountability regarding large-scale project and allowing public scrutiny of government decisions in relation to those projects
- the importance of transparency and accountability in substantial government expenditure, particularly in light of the economic impact of covid-19.
- the public interest in fulfilment of major commitments made by government
- the age of the document noting that the Planning and Design phase of the project is largely over
- the public interest in health service capabilities, particularly in light of the current concerns surrounding covid-19.

Contrary to disclosure:

- the agency's objection
- the amount of information contained in the document that is not already publicly available.

48. It is my view that the factors in favour of disclosure are particularly significant in this instance and clearly outweigh those contrary to disclosure such that disclosure of the document is in the public interest rather than contrary to it. Therefore, I am not satisfied that document 21 is exempt pursuant to clause 9(1).

Comment

49. I consider it appropriate to briefly comment on the conduct of the agency.⁹ I emphasise that my view of the agency's conduct is not part of the reasoning for my determination.
50. The agency failed to make a determination or internal review determination within the legislated timeframes. Additionally, the applicant agreed to an informal extension of time for an internal review determination to be issued, however the agency also failed to meet this deadline.

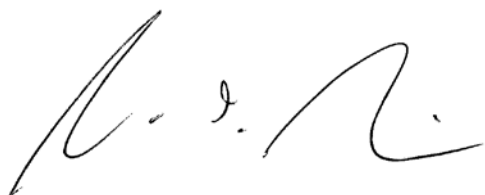
⁸ *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 70.

⁹ *Freedom of Information Act 1991*, section 39(16).

51. It is also my view that the agency has fallen far short of its requirements under the FOI Act in drafting its belated internal review determination.
52. The FOI Act says that on receipt of an access application, if an agency makes a determination to refuse access to the requested documents, it must give reasons in its notice of determination.¹⁰ Agencies must link the exemptions claimed to the actual contents of the documents, rather than make 'blanket' claims over the documents. This issue was discussed in the Ombudsman's recent 2014 audit.¹¹
53. The agency has done little more than rely upon the wording of the exemption clauses to claim that they apply. No further explanation has been provided as to how the documents in issue may be exempt. As I have already stated, a sub-clause was not even identified in relying upon clause 1(1).
54. The agency also identified only one public interest factor in regards to document 21, neglecting to consider any of the many public interest factors in favour of disclosure.
55. In light of my comment regarding the agency's conduct, 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.

Determination

56. In light of my views above, I reverse the agency's determination such that documents 1, 2 and 21 be released in full.



Wayne Lines
SA OMBUDSMAN

28 August 2020

¹⁰ *Freedom of Information Act 1991*, section 23(2)(f).

¹¹ See 'An audit of state government departments' implementation of the *Freedom of Information Act 1991* (SA), May 2014, Part 7A, available at <http://www.ombudsman.sa.gov.au/wp-content/uploads/An-audit-of-state-government-departments-implementation-of-the-Freedom-of-Information-Act-1991-SA1.pdf>.

APPENDIX 1

Procedural steps

Date	Event
28 August 2019	The agency received the FOI application dated 28 August 2019.
27 September 2019	The agency failed to determine the application within the 30 day period required by the FOI Act, ¹ and is deemed to have refused access to the documents. ²
4 October 2019	The agency received the internal review application dated 4 October 2019.
18 October 2019	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³
13 November 2019	The applicant and agency agreed to an informal extension until 27 November 2019.
17 December 2019	The agency issued a belated determination to the applicant
20 December 2019	The Ombudsman received the applicant's request for external review dated 20 December 2019.
29 January 2020	The Ombudsman advised the agency of the external review and requested submissions and documentation.
10 March 2020	The agency provided the Ombudsman with its submissions and documentation.
12 August 2020	The Ombudsman issued his provisional determination and invited submissions from the parties.

¹ *Freedom of Information Act 1991*, section 14(2).

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

³ *Freedom of Information Act 1991*, section 29(5).