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Determination

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

Applicant:	Senator Rex Patrick
Agency:	Department of the Premier and Cabinet
Ombudsman reference:	2021/01085
Agency reference:	DPC21/0144
Determination:	The determination of the agency is confirmed.
Date of Ombudsman's determination:	28 May 2021
Issues considered:	Imputed exemption Capital City Committee document
Legislation considered:	City of Adelaide Act 1998, section 18

Terms of the original application:

- A. Any correspondence sent in 2020 to or from the Department of the Premier and Cabinet / the office of the Premier and the South Australian Tourism Commission relating to the Formula E Car Racing
- B. Any briefings on Formula E prepared for the Premier in his capacity as either Premier or as Minister for Tourism

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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:
 - A. Any correspondence sent in 2020 to or from the Department of the Premier and Cabinet / the office of the Premier and the South Australian Tourism Commission relating to the Formula E Car Racing
 - B. Any briefings on Formula E prepared for the Premier in his capacity as either Premier or as Minister for Tourism

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.

Provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 15 April 2021. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.
5. The applicant provided submissions in response. I have considered these submissions in this determination.
6. The applicant suggested that I delay my final determination to await the decision of SACAT in another matter. I do not consider that doing this is appropriate in the circumstances.

Relevant law

7. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
8. 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.
9. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
10. 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.

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

11. The agency also now claims section 18 of the *City of Adelaide Act 1998*, which provides:
- (1) The following will be taken to be exempt documents for the purposes of the *Freedom of Information Act 1991*:
 - (a) a document that has been specifically prepared for submission to the Capital City Committee (whether or not it has been so submitted);
 - (b) a preliminary draft of a document referred to in paragraph (a);
 - (c) a document that is a copy of a part of, or contains an extract from, a document referred to in paragraph (a) or (b);
 - (d) an official record of the Committee;
 - (e) a document that contains matter the disclosure of which would disclose information concerning any deliberation or decision of the Committee.
 - (2) A document is not an exempt document under subsection (1) if–
 - (a) it merely consists of factual or statistical material that does not disclose information concerning any deliberation or decision of the Committee; or
 - (b) it is within a class of documents excluded from the operation of subsection (1) by the regulations.
 - (3) The Crown and the Adelaide City Council are entitled to access to–
 - (a) a document referred to in subsection (1); and
 - (b) any other document in the possession or control of the Committee under this Act.
 - (4) However–
 - (a) access to a document is not available under subsection (3) in breach of a duty of confidence; and
 - (b) access to a document under subsection (3) may be given on conditions determined by the Committee.
 - (5) In this section, a reference to the Committee includes a reference to a subcommittee or delegate of the Committee acting under this Act.
12. The agency claimed clauses 7, 8 and 13 of the FOI Act, but for reasons given below, I will not refer to those.

Documents in issue

13. The agency identified two documents within the scope of the application.

Issues in this review

14. Having regard to the agency's submissions and the exemptions claimed, it is for me to determine whether to confirm, vary or reverse the agency's refusal in regards to the documents in issue in this external review.

Consideration

15. An application for access to 'an agency's document' under section 13 must be accompanied by such information as is reasonably necessary to enable 'the document' to be identified,² and must be dealt by the agency with a determination about whether

² *Freedom of Information Act 1991* s 13(d)

access is to be granted to 'the document'.³ The document, not information in a document, is identified by the terms of an application as subject of the request. Further, the document is one which was existing at the time of the application, and is therefore not one that is subsequently generated to reflect redactions to the content of a pre-existing document.

16. In this matter, the agency claimed that significant portions of the documents were out of scope and so were the subject to redactions. A redaction of a document is a partial refusal of access. I note that 'scope' is not a basis for refusal under section 20 of the FOI Act. I therefore consider the documents as a whole, without regard to these redactions.
17. The agency claimed a number of exemptions under Schedule 1 of the FOI Act in relation to Documents 1 and 2. As I accept that section 18 of the *City of Adelaide Act 1998* applies to these documents, as was also claimed in submissions to my Office, I do not have to address the application of these exemptions under Schedule 1.
18. Document 2 are the minutes and agenda of a meeting of the Capital City Committee. Document 1 is an annotated agenda of the same. There are a number of attached reports to Document 2.
19. It is clear that Parliament intended to afford the Capital City Committee the same kind of secrecy as that enjoyed by Cabinet. Section 18 of the City of Adelaide Act makes the same provision for exemption of the Capital City Committee's documents as that originally found in clause 1(1) of the FOI Act in relation to Cabinet documents.
20. Parliament further fortified the secrecy of the Capital City Committee by preventing a Parliamentary Committee from conducting an inquiry into its affairs. To this end, section 19 of the City of Adelaide Act states:

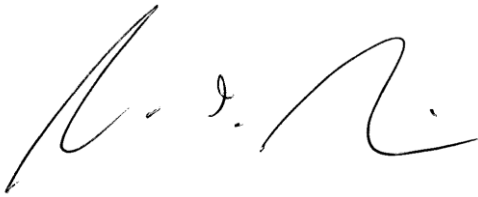
The functions and operations of the Capital City Committee may not be subject to inquiry under the *Parliamentary Committees Act 1991*.
21. In light of the similarity of the terms of section 18 with clause 1 of the FOI Act and the clear intention of Parliament, I am satisfied that I ought to consider section 18 with similar construction to that of clause 1 of Schedule 1 of the FOI Act.
22. I consider that the Minutes of a Committee meeting are the formal records of that Committee. Disclosure of the same would also disclose matter concerning the decisions of the Committee.
23. I therefore accept that Documents 1 and 2 are exempt documents.
24. Additional to the Minutes and Agendas, there are a number of attached reports to those agendas. The agency has treated those reports as forming part of Document 2. The question before me is whether those documents should be refused on the same basis by virtue of them being attached to the Documents. Unlike clause 1(2)(ab) of the FOI Act in relation to Cabinet documents, Parliament never severed attachments to Committee documents from the exemption applied to the principal documents. I therefore conclude that the remaining content of the Documents are likewise exempt.
25. By way of guidance to the agency, I note that in claiming section 18 of the City of Adelaide Act, it attempted to claim clause 12 of the FOI Act. This appears to be an attempt to synthesise the FOI Act, which makes no reference to exemptions outside of the FOI Act, and the City of Adelaide Act, which imputes an exemption to Schedule 1 of

³ *Freedom of Information Act 1991* s 19(1)

the FOI Act retrospectively. This raises two points. First, clause 12 cannot import a statutory secrecy provision unless that provision makes disclosure an offence. It therefore does not apply to section 18. Second, section 18 applies to the FOI Act regardless of the apparent lack of reference to it in the FOI Act. While exempt documents are defined by the FOI Act by reference to Schedule 1 of the FOI Act, section 18 imputes itself into Schedule 1 and should be applied as if it were itself found in Schedule 1.

Determination

26. In light of my views above, I confirm the agency's determination.



Wayne Lines
SA OMBUDSMAN

28 May 2021

APPENDIX 1

Procedural steps

Date	Event
18 January 2021	The agency received the FOI application.
18 February 2021	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
18 February 2021	The agency received the internal review application. The agency and applicant considered that the deemed refusal occurred on 17 February 2021. However, both appear to have counted the timeframe from the day of the application rather than the day after the application.
24 February 2021	The agency confirmed the determination.
9 March 2021	The Ombudsman received the applicant's request for external review.
10 March 2021	The Ombudsman advised the agency of the external review and requested submissions and documentation.
7 April 2021	The agency provided the Ombudsman with its submissions and documentation.
15 April 2021	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).