



Determination

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

Applicant	The Hon Stephen Mullighan MP
Agency	The Treasurer
Ombudsman reference	2020/04757
Agency reference	TRS20D1807
Determination	The determination of the agency is confirmed.

REASONS

Application for access

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

All minutes, briefings and correspondence titled 'Economic Impact of COVID-19' as described on the Objective document management system, between 14 November 2019 and 29 May 2020.

Background

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

Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

4. I provided my tentative view about the Treasurer's determination to the parties, by my provisional determination dated 11 November 2020. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the Treasurer's determination.
5. The Treasurer and interested parties provided submissions in response. I have considered these submissions in this determination.
6. The Treasurer has provided further submissions that disclosure would be contrary to the public interest.
7. I have received submissions from multiple interested parties. I have received strong objections to disclosure from the Commonwealth Treasury, as well as the Treasuries of

multiple States and Territories. I have considered these objections from paragraphs 43 onwards.

8. On 1 February 2021 I wrote to the applicant to provide him with a summary of the submissions received and notified him that I proposed to change my views based on those submissions. The applicant was invited to provide further submissions by 8 February 2021.
9. I have received no further submissions from the applicant. Accordingly I have considered the further submissions from the Treasurer and interested parties, and consider it appropriate to proceed to a final determination without issuing a revised provisional determination.

Relevant law

10. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
11. 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 provision is of relevance to this external review:

5—Documents affecting inter-governmental or local governmental relations

- (1) A document is an exempt document if it contains matter—
 - (a) the disclosure of which—
 - (i) could reasonably be expected to cause damage to intergovernmental relations; or
 - (ii) would divulge information from a confidential intergovernmental communication; and
 - (b) the disclosure of which would, on balance, be contrary to the public interest.

9—Internal working documents

- (1) A document is an exempt document if it contains matter—
 - (a) that relates to—
 - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and
 - (b) the disclosure of which would, on balance, be contrary to the public interest.
- (2) A document is not an exempt document by virtue of this clause if it merely consists of—
 - (a) matter that appears in an agency's policy document; or
 - (b) factual or statistical material.

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

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

13. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Documents in issue

14. The Treasurer identified two documents within the scope of the application.
15. The Treasurer determined that document one is exempt in full pursuant to clause 5(1)(a)(ii).
16. Whilst not relied upon in its determination of the application, the Treasurer has submitted to my Office that he considers document one is also exempt pursuant to clause 9(1).
17. The Treasurer also determined that document two is exempt in full pursuant to clause 17(c).
18. The applicant has indicated that he does not contend the exemption claimed over document two, and only wishes to review the exemption claimed over document one.
19. Accordingly this external review will focus solely on document one, which from here on will be referred to simply as 'the document'.

Issues in this review

20. It is for me to consider whether the Treasurer has justified his determination to refuse access to the document in issue and to determine whether to confirm, vary or reverse the Treasurer's determination in regard to the document.

Consideration

21. The information contained in the document relates to intergovernmental discussions of the economic impact of COVID-19.
22. The Treasurer submits that the document is exempt pursuant to clauses 5(1)(a)(ii) and 9(1).

Clause 5(1) - Documents affecting inter-government or local governmental relations

23. Whilst the Treasurer only specified that he considered the document to be exempt pursuant to clause 5(1)(a)(ii), the language used in the Treasurer's submissions to my Office indicate that the Treasurer also considers that the document should be exempt pursuant to clause 5(1)(a)(i).
24. In order for a document to be exempt pursuant to clause 5(1)(a) it must contain matter the disclosure of which:
 - could reasonably be expected to cause damage to intergovernmental relations, or
 - would divulge information from a confidential intergovernmental communication, and
 - would, on balance, be contrary to the public interest.
25. As both clauses require a decision maker to arrive at the conclusion that disclosure would, on balance, be contrary to the public interest for the clauses to apply, I consider it appropriate to assess both clauses together. I will consider the first element of each clause and then address the public interest.

Confidential intergovernmental communications

26. When determining whether communications between governments occur on a confidential basis, the following factors may be relevant:
- the nature of the information and its sensitivity²
 - the body from which it emanates and the relationship between the parties
 - the circumstances in which the communication took place.³
27. In the context of an international governmental relationship, President Davies in *Re Maher and Attorney-General's Department* observed that:

Moreover, as I have said, communications may be made not under any express agreement or even any necessarily implied agreement as to confidentiality but pursuant to a general understanding that communications of that nature will be treated in confidence.⁴

28. The approach in *Maher* appears to have been recently adopted by the South Australian District Court in *Hall v SA Police*,⁵ although I note that matter concerned an international relationship. Nevertheless, I consider that the approach in *Maher* is relevant and useful in this instance. As such, it is necessary, in my view, to consider the full circumstances surrounding the exchange of the information, and whether the information in particular was provided and received under such circumstances.
29. The Treasurer has not stated that the contents of the document was shared in circumstances that implied a quality of confidence. However based on my reading of the document and giving consideration to the high office of the parties involved, out of an abundance of caution I am willing to accept that the information has a quality of confidence.
30. Accordingly I consider the requirements for the first element of clause 5(1)(a)(ii) have been met.

Damage to intergovernmental relations

31. What constitutes 'damage' to intergovernmental relationships was considered by the Federal Court in *Arnold v Queensland*.⁶ Justice Wilcox considered that:

the words "relations between the Commonwealth and a State" refer to the total relationship between the Commonwealth and the relevant State. As is essential in a federation, there exists a close working relationship, over a wide spectrum of matters and at a multitude of levels, between representatives of the Commonwealth and representatives of each State. The word 'relations' includes all of those contacts. It would not normally be correct to describe a falling out between particular individuals on each side as constituting damage to "relations" between the two governments, even if there was some loss of co-operation between those individuals. But a dispute may have ramifications sufficiently extensive for it to affect "relations" between the governments as such. Questions of degree arise. They can only be considered in the light of the facts of each case⁷.

² *Smith, Kline and French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at 303.

³ *Re Maher and Attorney-General's Department* [1985] AATA 180 (17 July 1985) at [20]. The approach in *Re Maher* has recently been applied by the South Australian District Court in *Hall v SA Police* [2019] SADC 5 at [255].

⁴ *Re Maher and Attorney-General's Department* [1985] AATA 180 (17 July 1985) at [25].

⁵ *Hall v SA Police* [2019] SADC 5 at [255].

⁶ *Arnold on behalf of Australians for Animals v The State of Queensland; The Australian National Parks and Wildlife* [1987] FCA 148

⁷ *Arnold on behalf of Australians for Animals v The State of Queensland; The Australian National Parks and Wildlife* [1987] FCA 148, per Wilcox J at [32].

32. Justice Wilcox also commented on the requirements of a ‘reasonable expectation’ of damage:

the words “could reasonably be expected” do not require the demonstration of probability of damage. In *Attorney-General’s Department v Cockcroft* (1986) 64 ALR 97 a Full Court considered the meaning of the words “could reasonably be expected to prejudice the future supply of information” ... Bowen CJ and Beaumont J said that those words “require a judgement to be made by the decision maker as to whether it is reasonable, as distinct from something that it is irrational, absurd or ridiculous...”⁸

33. In the context of a relationship between the Commonwealth and the State of Queensland, the then Deputy President of the AAT observed in *Guy v the Department of Transport* that:

It would not, in my view, be an exaggeration to say that the relationship between the units of a Federation can be quite as complex and difficult as that between nation states, and that trust and confidence are vital to the nourishment of bodies... which are examples of Federal/State relationships based on mutual cooperation and not merely an assertion of legislative power.

It follows that I consider that a disclosure of the [document] against the wishes of the Government of Queensland could reasonably be expected to cause damage to relations between the Commonwealth and the State of Queensland.⁹

34. In regard to the objections of agencies, the Western Australian Information Commissioner in *Ravlich v Department of Productivity and Labour Relations* concurred with the conclusion of the AAT and observed that the reasonableness of the objections to disclosure were not relevant in assessing the likely impact of disclosure.¹⁰ That is, an agency’s strong objection to disclosure, however irrational the views underpinning those objections, must be considered in assessing whether disclosure could reasonably be expected to damage intergovernmental relations.

35. The Treasurer has provided the following statement in support of his view that disclosure could reasonably be expected to result in damage:

The release of this information could reasonably be expected to result in a loss of confidence in the South Australian Department of Treasury and Finance, as well as the South Australian Government in its obligations to maintain confidentiality. This could reasonably be expected to cause damage to its relationship with the Australian Government and other Governments of Australia.

36. In my view I do not consider that a substantial basis for a reasonable expectation of damage has been made out by the Treasurer. In my view it would not be unreasonable to expect that information shared between government agencies, particularly information related to matters of high, contemporaneous interest to the public such as a response to COVID-19, may be disclosed to the public at some future date.

37. I do not consider it a reasonable expectation that damage would occur between intergovernmental agencies if one agency shared information if it were in the public interest to do so.

38. However noting the Treasurer’s objections and the reasons in *Ravlich v Department of Productivity and Labour Relations*, I am willing to accept that however unlikely it may be that damage may occur, there is a possibility, and I consider that the first element of clause 5(1)(a)(i) has been met.

⁸ *Arnold on behalf of Australians for Animals v The State of Queensland; The Australian National Parks and Wildlife* [1987] FCA 148, per Wilcox J at [33].

⁹ *Guy v Department of Transport* (1987) 12 ALD 358 at [14].

¹⁰ *Ravlich v Department of Productivity and Labour Relations* [2000] WAICmr 58 at [22].

The public interest

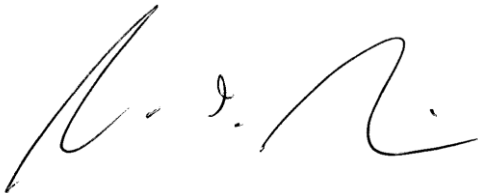
39. In order for a document to be exempt pursuant to either clause 5(1)(a)(i) or (ii), the disclosure of the document must, on balance, be contrary to the public interest. In order to determine whether disclosure is contrary to the public interest, a balancing test between competing factors must be considered.
40. To my mind, factors in favour of disclosure include:
 - fulfilling the objects of the FOI Act
 - enhancing scrutiny of government decision making
 - informing the public on economic considerations
 - disclosing information of high, contemporaneous interest to the public
 - increasing confidence in the public
41. Factors against disclosure include:
 - ensuring the efficient operation of government
 - ensuring that established confidential communication practices can continue
 - maintaining the flow of free and frank advice between government agencies
42. The Treasurer has provided the following submission as its consideration for the public interest:

The public interest in the flow of information required for the administration or development of intergovernmental projects, programs and for long-term intergovernmental projects, programs and for long-term intergovernmental planning, and ensuring confidence and trust between governments, including through the preservation of confidentiality attached to private communications ought to be considered.
43. Since issuing my provisional determination, I have received submissions from multiple Treasuries that if the document was disclosed, the other Treasuries of Australia would no longer be willing to share information in a free and frank manner with the Treasurer.
44. Given that I have been informed that damage will occur, rather than that the damage may be reasonably expected to occur, I must take that into consideration.
45. On my viewing of the document and its content, I am of the view that the damage foreseen by the other Treasuries is based on a plausible factual basis.
46. In considering the public interest in favour of disclosure of the document, there may be some benefit to informing the public on how government responded to COVID-19 in the early stages. However I consider that the disclosure of the actual content in this document would be of minimal benefit to the public interest of South Australia.
47. Given the anticipated damage on one hand, and the minimal benefit of disclosure on the other, I consider that disclosure of the document would, on balance, be contrary to the public interest.
48. The Commonwealth Treasury indicated its strong objection to disclosure of any part of the document.
49. Based on this, I am satisfied that the document is exempt in full pursuant to clauses 5(1)(a)(i) and (ii).
50. As I am satisfied that the document is exempt in full pursuant to clause 5(1), I no longer find it necessary to discuss the potential application of clause 9(1).

51. Similarly, the interested parties raised other clauses that the document may be exempt under, however I do not consider it necessary to discuss the potential application of the other clauses.

Determination

52. In light of my views above, I confirm the Treasurer's determination.

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

Wayne Lines
SA OMBUDSMAN

11 February 2021

APPENDIX

Procedural steps

Date	Event
5 May 2020	The Treasurer received the FOI application dated 5 May 2020.
26 September 2020	The Principal Officer determined the application.
30 September 2020	The Ombudsman received the applicant's request for external review dated 30 September 2020.
1 October 2020	The Ombudsman advised the Treasurer of the external review and requested submissions and documentation.
13 October 2020	The Treasurer provided the Ombudsman with his submissions and documentation.
11 November 2020	The Ombudsman issued his provisional determination and invited submissions from the applicant and Treasurer.
16 December 2020	The Ombudsman issued his provisional determination to the interested parties and invited submissions.