



**Determination**

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

<b>Applicant:</b>	The Hon Kyam Maher MLC
<b>Agency:</b>	Attorney-General's Department
<b>Ombudsman reference:</b>	2020/01954
<b>Agency reference:</b>	qA14990
<b>Determination:</b>	The determination of the agency is varied.
<b>Date of Deputy Ombudsman's determination:</b>	24 August 2021
<b>Issues considered:</b>	Deliberation of Cabinet Unreasonableness (personal affairs) Public interest Agency's decision-making functions Free and frank disclosure Effective performance by agency of its functions
<b>Exemption clauses relied upon:</b>	1(1)(e) 6(1) 9(1) 16(1)(a)(iv)
<b>Legislation considered:</b>	<i>Freedom of Information Act 1991</i>

**Terms of the original application:**

All submissions to the public consultation on the Freedom of Information (Miscellaneous) Amendment Bill 2019. Timeframe: 1 October 2019 - 10 February 2020.

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## REASONS

### Application for access

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

All submissions to the public consultation on the Freedom of Information (Miscellaneous) Amendment Bill 2019. Timeframe: 1 October 2019 - 10 February 2020.

### Background

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

### The Ombudsman's provisional determination

3. The Ombudsman provided his tentative view about the agency's determination to the parties, by his provisional determination dated 1 March 2021. He informed the parties that subject to his receipt and consideration of submissions from the parties, he proposed to vary the agency's determination.
4. The applicant advised that he accepted the Ombudsman's provisional determination.
5. On 25 March 2021 the agency provided submissions in response.
6. In the agency's submissions, it made the following statement:

a fair minded and reasonable observer may reasonably apprehend that you may not be impartial in the exercise of your review function in relation to this application.

I respectfully suggest that it would thus be appropriate in the circumstances to delegate your power to determine the application for external review to another decision maker.

Further, it would be inappropriate for your delegate to have regard to the views expressed in your provisional determination, but rather your delegate should arrive at his or her own conclusions having regard to the submissions previously made to you. Your delegate should also allow the parties an opportunity to comment in relation to his or her own provisional.

...

Should you delegate your power to determine this external review, your delegate should not be made aware of the conclusions you have reached in your provisional determination and therefore should not be provided a copy of these submissions.

7. The basis for the agency's statement relates to material in the documents which it claims is exempt. Under section 39(15), I should avoid disclosing in my reasons any matter that the agency claims is exempt matter, whether or not I agree with that claim. As a result, I cannot expand upon the reasons for this aspect of the agency's submissions any further.
8. In response to the agency's submissions, the Ombudsman has delegated any further consideration and decision-making functions in relation to this matter to me, in my role as the Deputy Ombudsman.

9. On 17 May 2021, I informed the agency by letter that I intended to determine this application for external review. In my letter I also informed the agency that I intended to have regard to the Ombudsman's provisional determination, and the submissions made by the agency on 25 March 2021, subject to any objections raised by 24 May 2021. As I have received no objections, I will proceed to determine this matter in the manner proposed in my 17 May 2021 letter.

### Deputy Ombudsman's provisional determination

10. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 8 July 2021. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
11. I have not received any further submissions from the applicant.
12. The agency provided further submissions. I have addressed the agency's additional submissions throughout my determination; in addition, I have substantially addressed them under the headings 'Documents in issue', 'Clause 1(1)(e) - Cabinet documents', 'Clause 9(1) - Internal working documents' and 'Clause 6(1) - Documents affecting personal affairs'.

### Relevant law

13. 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>
14. 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 relevant to this external 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.

#### 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).
- (2) A document is an exempt document if it contains allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead) the truth of which has

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

not been established by judicial process and the disclosure of which would be unreasonable.

- (3) A document is not an exempt document by virtue of subclause (1) or (2) merely because it contains information concerning the person by or on whose behalf an application for access to the document is made.

(3a) A document is an exempt document if it contains matter—

- (a) consisting of information concerning a person who is presently under the age of 18 years or suffering from mental illness, impairment or infirmity or concerning such a person's family or circumstances, or information of any kind furnished by a person who was under that age or suffering from mental illness, impairment or infirmity when the information was furnished; and
- (b) the disclosure of which would be unreasonable having regard to the need to protect that person's welfare.

### 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.

### 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.

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.

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**Documents in issue**

17. The agency identified 50 documents and attachments within the scope of the application.
18. In its initial determination, the agency refused access to all documents and attachments in full.
19. At internal review, the agency determined to give access to three documents and one attachment.
20. In submissions to this Office, the agency indicated that attachments to documents two and six were also disclosed to the applicant.
21. As of this point in time, the agency has claimed that 47 documents and various attachments are exempt in full.
22. I note that the documents identified by the agency as within scope can be divided into two distinct categories.
23. The first category, documents 1 to 7 and attachments, are related to the agency's internal workings and preparations in requesting submissions for the public consultation on the *Freedom of Information (Miscellaneous) Amendment Bill 2019*.
24. The second category, documents 8 to 50 and attachments, are the submissions received in response to the request for public consultation.
25. The agency has applied different exemption clauses to the different categories of documents, and notably it has applied clause 10 to only the first category of documents. Clause 10 relates to documents subject to legal professional privilege.
26. I note that the second category of documents more closely aligns with what was requested in the applicant's initial application for access.
27. In his application for external review, the applicant made the following two statements with respect to the agency's claim that documents are exempt pursuant to clauses 1 and 10:

For the avoidance of doubt, the original FOI request was for "*submission the [sic] to the public consultation...*" and not submissions to Cabinet. ... I would have thought it highly unusual that a document, submitted in response to a public consultation process, "contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet"....

Again, for absolute clarity, the request was for "*submissions the [sic] to the public consultation on the Freedom of Information (Miscellaneous) Amendment Bill 2019*". It would seem highly unusual for the department to receive legal advice through a public consultation. Further, the FOI request did not ask for documents that were created in response to the submissions – just the submissions themselves.

28. The applicant has since confirmed with this Office that he is not seeking access to the documents in the first category and therefore does not seek review of the agency's decision in relation to them.
29. Accordingly, I consider only documents 8 to 50, including attachments, to be in issue in this external review.

30. The agency determined that documents 8 to 50, including attachments, are exempt in full.
31. In response to the Ombudsman's provisional determination, the agency submits that the ambit of this external review should be read down further to exclude documents 19, 20, 26, 28 - 33, 36, 39 - 45, 46 and 48. The agency submits that:
- the applicant's submissions suggest documents 19, 20, 26, 28 - 33, 36, 39 - 45 are out of scope because they formed part of intergovernmental consultation rather than being part of the 'public' consultation process
  - documents 46 and 48 are out of scope because they comprise communications between AGD staff that discuss the responses to the consultation process rather than being responses to the public consultation process.
32. On the basis of the above the agency submits that these documents should be excluded from consideration in this review.
33. The concept of 'scope' was considered in the matter of *El Shafei v Central Adelaide Local Health Network (El Shafei)*.<sup>2</sup> In that matter, it was considered that an agency's sufficiency of search, or a claim that a document is not held by the agency or within scope of the application for access, is not a determination within the meaning of the FOI Act.
34. I consider the following observation by Executive Member Stevens to be the most relevant to the agency's submission that I should consider documents 19, 20, 26, 28 - 33, 36 and 39 - 45 to be outside of scope:
- The basic jurisdiction of the Ombudsman under section 39 of the FOI Act is to review a determination made by the agency. ... this does not include a claim by the agency that it does not hold a document. It does not include a review of the agency's adequacy of search for documents.
- ... the outcomes open to the Ombudsman under section 39(11) are to confirm, vary or reverse the determination. There is no power to order the agency to conduct further search or to remit the matter to the agency for further consideration as one might expect if there was a review of sufficiency.<sup>3</sup>
35. Whilst the above citation relates specifically to sufficiency of search, I consider it is relevant in this matter. If I am unable to review an agency's position that it does not hold further documents in relation to an application for access, then it also follows that I am unable to review an agency's position, as evinced in a determination, that it does hold documents in relation to an application for access.
36. It is my view that, as a determination was made that indicated the agency held documents related to the application for access, and as a determination was made to refuse access to those documents, then it is a matter of fact that the agency confirmed that the documents related to the application for access, and I have no authority to consider the accuracy of that fact in an external review.
37. My only consideration regarding what documents fall within the ambit of this external review is to the extent that the applicant is aggrieved by the agency's determination to refuse access to documents. Given that the applicant sought review by this Office of the agency's determination in full, that he has not specifically indicated that he does not seek review of documents 19, 20, 26, 28 - 33, 36, 39 - 46 and 48, and that he has indicated he was satisfied with the Ombudsman's provisional determination, I do not accept that those documents are not in issue in this external review.

<sup>2</sup> *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5.

<sup>3</sup> *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5 [30, 33]

38. In response to my provisional determination, the agency has again raised objection to my categorisation of the documents in issue in this external review. The agency made the following points:

The following documents are in response to targeted requests from the Attorney-General inviting feedback on legislation rather than being public submissions: ...

I suggest that there is a significant distinction between the documents that have been received as a result of targeted invitation to government agencies and those that have been received from members of the public in response to the invitation to the public to provide comment.

...

I further submit that the agency's obligation to disclose documents under the FOI Act is only enlivened when a proper application is made for documents. Because the Applicant, as he has clarified, has only sought access to the *public* consultation documents, there is no obligation on the agency to give access to the internal consultation documents; and consequently, I suggest, the jurisdiction of the Ombudsman to make a determination on external review with respect to those documents is not enlivened.

39. I do not accept the agency's position that documents 8 - 50 are not in issue in this external review.
40. The agency made a determination with respect to documents 1 - 50. For the reasons given above in reference to *El Shafei*, whether or not the documents ought to have been in scope of the application for access is irrelevant at this stage. The agency made a determination to refuse access to those documents, and I have jurisdiction to confirm, vary or reverse the agency's determination.
41. Further, I am not convinced by the agency's position that a distinction must be drawn between submissions from members of the public as opposed to submissions received from agencies, given that this position has only been put forward by the agency and not by the applicant.
42. Both my provisional determination and the Ombudsman's provisional determination indicated which documents are being considered in issue in this external review. If the applicant had an alternate view regarding which documents should be in issue in this external review, he has had the opportunity to bring those views to my attention. He has not done so.
43. It is not for the agency to dictate the extent to which an applicant is aggrieved by its determination.
44. Accordingly I will continue to proceed on the basis that the applicant is aggrieved by the agency's determination to refuse access to documents 8 - 50, and I consider those documents to be the documents in issue in this external review.

#### Issues in this review

45. It is for me to consider whether the agency has justified its determination to refuse access to the documents in issue and to determine whether to confirm, vary or reverse the agency's determination in regard to the documents.

#### Consideration

#### Documents 8 - 50 (Including attachments)

46. The agency determined that documents 8 to 50 and attachments are exempt in their entirety pursuant to clauses 1(1)(e), 6(1) and 9(1). The documents are for the most part submissions from members of the public, agencies and interested organisations in response to a request for public consultation on the *Freedom of Information (Miscellaneous) Amendment Bill 2019*.
47. In response to the Ombudsman's provisional determination, the agency also further raised its view that documents 8 to 50 are exempt pursuant to clause 16(1)(a)(iv).
48. I note that the exemptions claimed in the agency's internal review determination and the schedule of documents are incongruent. The numbering of documents compared to documents and attachments is also incongruent.
49. For avoidance of doubt I will address the exemptions and document numbers as set out in the agency's internal review determination.
50. I also note the following statement in the agency's internal review determination:
- In relation to one document (attachment 23a), it is not beyond dispute that this document was in fact within scope. If it was, then it was exempt according to clauses 1(1)(e) and 9(1) of Schedule 1 [sic] (clause 6(1) also applied to personal affairs reflected in that document).
51. For clarity I consider the above statement should be taken to mean that attachment 23a is within scope and the agency is of the view it is exempt pursuant to clauses 1(1)(e), 6(1) and 9(1).

#### **Clause 1(1)(e) - Cabinet documents**

##### *Documents 8 - 50 and attachments*

52. In the agency's internal review determination, it made the following statement with respect to documents claimed exempt pursuant to clause 1(1)(e):

I confirm the initial determination as it relates to the application of the clause 1(1)(e) exemption to documents:

- 8 - 18, inclusive
- 21 - 24
- 29 - 32
- 34 - 50 inclusive
- attachments 50a and 50b

In considering the initial determination afresh, I determine that this clause also applied to the following documents:

- 19 and 20
- 25 - 28 inclusive
- 33
- attachment 23a (if that document was within scope)

53. In other words, the agency's internal review determined that documents 8 - 50, including attachments, are exempt pursuant to clause 1(1)(e).

54. In the agency's initial determination, the agency simply stated:

The documents are exempt as they relate to Cabinet.



55. At internal review, the agency only expanded on its reasoning by quoting the wording of clause 1(1)(e).
56. I note that clause 1(1)(e) does not refer to documents simply 'relating' to Cabinet.
57. The South Australian Civil and Administrative Tribunal (**SACAT**) in *Department of the Premier and Cabinet v Dan van Holst Pellekaan* (**van Holst Pellekaan**)<sup>4</sup> considered the test to be applied when considering whether a document is exempt pursuant to clause 1(1)(e).
58. Executive Member Stevens considered that clause 1(1)(e) 'is broader than the equivalent provisions currently existing in other Australian jurisdictions' as a consequence of the inclusion of the words 'information concerning any' which do not appear in other jurisdictions' legislation;<sup>5</sup>

In other jurisdictions, the test is whether disclosure will "*disclose the deliberations or decisions*" (of Cabinet). Case law in those jurisdictions must be understood accordingly. Clause 1(1)(e) poses a broader test. It is whether disclosure will disclose "*information concerning any deliberation or decision of Cabinet*".

In *O'Connor v Leaw Pty Ltd* (1993) 42 NSWLR 285 at page 303, Rolfe JH stated:

'Concerning' has been defined as 'regarding', 'touching', 'in reference or relation to' and 'about'. It is, accordingly, a word of wide import...<sup>6</sup>

59. In *van Holst Pellekaan*, Executive Member Stevens considered that there were two questions to be addressed in the application of clause 1(1)(e):
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?<sup>7</sup>
60. In response to the Ombudsman's provisional determination, the agency provided a heavily redacted copy of a Cabinet submission (**the Cabinet submission**).
61. The submission was considered by Cabinet on 6 April 2020. To that extent I am satisfied that there has been a relevant deliberation of Cabinet.
62. The agency made the following submission:

All of the responses to consultation received were collated and discussed in detailed legal advice given to the Attorney-General on 21 February along with recommendations on further policy considerations arising from those responses.

The responses to the consultation were the subject of a Cabinet Submission considered by Cabinet on 6 April 2020 with a view to approving an amended version of the FOI Bill (taking into consideration the consultation responses) for introduction in Parliament.

63. The Cabinet submission provided to this Office has been heavily redacted. To the extent that the Cabinet submission has been disclosed to this Office, it is evident that numerous documents in issue were, to at least some degree, considered by Cabinet.

<sup>4</sup> *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56.

<sup>5</sup> *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56, [66].

<sup>6</sup> *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56, [67-68].

<sup>7</sup> *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56, [81].

64. Having considered the submissions put forward to me by the agency in response to the Ombudsman's provisional determination, my view is that a number of documents do concern a specific deliberation of Cabinet, and as such, the documents are exempt.
65. In reaching this view, I have had the opportunity to consider SACAT's most recent decision with respect to clause 1(1)(e). The matter is *Department of Treasury and Finance v Stephen Mullighan (Mullighan)*,<sup>8</sup> and the decision was made on 25 May 2021.
66. In the decision of *Mullighan*, Justice Hughes elaborated further on the reasons given by Executive Member Stevens in *van Holst Pellekaan*.
67. The following observations in *Mullighan* are of particular relevance to this matter:<sup>9</sup>

*What is a deliberation or a decision of Cabinet?*

88. A deliberation can be understood as Cabinet's thinking processes. A decision is an outcome or action agreed upon. As such, it includes 'noting'. As a collective decision-making body, the 'noting' of information is the formal mechanism by which the Cabinet and each of the Ministers in attendance is bound to the fact of the knowledge of that information. The clause is directed at protecting the decision-making process, but not the subject matter of the process. However, the revelation of the subject-matter may expose the process.

*The information in the document under consideration for release must concern a deliberation or decision of Cabinet [emphasis Hughes]*

89. The information referred to in clause 1(1)(e) and to which the decision-maker must turn his or her mind, must *concern* a Cabinet deliberation or decision (or several).
90. Looking to the words of the provision, there is no requirement of any sufficiency of relationship between the information and a deliberation or decision. There is no constraint on the proximity of the relationship between the information in the document proposed for release and the Cabinet deliberation or decision. It need not "shape" the deliberation or decision.
91. Proximity is not a relevant criterion.
92. Again, from a plain reading of the words of the provision, there is no qualitative aspect of the exemption with respect to the value of the information disclosed. It is irrelevant that the disclosure may provide minimal illumination of the deliberation or decision.
93. The document need not disclose a deliberation or decision on its face but need only contain information which if disclosed, would have the effect that a deliberation or decision is revealed. That effect may be achieved by the disclosure of the document without reference to other information but there is no basis to confine it so. If the effect is achieved by reference to other information, the document will nevertheless be exempt.
68. In light of the above observations by Justice Hughes, it is clear that the scope of clause 1(1)(e) is broad.
69. Further, I note that in *van Holst Pellekaan*, Executive Member Stevens held that when establishing that a connection exists between a document and a deliberation or decision of Cabinet, it does not matter whether the applicant possesses the information which would allow the connection to be established; the relevant question is whether

<sup>8</sup> *Department of Treasury and Finance v Stephen Mullighan* [2021] SACAT 28.

<sup>9</sup> *Department of Treasury and Finance v Stephen Mullighan* [2021] SACAT 28 at [88-93].

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the decision maker considering the matter can establish the connection based on the evidence before them.<sup>10</sup>

70. I have had particular regard to the fact that there is no proximity or any qualitative analysis required by clause 1(1)(e), and while the documents in and of themselves may not reveal the deliberation of Cabinet, the documents are linked to a specific deliberation through extrinsic material.
71. However, I will note that the Cabinet submission, in the form given to this Office, does not provide enough extrinsic evidence to demonstrate that all of the documents in issue concern a specific deliberation or decision of Cabinet.
72. I requested the agency provide the Cabinet submission to me in full, by letter dated 15 June 2021. I have not received any response from the agency, and as such I can only be guided by the evidence that I have before me.
73. With reference to the redacted Cabinet submission that has been given to this Office, it is apparent that aspects of documents 24, 31, 34 - 35, 39, 40, 41, 43 - 45, 47 and 50 were put before Cabinet as it has been revealed to me, through disclosed headings, that the authors of these documents were in some shape or form discussed, and to that extent I am satisfied that those documents concern a deliberation of Cabinet.
74. Additionally, documents 46 and 48 directly discuss the contents of document 31, and on this basis I am also inclined to accept that these documents concern a deliberation of Cabinet.
75. I note in my provisional determination, I did not refer to document 38, which also discusses document 31. I consider this to have been an oversight in my provisional determination, and I am now of the view that document 38 also concerns a deliberation or decision of Cabinet.
76. The Cabinet submission, however, does not provide me with any indication that documents 8 - 23, 25 - 30, 32 - 33, 36 - 37, 42 and 49 formed part of the submission, and the agency has not specified that these particular documents were subject to any discussion of Cabinet. In the absence of extrinsic material, I am not satisfied that a link has been established between these documents and a deliberation of Cabinet.
77. I remind the agency that under section 48 of the FOI Act, the agency bears the onus of justifying its determination. In the absence of further evidence, or any compelling reason that may explain why this evidence cannot be provided to this Office, I am not satisfied that the agency has justified that documents 8 - 23, 25 - 30, 32 - 33, 36 - 37, 42 and 49 concern a deliberation of Cabinet.
78. In light of the above, I am satisfied that documents 24, 31, 34 - 35, 38 - 41, 43 - 48 and 50 are exempt in full pursuant to clause 1(1)(e).
79. However, I do not consider documents 8 - 23, 25 - 30, 32 - 33, 36 - 37, 42 and 49 are exempt pursuant to clause 1(1)(e).
80. In response to my provisional determination the agency made further submissions, which include the following statements:

On 25 November 2019, Cabinet approved the tabling of the draft FOI Bill in Parliament to enable public consultation to occur. On 6 April 2020, Cabinet considered the changes made to the FOI Bill as result of submissions received during public consultation. The

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<sup>10</sup> *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56 at [95].

decision by Cabinet to introduce the FOI Bill required it, as a collective decision-making body, to consider more than just the specific information referred to in the Cabinet Submission, previously provided to [Ombudsman SA] in redacted form. It also required Cabinet to consider the FOI Act in its current form, the changes proposed to be made in the tabled version of the FOI Bill and further changes in the form of the FOI Bill as introduced.

Taking the above into consideration, I suggest that you are able to rely on the differences between the FOI Act in its current form and the FOI Bill as introduced in Parliament as relevant extrinsic material to draw inferences on what information must be connected to a deliberation or decisions of Cabinet to introduce the FOI Bill.

...

Further, as stated in my previous submissions, all consultation responses including documents 8 - 23, 25 - 30, 32 - 33, 36 - 38, 42 and 49 were the subject of detailed legal advice provided to the Attorney-General in advance of the relevant Cabinet deliberation and which provided the Attorney-General's position at the relevant Cabinet meeting.

81. I note again that I requested that the agency provide an unredacted version of the Cabinet submission in order to assess the agency's assertion that all the documents in issue concern a deliberation or decision of Cabinet. The agency has not provided the unredacted version, nor has it provided any response to my request or given any indication as to why it is unwilling to provide it.
82. Similarly, if the agency wishes to rely upon the 'detailed legal advice' provided to the Attorney-General as evidence that all of the documents it claims to be in issue concern a deliberation or decision of Cabinet, it should have provided the advice.
83. I consider that the agency's failure to provide the required material, which would go to show that there is extrinsic material that connects the documents to a deliberation or decision of Cabinet, falls short of its onus under section 48 to justify its determination, *in any proceedings*.
84. In forming this view, I have considered the decision of the Supreme Court in the matter of *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor (APY Lands)*.<sup>11</sup> In that matter, the Supreme Court considered, amongst other things, whether it was legally reasonable for the Ombudsman to make a determination without having viewed the documents in issue.
85. The Supreme Court determined that based on the facts of the matter, it was not legally unreasonable for the Ombudsman to make a determination to reverse the agency's determination without having viewed the document.
86. I consider the following passages of Justice Hinton's reasoning to be of particular importance:

Something more should be said about s 48 of the FOI Act. In my view, an external review is a proceeding for the purposes of s 48. Implicitly, the burden in s 48 is not simply persuasive but evidential; accepting this, it is for the agency to put all information necessary to justifying a determination before the Ombudsman. Failure to do so does not necessarily frustrate an external review or mean that the Ombudsman must resort to the powers contained in the *Royal Commissions Act 1917* (SA). But it will impact upon the discharge of the burden. That is to say, if an agency fails to put all information necessary to justify a determination before the Ombudsman then it risks the review being

<sup>11</sup> *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor* [2019] SASC 162.

determined on the basis of what was before the Ombudsman. If the determination is adverse to the agency, it cannot complain.<sup>12</sup>

87. Whilst acknowledging that the facts of the above matter, and the issues considered by the Supreme Court, differ to the issues in this external review, I consider the above to be persuasive authority on the proper construction of section 48, and what steps ought to be taken by this Office in order to obtain all information necessary to conduct an external review and determine whether to confirm, vary or reverse an agency's determination.
88. Based on the above reasoning, I consider that the agency has failed to meet its burden under section 48 both on an evidentiary level and a persuasive level.
89. By failing to provide the unredacted Cabinet Submission as requested, not providing the legal advice, and failing to provide any cogent reasons for why these documents cannot be provided to this Office, I consider that the agency has not put forward all information necessary to justify its determination that the documents in issue are exempt.
90. I do not accept the agency's suggestion that comparing the existing FOI Act to the tabled version of the FOI Bill and the initial Bill, and attempting to draw *inferences* based on the differences between the three documents provides sufficient evidence to conclude that information in the documents *must* be connected to a deliberation or decision of Cabinet.
91. I am mindful that there has been a recent decision of SACAT that touches upon the operation of section 48.
92. In the matter of *Department of the Premier and Cabinet v Seven Network (Operations) Ltd (DPC v Seven Network)*<sup>13</sup>, Justice Hughes considered an external review by the Ombudsman that determined to reverse an agency's determination without having viewed the document in issue.
93. In the matter of *DPC v Seven Network*, Justice Hughes considered that it was an error for the Ombudsman to determine that the document was exempt without having viewed the document, and made the following observations:

It was not open to the Ombudsman to draw such a conclusion based on the agency's failure to provide the document or any argument as to why the document (properly defined) was exempt. The role conferred upon the Ombudsman is that he determine whether a document is exempt and if necessary to use the powers conferred to gather the requisite information so that a decision can be made, rather than to rely on the submissions put by the agency. In so saying, the placement of the onus of establishing the basis for its determination is not overlooked. Section 48 provides: [citation of section 48 in full]

...

This must be understood as the burden between the FOI applicant and the agency. It is consistent with the Ombudsman's powers (both as set out in s 39 of the FOI Act and under the *Ombudsman Act 1972*) that the Ombudsman is authorised to obtain the necessary information required to make a decision to affirm, vary or reverse the agency's determination.<sup>14</sup>

<sup>12</sup> *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor* [2019] SASC 162 at [162].

<sup>13</sup> *Department of the Premier and Cabinet v Seven Network (Operations) Ltd* [Unreported, South Australian Civil and Administrative Tribunal, Hughes J 8 July 2021].

<sup>14</sup> *Department of the Premier and Cabinet v Seven Network (Operations) Ltd* [Unreported, South Australian Civil and Administrative Tribunal, Hughes J 8 July 2021] at [53 - 54].

94. I note that the facts of *DPC v Seven Network* again differ from the facts in this external review. Of particular importance is that *DPC v Seven Network* dealt with the issue of whether a document that the Ombudsman had not inspected fully was exempt.
95. In the matter currently before me I have been able to view the documents in issue in full. However, I do not have all the information before me that would support the agency's finding that the documents are exempt, given that I do not have before me *extrinsic material* that would allow me to draw a connection between the documents in issue, and a decision or deliberation of Cabinet.
96. On the face of it, having viewed the documents, I do not consider that documents 8 - 23, 25 - 30, 32 - 33, 36 - 37, 42 and 49 are exempt documents pursuant to clause 1(1)(e).
97. In order for me to be satisfied that the documents are exempt, it was for the agency, as set out by Justice Hinton in *APY Lands*, to place before me all the information necessary to justify its determination, including extrinsic material.
98. I note that the agency has been provided with multiple opportunities to provide all the information necessary to justify its determination. These opportunities are as follows:
- this Office's initial request for documents and submissions by letter, dated 5 May 2020
  - the Ombudsman's provisional determination and request for further submissions, dated 1 March 2021
  - my request for the Cabinet submission in full by letter, dated 15 June 2021
  - my provisional determination and request for further submissions, dated 8 July 2021.
99. I note again that the agency has not provided me with either the evidence that I have requested or any further evidence that it is relying upon (such as the detailed legal advice). This evidence is necessary for me to be satisfied that a connection between the documents and a deliberation or decision of Cabinet exists.
100. In my view, I have taken all steps that are required to give the agency an opportunity to provide me with the necessary evidence, and, by the agency's failure to do so, it has not met the burden required under section 48. I do not consider that I am required to take any additional steps to obtain further evidence from the agency.
101. Whilst I note Justice Hughes' view that the Ombudsman must, if necessary, use the powers conferred upon him to gather the requisite information to make a decision, I do not consider it is necessary in this matter due to a distinction of facts.
102. In reaching this view, I have given regard to the decision of the Supreme Court in *APY Lands*. Relevantly, I have considered the following statements by Justice Hinton:

The power conferred by s 39(5)(a) of the FOI Act is permissive. The Ombudsman was under no duty to proceed by conducting an investigation under s 39(5)(a). Except as provided by ss 39(9) and (10), how the Ombudsman chooses to conduct a review is a matter in the discretion of the Ombudsman. There being no duty to proceed in accordance with s 39(5)(a), not doing so cannot amount to jurisdictional error.<sup>15</sup>

...

As I have said, access is the norm under the FOI Act and exemption is the exception. To accede to APY's submission [that the Ombudsman exceeded jurisdiction in reversing

<sup>15</sup> *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor* [2019] SASC 162 at [157].

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APY's determinations without considering whether the documents subject of applications for access were exempt] would alter that policy upon external review, and only external review, to one from access unless, to no access until. APY did not identify any textual or contextual hook supportive of its submission.<sup>16</sup>

103. Again, whilst acknowledging that the facts of *APY Lands* differs to the facts in issue in this external review, I consider Justice Hinton's views to be persuasive as to the proper reading of section 48, and in understanding what is required of this Office in conducting an external review.
104. In *APY Lands*, the agency refuted the claim that it should be classified as an agency within the meaning of the FOI Act. As a follow-on effect of the agency's refutation, the agency refused to provide the Ombudsman with documents and failed to cite any cogent reasons for its refusal of access to documents.
105. In this matter, the agency determined that the documents in issue are exempt pursuant to clause 1(1)(e) and the agency provided me with a copy of the documents.
106. However on the face of the documents, it is not evident that all of the documents are exempt pursuant to clause 1(1)(e). If, as the agency asserts, that there is extrinsic material that connects the documents in issue to a deliberation or decision of Cabinet, it bore the onus under section 48 to provide that material to this office in order to justify its determination.
107. I consider the facts in this external review are sufficiently distinguished from the facts of *DPC v Seven Network* and as a result, I am not required to utilise the powers under section 39(5)(a) to obtain the extrinsic material. In reaching this view I note that I have been able to inspect the documents in issue, the agency has been given multiple opportunities to provide the extrinsic material, and *APY Lands* describes the investigative powers under section 39(5)(a) to be *permissive*.
108. Accordingly, in the absence of evidence of extrinsic material that link all of the documents to a decision or deliberation of Cabinet, I am not satisfied that all of the documents are exempt pursuant to clause 1(1)(e).
109. I remain of the view that documents 24, 31, 34 - 35, 38 - 41, 43 - 48 and 50 are exempt in full pursuant to clause 1(1)(e), and that documents 8 - 23, 25 - 30, 32 - 33, 36 - 38, 42 and 49 are not exempt pursuant to clause 1(1)(e).
110. As I am satisfied that documents 24, 31, 34 - 35, 38 - 41, 43 - 48 and 50 are exempt pursuant to clause 1(1)(e), I do not consider it necessary for me to turn my mind to whether those documents are exempt pursuant to any other clause.
111. Therefore I will only be considering documents 8 - 23, 25 - 30, 32 - 33, 36 - 37, 42 and 49 with respect to the other exemption clauses relied upon by the agency, which are clauses 9(1), 16(1)(a)(iv) and 6(1).

#### **Clause 9(1) - Internal working documents**

*Documents 8 - 23, 25 - 30, 32 - 33, 36 - 37, 42 and 49 including attachments*

112. The agency determined that documents 8 - 23, 25 - 30, 32 - 33, 36 - 37, 42 and 49, including attachments, are exempt in full pursuant to clause 9(1).

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<sup>16</sup> *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor* [2019] SASC 162 at [168].

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113. I note that in the agency's submissions, the agency raised issue with the Ombudsman failing to consider the application of clause 9(1)(a).
114. Having considered the Ombudsman's provisional determination, I do consider that there was an oversight in the Ombudsman not referring to clause 9(1)(a).

*Clause 9(1)(a)*

115. The scope of clause 9(1)(a) is wide, particularly given the words 'that relates to'.
116. The 'opinion, advice or recommendation', or 'consultation or deliberation' must nevertheless have been obtained, prepared or recorded in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency.
117. The objective of clause 9 is that government officers are free to provide frank and candid advice in order to promote good government decision-making.<sup>17</sup>
118. On my viewing of the documents, I am satisfied that the requirements of clause 9(1)(a) have been established.

*Clause 9(1)(b)*

119. In order for an internal working document to be an exempt document, the disclosure of the document must, on balance, be contrary to the public interest.
120. In its initial determination, the agency made the following statement:

The exempt documents are correspondence sent by external parties to the agency containing opinions and advice that were considered for the purpose of decision making relating to the functions of government.

The public interest factors favouring release of this material include providing information that is of particular interest to the applicant and meeting the objects of the Act.

On balance, it is not in the public interest to disclose the content of the exempt documents consisting of responses received by the agency following a request for input with respect to proposed policy or law reform. It is important for the agency to receive frank and comprehensive responses to such requests, including the expression of views which may be contentious. The prospect that unknown third parties may obtain access to those documents by way of an FOI application may inhibit the provision of full and open opinions on such matters to the agency in future.

121. This reasoning was not expanded upon in the agency's internal review determination.
122. I do not consider the agency's determination adequately applies the public interest to the actual content of the documents.
123. 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.<sup>18</sup> 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 2014 FOI audit.<sup>19</sup>

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<sup>17</sup> *Pizzino v SA Police* (Unreported, South Australian Civil and Administrative Tribunal, Stevens ESM, 2 January 2020).

<sup>18</sup> Freedom of Information Act 1991, section 23(2)(f).

<sup>19</sup> 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>.



124. The agency has not differentiated between the documents to identify which contain views that may be contentious. On my reading there are a number of documents where it is not apparent that disclosure could be contrary to the public interest.
125. Further, stating that disclosure may inhibit the provision of full and open opinions as the sole factor that tips the public interest against disclosure is inadequate.
126. In order for the concept that disclosure would hinder free communication to apply, it requires a specific set of circumstances. In my view, the agency has not established that such circumstances exist.
127. In considering the agency's position, I have had regard to the decision of the District Court in the matter of *Treglown v SA Police*.<sup>20</sup> In that case Herriman J referred to the matter of *Pemberton and The University of Queensland*<sup>21</sup> and cited the following statement:<sup>22</sup>

that the public interest would be injured by the disclosure of particular documents because candour and frankness would be inhibited in future communications of a similar kind ... should be disregarded **unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind, and that tangible harm to the public interest will result from that inhibition.**

Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest.

[Emphasis by Herriman J]

128. Herriman J went on to state:<sup>23</sup>

It appears to me that whilst it may be presumed that the prospect of disclosure will not ordinarily inhibit candour such as to be contrary to the public interest, that presumption is rebuttable ... It would be idle to speculate as to the range of circumstances which might fall outside of that presumption: each case must be considered on its merits.

129. In considering Herriman J's view, I am not satisfied that the agency has sufficiently made out that disclosure of the document would inhibit the agency's candour in its internal communications to the extent that it would be contrary to the public interest.
130. The agency has not laid a factual basis for rebutting the presumption that the prospect of disclosure would not inhibit candour.
131. The agency made further submissions with respect to the public interest, and cited the 'Howard factors' as providing useful guidance. The Howard factors are as follows:
- (i) the higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed;
  - (ii) disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;

<sup>20</sup> *Treglown v SA Police* [2011] SADC 139.

<sup>21</sup> *Pemberton and the University of Queensland* [1984] QICmr32.

<sup>22</sup> *Treglown v SA Police* [2011] SADC 139 [157].

<sup>23</sup> *Treglown v SA Police* [2011] SADC 139 [159].

(iii) disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest;

(iv) disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest;

(v) disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process.

132. I note that the Full Court of the Supreme Court of South Australia considered the application of the Howard factors in the matter of *Attorney-General for the State of SA v Seven Network Operations Ltd*.<sup>24</sup> In that matter, the Court endorsed the view that the factors are no more than general indicators that may be used in assessing where the public interest may lie, but they are neither mandatory nor definitive.<sup>25</sup>

133. On my viewing of the documents, I consider the Howard factors to be of limited value.

134. In particular, I note that the third factor has already been discussed, given that it was the only factor the agency relied upon in its determination and internal review determination.

135. In the agency's further submissions, it has stated:

The potential for these documents to be disclosed is reasonably likely to inhibit future participation on public consultation. This factor cannot be considered in the context of the FOI Bill in a vacuum and must be viewed in relation to draft bills generally, noting other bills (for example on issues such as abortion, euthanasia and guardianship) are likely to concern particularly sensitive and personal subject matters.

...

I note that most of these documents are high-level communications by the Chief-Executive of the agency (or deputy or equivalent) and the Attorney-General and refer to the operations of those agencies.

136. I find the rest of the agency's submission with regard to clause 9(1) to be of little persuasive value, however I consider it relevant to respond to the above statements in particular.

137. By simply restating that disclosure is reasonably likely to inhibit future participation on public consultation, the agency has not, in my view, rebutted the presumption referred to by Herriman J. In particular the agency has not addressed the prospect of inhibition as a matter to be considered with regard to the specific content of the documents. I consider the agency's position, that I am required to consider the ramifications of disclosure of the documents in the context of all draft amendment bills, to be incorrect.

138. I note that in the matter of *Attorney-General for the State of SA v Seven Network Operations Ltd*, consideration was given to a determination by the Ombudsman. Several sections of the Ombudsman's determination were cited with approval, and I consider it appropriate to restate the following paragraph from the Ombudsman's determination verbatim.

The FOI Act identifies only limited classes of documents as exempt regardless of their contents such as Cabinet documents<sup>26</sup> and Executive Council documents<sup>27</sup>. Most other classes of documents, including internal working documents, are only exempt if their

<sup>24</sup> *Attorney-General for the State of SA v Seven Network Operations Ltd* [2019] SASFC 36.

<sup>25</sup> *Attorney-General for the State of SA v Seven Network Operations Ltd* [2019] SASFC 36 [132].

<sup>26</sup> Clause 1 of Schedule 1 to the *Freedom of Information Act 1991*.

<sup>27</sup> Clause 2 of Schedule 1 to the *Freedom of Information Act 1991*.

disclosure would be contrary to the public interest. This was noted by Deputy President Hall in *Re Lianos and Secretary to the Department of Social Security*<sup>28</sup>. Furthermore the FOI Act expressly applies to documents held by Ministers of the Crown<sup>29</sup>, many of which could reasonably be expected to contain high level communications.

139. From the above, outside of the limited classes of documents discussed, whether a document is an exempt document turns on the actual content of the document. The fact that other draft bills such as abortion, euthanasia or guardianship may raise issues which are sensitive or contentious, is irrelevant to considering whether the information in the documents in issue are themselves sensitive or contentious.
140. Given the agency's submissions and the fact the agency has failed to provide submissions by reference to any of the specific contents of the documents, and with particular regard to the agency's stance that documents 19, 20, 26, 28, and 30 are exempt, I can only assume the agency is treating the documents in issue as a class of documents, which in my view is an incorrect approach.
141. Similarly, the argument that the documents are 'high-level' communications in and of itself does not suggest that disclosure of the documents would be contrary to the public interest.
142. I note the factor of high-level communications is described in terms of likelihood. The simple fact that the documents were created as a result of communications between high offices may be suggestive of the documents' sensitive content, but it does not follow that all high-level communications are in fact sensitive regardless of their contents.
143. Further, the agency has provided little evidence that it has considered the potential public interest factors that would favour disclosure.
144. In my view, the following factors favour disclosure:
- fulfilling the objects of the FOI Act
  - informing and positively contributing to ongoing public debate about the FOI Amendment Bill and FOI Act generally
  - providing the public with an opportunity to participate in government decision making processes
  - increasing transparency in the operation of agencies
  - providing applicants with documents of special interest to them
145. In light of the above, I am not persuaded that disclosure of the documents would, on balance, be contrary to the public interest.
146. In response to my provisional determination, the agency has made the following further submissions:

With respect, I do not agree with your application of the public interest test. The Victorian Supreme Court has held that the public interest considerations underlying the exemption of internal working documents in that state include:

... the efficient and economical conduct of government, protection of the deliberative processes of government, particularly at high levels of government and in relation to sensitive issues, and the preservation of confidentiality so as to promote the giving of full and frank advice.<sup>30</sup>

<sup>28</sup> *Re Tony Lianos and Secretary to the Department of Social Security* [1985] AATA 38.

<sup>29</sup> Section 4(1) of the *Freedom of Information Act 1991*.

<sup>30</sup> *Secretary, Department of Justice v Osland* [2007] VSCA 96 at [77].

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Additionally, the Victoria Civil and Administrative Tribunal in *Re Hulls and Victorian Casino and Gaming Authority*<sup>31</sup> added several other considerations that may be taken into account in determining where the public interest lies, relevantly including:

- the degree of sensitivity of the issues involved in the deliberation;
- the state of the policy development process when the document was created;
- the likelihood that disclosure would create mischief in one way or another

147. As the agency noted, the cases it cited apply to public interest consideration in the State of Victoria. Whilst case law from other jurisdictions may provide useful guidance and be of persuasive value, caution should be used in citing such cases with authority, particularly when the wording of the relevant provisions may differ.

148. The wording of the similar provision to clause 9(1) in the *Freedom of Information Act 1982* (Vic), in its current form, provides as follows:

### 30 Internal working documents

- (1) Subject to this section, a document is an exempt document if it is a document that disclosure of which under this Act -
- (a) would disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers, or an officer and a Minister, in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
  - (b) would be contrary to the public interest.

149. I note that the cases the agency cited were decided in 1998 and 2007. The section number for the similar provision to clause 9(1) in *Freedom of Information Act 1982* (Vic) has since changed between those dates, however the wording remains unchanged.

150. The test under the Victorian Act requires a decision maker to determine whether disclosure would be contrary to the public interest. There is no requirement that a decision maker turn their mind to whether, *on balance*, disclosure would be contrary to the public interest, as is the requirement under the FOI Act. I consider the additional words present in the FOI Act to be significant.

151. However, with above in mind, I have nevertheless turned my mind to the additional public interest factors put forward by the agency.

152. I do not consider the documents, in and of themselves, contain matter that is of a sensitive nature. I remain of the view that the agency's submission that I do not treat the documents in issue 'in a vacuum' is incorrect.

153. I have given little weight to the state of the policy development process when the documents were created, noting that it would have been apparent to the authors that the policy in issue, that is, amending the *Freedom of Information Act 1991*, would be subject to continuing change until the matter is put before parliament.

154. There is nothing before me to suggest that disclosure of the documents would 'create mischief in one way or another', and I afford that argument no weight.

155. The agency has re-emphasised a number of points regarding its view that disclosure of the documents would lead to an inhibition of frankness and candour.

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<sup>31</sup> *Re Hulls and Victorian Casino and Gaming Authority* (1998) 12 VAR 483.

156. I do not consider it necessary to go into any significant detail about the remainder of the agency's latest submissions, other than to reiterate, for the reasons already stated, that I am not of the view, based on the content of the documents, that disclosure would lead to an inhibition of frankness or candour.
157. Even if I were to accept that disclosure would cause an inhibition of frankness and candour, I could not foresee the inhibition to be to such a great extent that it would mean disclosure of the documents would, on balance, be contrary to the public interest.
158. Accordingly, my view is that the documents are not exempt pursuant to clause 9(1).

#### Clause 16(1)(a)(iv)

*Documents 8 - 23, 25 - 30, 32 - 33, 36 - 37, 42 and 49 including attachments*

159. In response to the Ombudsman's provisional determination, the agency made the following submission:

The reasons given ... in relation to clause 9(1) would also support exemption of the documents under clause 16(1)(a)(iv) given that the management of legislative change of acts committed [sic] to the Attorney-General is a key AGD function. As the disclosure of the documents is reasonably likely to inhibit future participation in the process of consultation on draft bills, this will in turn significantly and adversely affect AGD's functions in advising the Attorney-General and managing legislative change.

160. A document is exempt pursuant to clause 16(1)(a)(iv), if its disclosure:
- could reasonably be expected to have a substantial adverse effect on the effective performance by an agency of the agency's functions, and
  - would, on balance, be contrary to the public interest.
161. The phrase 'substantial adverse effect' is not defined in the FOI Act, however the District Court has held that it relates to an effect that is sufficiently serious or significant to cause concern to a properly informed, reasonable person.<sup>32</sup> The test was stated to be 'a high one'.<sup>33</sup>
162. Given that the test is a 'high one', and in light of the issues I have raised with the agency's repeated reliance on the suggestion that disclosure would inhibit the frankness and candour of communication without a substantial justification, I am not satisfied that the agency has established that disclosure of the documents would have a substantial adverse effect on the agency's functions.
163. Further, the agency did not provide any consideration of the public interest with respect to clause 16(1)(a)(iv), noting that public interest considerations will differ from clause to clause.
164. As I am not satisfied that the first element of clause 16(1)(a)(iv) has been established, I do not consider it necessary to consider the public interest with respect to clause 16(1)(a)(iv).
165. Accordingly I do not consider the documents to be exempt pursuant to clause 16(1)(a)(iv).

<sup>32</sup> *Konieczka v South Australian Police* [2006] SADC 134 [15], referring to *Re Thiess and The Department of Aviation* (1986) 9 ALD 454.

<sup>33</sup> *Konieczka v South Australian Police* [2006] SADC 134 [18].

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**Clause 6(1) - Documents affecting personal affairs***Documents 8 - 23 and 27*

166. In the agency's internal review determination, it made the following statement with respect to documents claimed exempt pursuant to clause 6(1):

I confirm the initial determination as it relates to the application of the clause 6(1) exemption to those aspects of the following documents which contained information amounting to personal affairs under the FOI Act:

- 8 - 12, inclusive
- 14, 17, 18, 21, 22, 27
- attachment 23a

In considering the initial determination afresh, I determine that this clause also applied to the personal affairs contained in the following documents:

- 13, 15, 16, 23
- attachment 2d

167. The above can be expressed as the agency determined documents 8 - 23 and 27 are exempt pursuant to clause 6(1). As I do not consider attachment 2d to be in issue I will not consider it in my reasoning.

168. In the agency's initial determination, it made the following statement:

The exempt documents contain personal identifiers of external parties and also their views on this subject matter. I consider it unreasonable to release these details to third parties.

169. In the agency's internal review determination, it amended its reasoning to the following:

Each of [these] documents includes contact details which are captured within the exemption created by clause 6(1). Those details were legitimately exempted under the FOI Act. I acknowledge, however, that those details could have been redacted and partial access could have been granted to those documents, subject to the application of any other exemption.

In my view, all of those documents were subject to another exemption pursuant to clause 1(1)(e) of Schedule 1, as set out above. Accordingly, I do not consider that access should be granted to those documents.

170. As I consider that clause 1(1)(e) does not apply, I consider it appropriate that the agency does grant access to the documents with information removed which is appropriately covered under clause 6(1).

171. 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.

172. The term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act. Among other things, it provides that 'personal qualities or attributes' are a person's personal affairs. The term has also been held to involve 'matters of private concern to an

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individual'<sup>34</sup> and the 'composite collection of activities personal to the individual concerned'.<sup>35</sup>

173. Following the agency's reasoning in its internal review determination, I agree that contact details and personal identifying information of members of the public should be redacted from the documents.
174. Where the documents relate to submissions which were submitted on behalf of an agency or organisation, I do not consider that the names or publicly available contact information is covered under the scope of personal affairs. In instances where there are mobile phone numbers, I consider that this information should be redacted.
175. Given the agency's submissions, I consider that the internal review determination varied the agency's determination to the effect that it no longer considered the content of the submissions is exempt pursuant to clause 6(1).
176. For the sake of clarity, if the agency were to maintain that the entire content of the submissions are exempt pursuant to clause 6(1), I would consider this to be an incorrect application of clause 6(1), given that it would be possible to redact information relating to the personal affairs of persons other than the applicant.
177. When the submissions are divorced of personally identifying information from members of the public, the submissions are opinions which have been provided as part of a public consultation process. Given this, I do not consider the opinions could be characterised as 'matters of a private concern'.
178. Accordingly, I vary the agency's application of clause 6(1) to the effect that personal details of members of the public including names, telephone numbers and email addresses should be redacted. I do not consider it necessary to redact the names and contact details where submissions have been made in a professional capacity, with the exception of telephone numbers.
179. In response to the Ombudsman's provisional determination, the agency indicated it accepts the proposed exemptions relating to the redaction of information related to personal affairs. However the agency considers that document 23a should be exempt in full pursuant to clause 6(1) and 6(2).
180. I disagree with the agency's assessment of document 23a. I consider that with the removal of the relevant names, the document cannot be considered a matter of private concern to an individual, or that person's personal affairs.
181. In response to my provisional determination, the agency has reiterated that document 23a should be treated as exempt, and that if it were to be disclosed, then further information be redacted from document 23a. In particular the agency has referred to one paragraph on the first page of the document.
182. I accept I made an oversight in not stating explicitly that the residential address of the individual referred to in documents 23 and 23a should also be redacted. Additionally document 23a refers to a licence, which I also accept should be redacted.
183. However with respect to the particular paragraph that the agency submits should be exempt from document 23a, I note that the paragraph in issue has already been published online with redactions of a name, address and licence number. The

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<sup>34</sup> *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.

<sup>35</sup> *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

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published version of this information also contains a substantial amount of information related to document 23a.

184. I am mindful that under section 39(15) of the FOI Act, in giving my reasons I should avoid revealing any matter that the agency claims is exempt, whether or not I agree with the claim.
185. As such I cannot be more specific as to what the information is or specifically where it can be accessed.
186. However as the information is already publicly available in a redacted form, I do not consider disclosure of the information in a similar redacted form in would be unreasonable.
187. The agency has noted that if I were of the view that document 23a should be disclosed, that I should make efforts to contact the interested party.
188. Under section 39(10), I must not make a determination to the effect that access is to be given to a document to which Division 2 of Part 3 applies unless I have taken steps as are reasonably practicable to obtain the views of any interested person as to whether or not the document is exempt.
189. Division 2 of Part 3 applies to documents affecting personal affairs.
190. I consider that I do not need to take any further steps, as are reasonably practicable, to obtain the views of the interested party and that I have discharged my onus under section 39(10). Again, due to the operation of section 39(15), I cannot elaborate on this point any further.
191. Additionally on my review of the documents, I consider that document 49 contains information that would constitute the personal affairs of a person, and I consider its disclosure would be unreasonable. This information appears on page 2 of document 49 and relates to the personal circumstances of a person other than the applicant.
192. Page 2 of document 49 contains two emails, and it is my view that both emails on page 2 should be redacted.

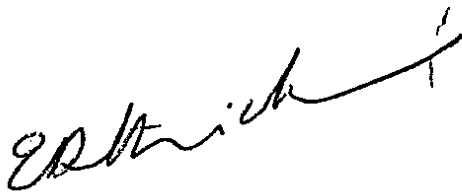


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**Determination**

193. In light of my views above, I vary the agency's determination in the following manner:

- documents 1 - 7 and attachments are exempt
- documents 8 - 23 and 27 are to be disclosed with names, telephone numbers and email addresses redacted
- document 23a is to be disclosed with names, address and license number redacted
- document 49 is to be disclosed, with the two emails on page 2 redacted
- documents 24, 31, 34 - 35, 38 - 41, 43 - 48 and 50 and attachments are exempt in full pursuant to clause 1(1)(e)
- documents 25 - 30, 32 - 33, 36 - 37, 42 and attachments are to be released in full.



Emily Strickland  
DEPUTY OMBUDSMAN

24 August 2021

## APPENDIX

## Procedural steps

Date	Event
10 February 2020	The agency received the FOI application dated 10 February 2020.
9 April 2020	The agency determined the application.
15 April 2020	The agency received the internal review application dated 15 April 2020.
28 April 2020	The agency varied the determination.
5 May 2020	The Ombudsman received the applicant's request for external review dated 5 May 2020.
5 May 2020	The Ombudsman advised the agency of the external review and requested submissions and documentation.
20 May 2020	The agency provided the Ombudsman with its submissions and documentation.
1 March 2021	The Ombudsman issued his provisional determination and invited submissions from the parties.
25 March 2021	The agency provided the Ombudsman with its submissions in response to his provisional determination.
8 July 2021	The Deputy Ombudsman issued her provisional determination and invited submissions from the parties.