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Determination

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

Applicant:	Professor Warren Jones
Agency:	Department for Environment and Water
Ombudsman reference:	2022/00666
Agency reference:	DEW21/031
Determination:	The determination of the agency is varied.
Date of Ombudsman's determination:	2 June 2022
Issues considered:	Deliberation of Cabinet
Exemption clauses relied upon:	1(1)(e)
Legislation considered:	<i>Freedom of Information Act 1991</i>

Terms of the original application:

All Departmental Reports, correspondence and briefings related to the National Trust SA of Ayers House from 1/1/20 to 30/6/21

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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 Departmental Reports, correspondence and briefings related to the National Trust SA of Ayers House from 1/1/20 to 30/6/21

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 agency's determination to the parties, by my provisional determination dated 19 May 2022. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
5. The agency indicated that it had no further submissions to make.
6. I discussed the scope of clause 1(1)(e) with the applicant and he indicated his desire to discuss my determination with the current Minister for Climate, Environment and Water, the Hon. Susan Close, once it was finalised.
7. The applicant otherwise advised that he had no further substantive submissions to make with regard to the reasons for my determination.
8. Accordingly, my reasons are the same as those expressed in my provisional determination.

Relevant law

9. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
10. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access. The following clauses are relevant to this external review:

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

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.

4–Documents affecting law enforcement and public safety

- (2) A document is an exempt document if it contains matter the disclosure of which–
- (a) could reasonably be expected–
 - (i) prejudice the investigation of any contravention or possible contravention of the law (including any revenue law) whether generally or in a particular case; or
 - (ii) to enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be ascertained; or
 - (iii) to prejudice the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law (including any revenue law); or
 - (iv) to prejudice the maintenance or enforcement of any lawful method or procedure for protecting public safety; or
 - (v) endanger the security of any building, structure or vehicle; or
 - (vi) prejudice any system or procedure for the protection of persons or property; and
 - (b) would, on balance, be contrary to the public interest.

7–Documents affecting business affairs

- (1) A document is an exempt document–
- (a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person; or
 - (b) if it contains matter–
 - (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and
 - (ii) the disclosure of which–
 - (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
 - (B) would, on balance, be contrary to the public interest; or
 - (c) if it contains matter–

- (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
- (ii) the disclosure of which—
 - (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
 - (B) 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.

10—Documents subject to legal professional privilege

- (1) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.
- (2) A document is not an exempt document by virtue of this clause merely because it contains matter that appears in an agency's policy document.

13—Documents containing confidential material

- (1) A document is an exempt document—
 - (a) if it contains matter the disclosure of which would found an action for breach of confidence; or
 - (b) if it contains matter obtained in confidence the disclosure of which—
 - (i) might reasonably be expected to prejudice the future supply of such information to the Government or to an agency; and
 - (ii) would, on balance, be contrary to the public interest.

17 –Documents subject to contempt etc

- (1) A document is an exempt document if it contains matter the public disclosure of which would, but for any immunity of the Crown—
 - (a) constitute contempt of court; or
 - (b) contravene any order or direction of a person or body having power to receive evidence on oath; or

(c) infringe the privilege of Parliament.

11. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
12. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Documents in issue

13. The agency identified 80 documents within the scope of the application.
14. The agency failed to determine the application for access and application for internal review within the statutory timeframe and was deemed to have determined to refuse access to all documents found within scope.
15. The agency has provided submissions to my Office indicating its views that the majority of documents found within scope are exempt in part and in full.
16. In submitting that documents are exempt in part and in full, the agency has relied upon clauses 1(1)(a), (b), (e), (f), 4(2)(a)(v), 7(1)(b), 9(1), 10(1), 13(1)(b), 15(a), 17(c).
17. The agency also submits that several documents contain out of scope material.

Issues in this review

18. 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

Out of Scope Material

19. The agency submits that several documents contain material, or possibly contain material, which is out of scope and indicated its view that the out of scope material should be redacted and that the documents can be 'partially' released. No exemption clauses have been claimed over the material.
20. I disagree with the approach taken by the agency and reject its submission that a document can contain material which is out of scope and should be redacted on only that basis.
21. In reaching this view I have given consideration to the following observation by Justice Hughes in the matter of *State of South Australia (Department of the Premier and Cabinet v Seven Network (Operations) Ltd*:²

Where an agency has identified that it holds a document of which only part falls within the scope of a request for documents under the FOI Act -

- Is a decision-maker permitted to treat only part or parts that fall within the scope of the request as constituting the subject of a determination to grant or refuse access

² *State of South Australia (Department of the Premier and Cabinet v Seven Network (Operations) Ltd* [2021] SACAT 60.

under the FOI Act;

Answer: No.

- Is the withholding of part of a document identified by an agency as not falling within the scope of a request a refusal to give access for the purposes of section 19 or 20 of the FOI Act;

Answer: Yes.

- Does the Ombudsman have jurisdiction to review, vary or depart from an agency's identification of what part or parts fall within the scope of the request for the purposes of a determination to grant or refuse access under the FOI Act;

Answer: Yes.³

22. Having regard to Justice Hughes' observations, an agency is not permitted to treat only a part or parts of a document as falling within the scope of a request, and I have jurisdiction to confirm, vary or reverse the agency's determination to refuse access to the material in documents that the agency claims is out of scope.
23. However, I note that the agency has marked several documents with the caveat 'if not exempt, remove out of scope information', with the exemption being marked as clause 1(1)(e).
24. Accordingly I will consider the application of clause 1(1)(e) to the exempt material.

Clause 1 - Cabinet documents

Clause 1(1)(e)

25. The agency submits that documents 5, 7, 9, 10, 15 - 17, 19, 20 - 22, 24 - 26, 33, 34, 36 - 39, 42 - 45 and 79 are exempt in part and in full pursuant to clause 1(1)(e).
26. A document is exempt pursuant to clause 1(1)(e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet.
27. The South Australian Civil and Administrative Tribunal (**SACAT**) in *Department of the Premier and Cabinet v Dan van Holst Pellekaan (van Holst Pellekaan)*⁴ considered the test to be applied when considering whether a document is exempt pursuant to clause 1(1)(e).
28. 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;⁵

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:

³ *State of South Australia (Department of the Premier and Cabinet v Seven Network (Operations) Ltd* [2021] SACAT 60 [47].

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

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

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

29. 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?⁷
30. There have been references throughout the documents that evidence the existence of a 'Cabinet Note' and a directive contained in that note. The specific directive appears to have been issued prior to the creation of the documents and appears to not have been found within the timeframe of the documents.
31. Most relevantly, document 26 contains a subsequent submission by the then Minister for Environment and Water, the Hon. David Speirs, which was formally noted by Cabinet on 2 November 2020.
32. The formal act of 'noting', where Cabinet as a collective decision-making body has received and acknowledged information, has been held to constitute a decision of Cabinet.⁸
33. I am satisfied that the requirements for the first limb of the test set out in *van Holst Pellekaan* have been met. There has been a relevant decision of Cabinet.
34. The second limb of the test, that clause 1(1)(e) applies if the document contains matter the disclosure of which would disclose information *concerning* that decision, is one of substantial scope.
35. I have given consideration to a decision of SACAT in the matter of *Department of Treasury and Finance v Stephen Mullighan (Mullighan)*.⁹
36. In the decision of *Mullighan*, Justice Hughes elaborated further on the reasons given by Executive Member Stevens in *van Holst Pellekaan*.
37. The following observations in *Mullighan* are of particular relevance to this matter:¹⁰
- The information in the document under consideration for release must concern a deliberation or decision of Cabinet* [emphasis Hughes]
88. 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).
 89. 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.
 90. Proximity is not a relevant criterion.

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

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

⁸ *Department of Treasury and Finance v Stephen Mullighan* [2021] SACAT 28 at [88]; *Central Adelaide Local Health Network v Picton* [2021] SACAT 85 at [64].

⁹ *Department of Treasury and Finance v Stephen Mullighan* [2021] SACAT 28.

¹⁰ *Department of Treasury and Finance v Stephen Mullighan* [2021] SACAT 28 at [88-93].

91. 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.
92. 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.
38. 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 the decision maker considering the matter can establish that the connection exists based on the evidence before them.¹¹
39. In light of the above observations by Justice Hughes and Executive Member Stevens, it is clear that the potential scope of clause 1(1)(e) is, to put plainly, immense.
40. The Cabinet submission contained in document 26 sets out four recommendations for Cabinet to note. On my reading of the documents in issue, and having regard to the observations in *Mullighan*, there is room for suggestion that all of the information that the agency has claimed to be exempt throughout the 80 documents *concerns* those four recommendations.
41. This would not merely be limited to the information claimed to be exempt pursuant to clause 1(1)(e), and includes information in documents 5, 7 - 10, 14 - 26, 28 - 34, 36 - 40, 42 - 47, 56 - 59, 61 - 66, 72, 73, 75, 76, and 78 - 80.
42. As Cabinet formally acknowledged those four recommendations, it would then follow that if the information in issue concerns those recommendations, the information would also concern a decision of Cabinet, and the deliberation of Cabinet in making that decision to merely note the submissions.
43. I observe that throughout the documents, a constant thread has been created by the agency that connects the documents to the Minister's submission that was formally noted by Cabinet.
44. There is also reference in the documents that the matter under discussion is highly sensitive and requires the protection of Cabinet confidentiality. Document 20 in particular specifies that the information in issue will be connected to a Cabinet submission that would be lodged for noting at a future date. I am satisfied that this did later occur.
45. Whether or not all of the information could be said to concern that deliberation and decision of Cabinet depends on how far the scope of clause 1(1)(e) should be read.
46. I note that in a later decision of SACAT in the matter of *Central Adelaide Local Health Network v Picton (Picton)*¹², Justice Hughes observed that the 'outer limits' of the class

¹¹ *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56 at [95].

¹² *Central Adelaide Local Health Network v Picton* [2021] SACAT 85.

of documents that would be captured under a broad interpretation of clause 1(1)(e) is a matter that has yet to be determined.¹³

47. Having regard to the broad wording of clause 1(1)(e) and the existing authority, and in the absence of a clear delineation of where the outer bounds of clause 1(1)(e) lies, I find myself in a position where I have to conclude that all of the information in issue concerns a deliberation or decision of Cabinet, even if the consequence of such a conclusion is potentially an absurd one.
48. I acknowledge that one limit to the application of clause 1(1)(e) is that there is a requirement that a 'disclosure' must occur.
49. In the matter of *Mullighan*, the following was observed:

Clause 1(1)(e) affords exempt status to documents which, if released, would disclose certain information. 'Disclosure' in this context means a revelation for the first time. However, this is not to be understood to refer to the document itself but to the information. If the information, though not necessarily the document, is within the public domain, to that extent release of the document containing the information may not constitute a disclosure as there may not be a revelation. Whether there is or not will depend on other information in the document and whether the release of the document itself amounts to information that has not been disclosed. In other words, the existence of the document may itself constitute information concerning a deliberation or decision of Cabinet.¹⁴
50. Having regard to the above, I note that the ultimate outcome of the deliberation and decision of Cabinet in this matter, as it relates to Ayers House and the National Trust, has been heavily publicised. However whilst accepting that the final outcome of the Cabinet deliberation and decision is publicly known, I consider that the information in issue, that is all of the agency's internal communications that have been marked for exemption which also includes business information related to third parties, has not been publicly disclosed.
51. In light of, it is my view that all of the information marked for exemption by the agency in documents 5, 7 - 10, 14 - 26, 28 - 34, 36 - 40, 42 - 47, 56 - 59, 61 - 66, 72, 73, 75, 76, and 78 - 80 is covered by clause 1(1)(e).
52. I acknowledge that the outcome of this conclusion will likely be unsatisfactory to the applicant, particularly noting the delay in the agency handling his application for access.
53. I advise that if the applicant is aggrieved by my conclusion, he may appeal it with SACAT, and perhaps more guidance may be provided on how clause 1(1)(e) should be delineated.
54. However in saying this, I consider it appropriate to state clearly that any disquiet that I have expressed regarding the operation of clause 1(1)(e) is not directed at the decisions of SACAT or its members, even if I consider that some further guidance from the Tribunal would be beneficial.
55. I note that SACAT is bound, as am I, to follow the words of the legislation as it exists.

¹³ *Central Adelaide Local Health Network v Picton* [2021] SACAT 85 at [59].

¹⁴ *Department of Treasury and Finance v Stephen Mullighan* [2021] SACAT 28 at [94].

56. The circumstances of this matter, to my mind, have demonstrated that there are significant issues with the construction of clause 1(1)(e) and how broadly the inclusion of the word 'concerning' has expanded the scope of its operation.
57. I recognise that there are two other jurisdictions in Australia that have an equivalent exemption to clause 1(1)(e) where information that simply 'concerns' or is 'about' a deliberation or decision of Cabinet will be exempt.¹⁵
58. However, the inclusion of the word 'concerning' or 'about' in those two jurisdictions and in this State do not appear to be in line with the majority of Australian jurisdictions. The equivalent provisions to clause 1(1)(e) in other jurisdictions do not include the word 'concerning', or a similar term, and as such the exemptions appear to be more limited to information that reveals a deliberation or decision of Cabinet itself, as is the case in the equivalent FOI Acts of the Commonwealth¹⁶, Western Australia¹⁷, Queensland,¹⁸ Victoria¹⁹, the ACT²⁰ and Tasmania.²¹
59. As an aside, I also note that the majority of other jurisdictions extend Cabinet confidentiality to a period of 10 years, which is in contrast to the FOI Act which by operation of clause 1(2)(b) extends Cabinet confidentiality to documents up to 20 years of age.
60. I consider that the breadth of the exemption contained in clause 1(1)(e), and the success at which the agency has woven a tenuous thread of a Cabinet deliberation and decision through its internal discussions in order to attract the confidentiality of Cabinet to sit at odds with the underlying principles of the FOI Act.
61. Professor John McMillan, former Australian Information Commissioner and former Commonwealth Ombudsman, observed in an article published in the Australian Journal of Administrative Law that Cabinet exemptions 'can easily be invoked by putting documents on a trolley and walking it into the Cabinet room'.²²
62. Whilst Professor McMillan's comment may be exaggerated and not completely accurate, particularly with regard to the Commonwealth FOI Act, I consider that what has occurred in the circumstances of this matter is only slightly removed from what Professor McMillan suggested is possible.
63. The objects of the FOI Act provide that the purpose of the Act is to promote openness in government and accountability of Ministers, and to further the good government of the State. One of the ways this is achieved is by allowing the public to more effectively participate in government decision-making, and to ensure that there is a suitable level of transparency over the actions of government agencies.
64. This is however balanced against such restrictions that are consistent with the public interest and preserving personal privacy.
65. It is apparent that the agency has sought to keep its communications confidential, and to shield its internal deliberations from public scrutiny. Whether the agency sought to do this by deliberately weaving a thread of Cabinet confidentiality throughout the

¹⁵ *Information Act 2002* (NT), section 45(1)(v); *Government Information (Public Access) Act 2009* (NSW), clause 2(1)(d) and (e) of Schedule 1.

¹⁶ *Freedom of Information Act 1982* (Cth), section 34(3).

¹⁷ *Freedom of Information Act 1992* (WA), clause 1(1) of Schedule 1.

¹⁸ *Right to Information Act 2009* (Qld), clause 2(1)(b) of Schedule 3.

¹⁹ *Freedom of Information Act 1982* (Vic), section 28(1)(d).

²⁰ *Freedom of Information Act 2016* (ACT), clause 1.6(1)(d) of Schedule 1

²¹ *Right to Information Act 2009* (Tas), section 26(1)(d).

²² Professor John McMillan, 'Transparent Government - Are We Travelling Well?' (2021) 28 AJ Admin L 259, [260].

discussions is not clear, however the consistent reference to the Cabinet submission throughout the documents has given rise to the unfortunate outcome that all of the documents at issue can be found to fall under the clause 1(1)(e) exemption, irrespective of their actual connection to the matter. I consider that a situation where material entirely superfluous to a Cabinet deliberation could be exempt under clause 1(1)(e) simply because disclosure could be said to disclose 'information concerning' a Cabinet deliberation, however slight and contrived by an agency that may be, is utterly unsatisfactory and at odds with the principles and objects of the FOI Act.

66. However, based on the legislation as it exists, and having regard to the existing authority that has clearly indicated how far-reaching clause 1(1)(e) is to be interpreted, I consider that I am bound to conclude the information marked for exemption throughout the documents is exempt pursuant to clause (1)(e).
67. As I have concluded that the information marked for exemption by the agency is exempt pursuant to clause 1(1)(e), I do not consider it necessary to turn my mind to the potential application of the other clauses the agency has raised.
68. Whilst I propose to uphold the agency's submissions, and noting that I have expanded upon the agency's reliance of clause 1(1)(e), my determination is not to be taken as an endorsement of how far the confidentiality of Cabinet has been extended to the information in issue.

Determination

69. In light of my views above, I vary the agency's determination to the effect that documents 5, 7 - 10, 14 - 26, 28 - 34, 36 - 40, 42 - 47, 56 - 59, 61 - 66, 72, 73, 75, 76, and 78 - 80 are exempt in part and in full pursuant to clause 1(1)(e).



Wayne Lines
SA OMBUDSMAN

2 June 2022

APPENDIX

Procedural steps

Date	Event
19 July 2021	The agency received the FOI application dated 19 July 2021.
18 July 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
22 December 2021	The agency received the internal review application dated 13 December 2021.
6 January 2021	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³
4 February 2022	The Ombudsman received the applicant's request for external review dated 4 February 2022.
9 February 2022	The Ombudsman advised the agency of the external review and requested submissions and documentation.
18 March 2022	The agency provided the Ombudsman with its submissions and documentation.
19 May 2022	The Ombudsman issued his provisional determination and invited submissions from the parties.

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

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

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