



Determination

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

Applicant:	Mr John Hughes
Agency:	SA Police
Ombudsman reference:	2022/00129
Agency reference:	22/0793
Determination:	The determination of the agency is varied.
Date of Ombudsman's determination:	28 March 2022
Issues considered:	Deliberation or decision of Cabinet Exempt intergovernmental document Confidential intergovernmental communication Damage to intergovernmental relationships Agency's decision-making functions
Exemption clauses relied upon:	1(1)(e) 3 5(1) 9(1)
Legislation considered:	<i>Freedom of Information Act 1991</i>

Terms of the original application:

Mr Grantly [sic] Stevens, who is appointed as and exercises the powers and functions of The State Co-Ordinator (as defined under the South Australian Emergency Management Act 2004), has within various Directives signed by him, directed that masks are required to be worn over mouth and nose by persons in specific circumstances and at specific times. Information Requested Provide: (1) any Prime Document(s) and/or (2) any 3rd party advice/opinion received by and used by The State Co-Ordinator to form his opinion that the mask wearing directions contained in his Directions would stop or reduce the person to person transmission of the SARS-COV-2 virus and reduce the incident of the COVID-19 disease in the community of South Australia and therefore achieve the state purposes of the South Australian Emergency Management Act 2004.

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:

Mr Grantly [sic] Stevens, who is appointed as and exercises the powers and functions of The State Co-Ordinator (as defined under the South Australian Emergency Management Act 2004), has within various Directives signed by him, directed that masks are required to be worn over mouth and nose by persons in specific circumstances and at specific times. Information Requested Provide: (1) any Prime Document(s) and/or (2) any 3rd party advice/opinion received by and used by The State Co-Ordinator to form his opinion that the mask wearing directions contained in his Directions would stop or reduce the person to person transmission of the SARS-COV-2 virus and reduce the incident of the COVID-19 disease in the community of South Australia and therefore achieve the state purposes of the South Australian Emergency Management Act 2004.

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 8 February 2022. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to reverse the agency's determination.
5. By email dated 11 February 2022 the applicant advised that he had no further comment to make. On 22 February 2022 the agency provided me with some initial submissions, and requested an extension of time to provide further submissions. The extension of time was granted and the agency subsequently provided me with further submissions on 8 March 2022. I have assessed those submissions in the body of this determination.

Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
7. 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.
8. The following clauses of Schedule 1 of the FOI Act is relevant to my external review:

1–Cabinet documents

- (1) A document is an exempt document–

¹ Freedom of Information Act 1991, section 12.

- (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.

3—Exempt documents communicated by another government

A document is an exempt document if—

- (a) it contains information from an intergovernmental communication to the Government of South Australia or a council; and
- (b) notice has been received from the relevant Government or council that the information would be protected from disclosure under a corresponding law of the Commonwealth or another State.

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.

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.

Documents in issue

11. The agency identified three documents within the scope of the application.

Issues in this review

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

Consideration

13. The agency determined that all three documents are exempt in full on the basis of clause 1(1)(e):

The document is exempt as it contains matter the disclosure of which would disclose information concerning Cabinet deliberation. The confidentiality necessary for effective government requires that deliberations of Cabinet should be protected from mandatory disclosure pursuant to the FOI Act.

14. The above was the only explanation provided by the agency for its reliance upon clause 1(1)(e) in its original determination. No further explanation was provided in the internal review determination, and the agency initially declined to provide my Office with any additional submissions.
15. In my provisional determination I reminded the agency that section 48 of the FOI Act requires the agency to justify its position. I also advised my view that in the context of a reliance upon clause 1(1)(e), I agree with the views of the South Australian Civil and Administrative Tribunal (**the Tribunal**), that this requires the agency to address two questions:
 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?²
16. Recently the Tribunal has considered the application of clause 1(1)(e). Relevantly, the Tribunal considered that:³

A deliberation can be understood as Cabinet's thinking processes.⁴ 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 knowledge of that information.⁵ The clause is directed at protecting the decision-making process, not the subject matter of the process.⁶ However, the revelation of the subject-matter may expose the process.
17. In my provisional determination I observed that, based on the contents of document 3, it appeared that the annexure to the email may have been formally noted by Cabinet. I advised that if this is the case, I can only conclude that there has been a decision of Cabinet and, in light of the Tribunal's broad interpretation of clause 1(1)(e), that disclosure of document 3 would disclose information concerning that decision.
18. I advised the agency that I was not yet satisfied that its position that document 3 is exempt had been justified, but invited the agency to provide me with submissions as to whether the annexure in document 3 was in fact formally noted by Cabinet. I also advised the applicant that if the agency was able to provide me with such submissions, my final determination would likely be to the effect that document 3 is exempt.
19. In its submissions dated 22 February 2022, the agency confirmed that document 3 was submitted to, and considered by Cabinet at its meeting on 16 August 2021. The agency further confirmed that the document was formally noted at that meeting.
20. In light of my assessment above and the agency's submissions, I am therefore satisfied that document 3 is exempt on the basis of clause 1(1)(e). Although this is a departure from my provisional view, I do not consider it necessary to issue a revised provisional determination as this outcome was foreshadowed in my provisional determination.

² *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56, [81].

³ *Department of Treasury and Finance v Mullighan* [2021] SACAT 28, at [88].

⁴ *Re Waterford and Department of the Treasury* (No.2) [1984] AATA 67; (1984) 5 ALD 588.

⁵ See generally the discussion of Cabinet processes in *Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301 including the observation that a "deliberation" may occur even where no decision occurs at [88].

⁶ *Secretary to the Department of Infrastructure v Asher* (2007) 19 VR 17; [2007] VSCA 272 at [4]-[6] (Buchanan JA).

21. As per the agency's schedule of documents, document 1 and 2 relate to matters involving National Cabinet.
22. I advised in my provisional determination that I consider that the reference to 'Cabinet' in clause 1 specifically relates to the South Australian Cabinet. I also advised that, in any event, I refer to the decision made by The Honourable Justice White on 5 August 2021. Contrary to the submissions of the Department of the Prime Minister and Cabinet, His Honour concluded that the National Cabinet is not a committee of Cabinet.⁷ Accordingly, I formed the view that regardless of my interpretation of 'Cabinet' in the context of clause 1, it is clear that the documents cannot be exempt pursuant to clause 1(1)(e) on the basis that they contain information concerning a deliberation of National Cabinet.
23. I observed that this argument was in fact raised by the applicant in their application for internal review, and that it was unclear why the agency neglected to address this in the internal review determination. The agency provided no further comment on this specific observation.
24. In its submissions dated 22 February 2022 the agency advised that it no longer claims exemption under clause 1(1)(e) in relation to documents 1 and 2. In the alternative, the agency submits that the documents are exempt on the basis of clause 9(1), and requested an extension of time to provide further submissions regarding the applicability of clause 3. On 8 March 2022 the agency provided further submissions to the effect that documents 1 and 2 are fully exempt on the basis of clauses 3 and 5(1). I have first considered the applicability of clause 3.
25. Although neither of the documents originated from another government, I acknowledge that clause 3 applies to information from an intergovernmental communication. I accept that both documents relay such information. Although there are portions of the documents which do not fall within this category, I am satisfied that it is not possible to separate that information in a meaningful way and therefore accept that the requirements of clause 3(a) are satisfied for the entirety of the documents.
26. In relation to clause 3(b), the agency submits:
- Significantly, clause 3(b) relevantly provides that a document is an exempt document if 'notice has been received... that the information would be protected from disclosure'. Clause 3(b) therefore requires only that notice is provided. It does not require the relevant South Australian decision maker to conduct an analysis of the applicability or otherwise of the relevant 'corresponding law'.
- ...
- Accordingly, for the above reasons, the Clause 3 Notice is sufficient, without more, to satisfy the requirements of cl 3(b). As a consequence the agency submits that Documents 1 and 2 are wholly exempt under cl 3 of Schedule 1 of the FOI Act.
27. I disagree with the agency's submissions that mere receipt of a notice is sufficient to satisfy the requirements of clause 3(b), and consider it appropriate for me to take steps to identify any deficiencies in the notice which might render it invalid. To take the alternative approach as is suggested by the agency, would effectively allow a government or council to unilaterally prevent disclosure of documents without any further assessment. I do not consider this to be consistent with either the objects of the FOI Act which promote disclosure of information, or the applicant's legislated right to an independent review.

⁷ *Patrick and Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719 (5 August 2021).

28. The agency has provided me with a notice from the Commonwealth Department of the Prime Minister and Cabinet advising that documents 1 and 2 are exempt from disclosure under the Commonwealth *Freedom of Information Act 1982* (the Cth Act). Specifically, the notice states that page 3 of document 1 is exempt pursuant to section 34(1)(d) and both documents are exempt pursuant to sections 47B and 47C. Those sections relevantly provide:

34 Cabinet documents

General rules

- (1) A document is an exempt document if:
- (a) both of the following are satisfied:
 - (i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;
 - (ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or
 - (b) it is an official record of the Cabinet; or
 - (c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or
 - (d) it is a draft of a document to which paragraph (a), (b) or (c) applies.

47B Public interest conditional exemptions—Commonwealth-State relations etc.

A document is conditionally exempt if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State

47C Public interest conditional exemptions—deliberative processes

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:
- (a) an agency; or
 - (b) a Minister; or
 - (c) the Government of the Commonwealth.

29. I accept that the annexure in document 1 is a document originating from National Cabinet, however as already outlined, I see no reason to depart from the reasoning of Justice White that National Cabinet is not a committee of Cabinet. Relevantly, Justice White's consideration was in fact based on a claim of exemption under section 34(1). Accordingly, it is clear that no part of section 34(1) of the Cth Act is relevant to either document. To this extent I consider the notice received from the Department of the Prime Minister and Cabinet to be defective.
30. This again reinforces my view that it is appropriate for me to take steps to investigate the validity of a notice received under clause 3. To accept the notice on its face and without any further assessment would, in the current circumstances, directly undermine the decision of Justice White.
31. Noting that I specifically made reference to Justice White's ruling in my provisional determination, I query whether the notice of the Department of the Prime Minister and Cabinet was in fact issued as a result of genuine assessment of the documents and provisions of the Cth Act, or merely an attempt to sidestep that ruling. The clear misapplication of section 34(1), together with the agency's assertion that I must accept the notice at face value might indicate the latter intention.
32. As to section 47B of the Cth Act, whilst I acknowledge the reference to confidentiality in the National Cabinet Terms of Reference, having regard to the nature of the information in the documents, in particular the age of the information, it does not seem likely to me

that disclosure would or could reasonably be expected to damage relations between the Commonwealth and South Australia.

33. I do however acknowledge that section 47C is extremely broad, and that the documents at least relate to recommendations prepared and consultation which took place in the course of the exercising of functions by the Government of the Commonwealth.
34. That said, the Cth Act distinguishes between exempt documents and conditionally exempt documents, with the latter requiring that in addition to satisfying the requirements of the conditional exemption clause, disclosure must also be contrary to the public interest.⁸ Both sections 47B and 47C are conditional exemptions.
35. In relation to the public interest test, the notice provided to me states only that release may affect the way in which consultation with States and Territories takes place in the future, which would not be in the public interest. According to the relevant provisions of the Cth Act, an assessment of where the public interest lies requires a balancing process;⁹ it is not sufficient to merely identify one relevant factor against disclosure without considering factors favouring access.
36. I do not consider it likely that the Commonwealth government would decline to properly participate in, or enable, a national approach to managing a pandemic for fear of disclosure of dated and not particularly sensitive documents.
37. Additionally, the notice provided to me fails to acknowledge several public interest factors in favour of disclosure such as furthering the objects of the respective FOI Acts, promoting accountability of government decision-making and allowing members of the public to be informed on highly important topics which directly affect them.
38. I do not consider that the notice provides me with sufficient evidence to be satisfied that the Department of the Prime Minister and Cabinet conducted a proper assessment of whether disclosure of documents 1 and 2 would be contrary to the public interest. Accordingly, I consider the notice to be defective insofar as it claims that the documents are exempt under sections 47B and 47C of the Cth Act.
39. In light of my assessment above, I consider that the notice is sufficiently defective to be rendered invalid. I am therefore not satisfied that I have received a valid notice for the purpose of clause 3(b).
40. Turning now to the applicability of clauses 5(1), noting again the Terms of Reference of National Cabinet, I accept that disclosure of documents 1 and 2 would divulge information from a confidential intergovernmental communication. I do not however accept that disclosure could reasonably be expected to cause damage to intergovernmental relations. As outlined above, the information does not appear to be particularly sensitive and is in fact quite dated when considering the rapidly changing nature of the COVID-19 pandemic.
41. I accept that both documents 1 and 2 satisfy the initial requirements of clause 9(1).
42. I now turn my mind to the public interest test required of clauses 5(1) and 9(1).
43. I accept that the information in both documents passed between officers of seniority, and also accept that generally, the higher the office of the persons between whom the communications pass, the more likely it will be that the communication should not be

⁸ *Freedom of Information Act 1982* (Cth), sections 11A(5), 11B and 31A.

⁹ *Iplex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 70.

disclosed. That said, I also consider that the more senior the person, the greater the expectation that they should conduct themselves with a level of transparency and accountability.

44. The agency submits that the information in the documents is highly sensitive; I disagree. Whilst I accept that up-to-date information about the issues discussed might be considered to be sensitive, it is my view that the sensitivity of the information arguably decreases with the passage of time. As already outlined, the COVID-19 pandemic is constantly and rapidly changing, and so too is the government's response. While current discussions around the pandemic might be sensitive, it is difficult to see how the same sensitivity continues to attach to discussions which have long since passed.
45. The agency acknowledges that the subject matter of the documents generates substantial community interest, and that there is public interest in debate and scrutiny of government decisions which have a significant impact on the public. I agree, and advise that I consider these factors to carry substantial weight. Whilst there is public interest in enabling scrutiny of any government decision, that interest is clearly heightened in relation to decisions which directly affect the rights, liberties and health of the public.
46. In relation to the agency's submissions that confidentiality is necessary to prevent a dampening effect on the frankness and candour of senior public servants, I take the same view as outlined in my response to Department of the Prime Minister and Cabinet's notice. This submission cannot be assessed as a standalone statement; it must be assessed in the context of the documents in issue. For reasons already outlined, I do not consider that it likely that disclosure of documents 1 and 2 would result in senior government officials ceasing to perform their functions, or performing them to a lower standard.
47. I do not consider the possibility that disclosure would cause confusion and unnecessary debate is a relevant public interest consideration, as they agency submits. Nevertheless, I am not satisfied that such an outcome is likely given the rapidly changing nature of the pandemic, and the substantial amount of up-do-date information readily available to the public. On the contrary, I consider it highly unlikely that the public would be confused by the disclosure of such dated discussions. Furthermore, I consider that it is not unreasonable to expect the government to be prepared to defend any decision it makes, including decisions to reject certain options in lieu of others.
48. Balanced against the public interest in furthering the objects of the FOI Act, enabling scrutiny of high profile government decisions, promoting public debate and enabling members of the public to be informed on matter which directly and substantially affect them, I am not satisfied that disclosure of documents 1 and 2 would be contrary to the public interest.

Determination

49. In light of my views above, I vary the agency's determination such that documents 1 and 2 are not exempt, and document 3 is exempt on the basis of clause 1(1)(e).



Wayne Lines
SA OMBUDSMAN

28 March 2022

APPENDIX 1

Procedural steps

Date	Event
12 October 2021	The applicant lodged their FOI application with the Department of the Premier and Cabinet.
15 October 2021	In accordance with section 16(1) of the FOI Act, the Department of the Premier and Cabinet transferred the application to the agency.
26 October 2021	In accordance with section 14A of the FOI Act, the agency extended the time to deal with the application until 9 December 2021.
19 November 2021	The agency determined the application.
15 December 2021	The agency received the internal review application dated 13 December 2021.
16 December 2021	The agency confirmed the determination.
10 January 2022	The Ombudsman received the applicant's request for external review dated 9 January 2022.
10 January 2022	The Ombudsman advised the agency of the external review and requested submissions and documentation.
11 January 2022	The agency provided the Ombudsman with its submissions and documentation.
8 February 2022	The Ombudsman issued his provisional determination and invited submissions from the parties.
11 February 2022	The applicant advised that they had no further comment to make.
22 February 2022	The agency provided a partial response to the provisional determination and requested an extension of time to provide a further response.
8 March 2022	The agency provided a further response to the provisional determination.