

Determination

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

Applicant	Mr Anthony Templeton
Agency	City of Adelaide
Ombudsman reference	2015/05831
Agency reference	ADEL127822
Determination	The determination of the agency is varied.

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:

Any documents related to and/or tabled at a special meeting of the Adelaide City Council held on Monday, March 9 at 9.30am. The documents would include, but not [be] limited to, any reports, draft reports, memos, minutes of meetings, out of session papers, workshop material, emails and/or calendar entries.

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 6 September 2016. 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. To date, neither the applicant nor the agency have provided submissions in response. Accordingly, this final determination is in the same terms as my provisional 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 agency claims that two documents are exempt as they are subject to legal professional privilege (clause 10(1)) and contain confidential material (clause 13(1)(a)).
9. These clauses provide:

Clause 10(1)

- (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.

Clause 13(1)(a)

- (1) A document is an exempt document-
 - (a) if it contains matter the disclosure of which would found an action for breach of confidence...

10. The agency has also raised section 90(3) of the *Local Government Act 1999*.² The relevant parts of section 90 provide:

Meetings to be held in public except in special circumstances

- (1) Subject to this section, a meeting of a council or council committee must be conducted in a place open to the public.
- (2) A council or council committee may order that the public be excluded from attendance at a meeting to the extent (and only to the extent) that the council or council committee considers it to be necessary and appropriate to act in a meeting closed to the public in order to receive, discuss or consider in confidence any information or matter listed in subsection (3) (after taking into account any relevant consideration under that subsection).
- (3) The following information and matters are listed for the purposes of subsection (2):
 - (a) information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead);
 - ...
 - (e) matters affecting the security of the council, members or employees of the council, or council property, or the safety of any person;
 - ...
 - (h) legal advice;
 - ...

11. This claim gives rise to section 91(7) of the *Local Government Act 1999*. It provides

- (7) However, subsections (4) [requiring public display of minutes], (5) [entitling a person to inspect documents, including minutes and reports to a council or council committee received at a meeting of the council or committee] and (6) [entitling a

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

² In addition to this section, the agency referred to section 9 of Schedule 1 to the *Local Government Act 1999*. I note, however, that Schedule 1 comprises only two sections.

person to a copy of documents available for inspection under subsection (5)] do not apply to a document or part of a document if–

- (a) the document or part relates to a matter dealt with by the council or council committee on a confidential basis under Part 3; and
- (b) the council or council committee orders that the document or part be kept confidential.

12. Under section 48, the onus is on the agency to justify its determination ‘in any proceedings’. This includes the external review process.
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 agency initially identified four documents within the scope of the application.
15. The agency determined to release documents 1 to 3 in full.
16. Document 4 is comprised of an email dated 11 March 2015, attaching the minutes of a special meeting of the Adelaide City Council held on 9 March 2015 (**the minutes**). The agency determined to release the email in full but has refused access to the minutes in their entirety.
17. In response to a request from my Office, the agency identified a further document within the scope of the application (**the document**). The agency claims that this document is exempt in its entirety.

Issues in this review

18. It is for me to determine whether the agency is justified in refusing the applicant access to the minutes and the document.

Parties’ submissions

The applicant

19. When applying for external review, the applicant submitted that ‘the documents are in the public interest as they relate to the expenditure of ratepayer funds’.

The agency

The minutes

20. In its determination, the agency claimed that the minutes are subject to legal professional privilege and their disclosure would found an action for breach of confidence.
21. The agency’s solicitors have briefly elaborated on these claims in submissions to my Office. The agency claims that the submissions themselves are subject to legal professional privilege, however.
22. I must avoid disclosing claimed exempt matter in my reasons.³ I will therefore only briefly outline the agency’s submissions.

³ *Freedom of Information 1991*, section 39(15).

23. In addition to its claims of exemption over the minutes, the agency relies on section 90(3) of the *Local Government Act 1999* and a deed.
24. In support of its position, the agency has provided a copy of a deed between it and another party dated 11 March and 12 March 2015 (**the deed**).

The document

25. The agency claims that the document is 'highly confidential, [and] subject to legal professional privilege...'

Consideration

Clause 13(1)(a)

26. To succeed in claiming clause 13(1)(a) as a basis for refusing access to a document it is necessary to demonstrate that the relevant document contains matter 'the disclosure of which would found an action for breach of confidence'. The obligation of confidence may be contractual or equitable. In addition, 'would' should be read as 'could'.⁴

The minutes

27. The minutes total five pages. I note that pages 1 to 3 and 5 are publicly accessible.⁵ Given this, my view is that the agency's claims of exemption with respect to these pages of the document cannot be justified. That is to say, any legal professional privilege that may have attached to the pages has obviously been waived, and the information in the pages no longer has the necessary quality of confidence.
28. Accordingly, I will proceed to consider whether page 4 of the minutes is exempt.
29. I am satisfied that the document is exempt under clause 13(1)(a).
30. I nevertheless consider that it would be practicable to release all but page 4 of the minutes in accordance with section 20(4) of the FOI Act. Section 20(4) of the FOI Act provides that if it is practicable to give access to a copy of a document after deleting exempt matter, and it appears 'that the applicant would wish to be given access to such a copy, the agency must not refuse to give access ... to that limited extent.'

The document

31. The document totals 48 pages.
32. I have considered the deed, in particular clause 6 of the deed and the dates it was executed, in conjunction with the document. I am satisfied that the deed is sufficient to give rise to a contractual obligation of confidentiality with respect to the document.
33. I am satisfied that the document is exempt under clause 13(1)(a).

Clause 10(1)

34. Clause 10(1) allows an agency to refuse an applicant access to a document where the document would be able to be withheld from disclosure in any hypothetical legal proceedings on the grounds of legal professional privilege.

⁴ *Bray and Smith v WorkCover* (1994) 62 SASR 218 at 226 to 227.

⁵ I have omitted the reference so as to avoid disclosing claimed exempt matter. I provided the link to the agency by letter dated 6 September 2016.

35. In *Esso Australia Resources Limited v The Commissioner of Taxation*, the High Court decided that a document is privileged from production in legal proceedings if it is a confidential communication between a client and their solicitor that was created for the dominant purpose of obtaining or giving legal advice; or if it is a confidential communication made for the dominant purpose of use, or obtaining material for use in, pending or anticipated legal proceedings.⁶
36. Dominant has been held to mean a 'ruling, prevailing or most influential' purpose.⁷
37. In addition, I have considered the Federal Court case of *Trade Practices Commission v Sterling*,⁸ in which Lockhart J described the classes of documents that may attract legal professional privilege:
- (a) Any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or the agent of either of them...
 - (b) Any document prepared with a view to its being used as a communication of this class, although not in fact so used...
 - (c) Communications between the various legal advisers of the client, for example between the solicitor and his partner or his city agent with a view to the client obtaining legal advice or assistance...
 - (d) Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf...
 - (e) Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence...
 - (f) Communications passing between the party and a third person (who is not the agent of the solicitor to receive the communication from the party) if they are made with reference to litigation either anticipated or commenced, and at the request or suggestion of the party's solicitor; or, even without such request or suggestion, they are made for the purpose of being put before the solicitor with the object of obtaining his advice or enabling him to prosecute or defend an action...
 - (g) Knowledge, information or belief of the client derived from privileged communications made to him by his solicitor or his agent...⁹

The document

38. Having regard to the capacity in which the author prepared the document, and the reasons cited for its creation within the document itself, I am not satisfied that the document:
- was created for the dominant purpose of obtaining or giving legal advice
 - is a confidential communication made for the dominant purpose of use, or obtaining material for use in, pending or anticipated legal proceedings.

⁶ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

⁷ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49, 64-65.

⁸ *Trade Practices Commission v Sterling* (1979) 36 FLR 244.

⁹ References omitted.

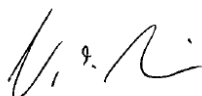
39. In my view, the document is not exempt under clause 10(1).
Page 4 of the minutes
40. Given my views above regarding the document, along with the contents of the minutes, I am not satisfied that page 4 of the minutes:
- was created for the dominant purpose of obtaining or giving legal advice
 - is a confidential communication made for the dominant purpose of use, or obtaining material for use in, pending or anticipated legal proceedings.
41. In my view, page 4 of the minutes is not exempt under clause 10(1).

Determination

42. In light of my views above, I vary the agency's determination to release pages 1 to 3 and 5 of the minutes.

Comment

43. In its determination of this matter the agency merely cited the exemption provisions relied upon.
44. 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.¹⁰ Agencies must link the exemptions claimed to the actual contents of the documents. This issue was discussed in the former Ombudsman's 2014 FOI audit.¹¹
45. To date, the agency has failed to give the applicant any reasons for its refusal of access to the minutes and the document. In addition, it is both disappointing and unhelpful that during my review the agency claimed that the limited reasons provided to my Office were themselves exempt.



Wayne Lines
SA OMBUDSMAN

26 September 2016

¹⁰ *Freedom of Information Act 1991*, section 23(2)(f).

¹¹ 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>.

APPENDIX - 2015/05831

Procedural steps

Date	Event
3 June 2015	The agency received the FOI application dated 3 June 2015.
24 June 2015	The Principal Officer of the agency determined to extend the time for dealing with the application for access to 20 July 2015. ¹
20 July 2015	The Principal Officer of the agency determined the application.
24 July 2015	The Ombudsman received the applicant's request for external review via the Ombudsman SA website.
27 July 2015	The Ombudsman advised the agency of the external review and requested submissions and documentation.
18 August 2015	The agency provided the Ombudsman with its submissions and documentation.
2 August 2016	Ombudsman SA requested an additional document from the agency by email.
16 August 2016	Ombudsman SA received the additional document from the agency by email.
24 August 2016	Ombudsman SA requested another document and submissions from the agency by email.
31 August and 5 September 2016	The agency emailed its responses to Ombudsman SA's queries.
5 September 2016	Ombudsman SA invited the agency's response to information proposed for inclusion in the Ombudsman's provisional reasons by email.
6 September 2016	Ombudsman SA received the agency's response by email.
	The Ombudsman issued his provisional determination to the parties.

¹ *Freedom of Information Act 1991*, section 14A.

