

Determination

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

Applicant	Mr John Gardner MP
Agency	Department for Education & Child Development
Ombudsman reference	2016/04931
Agency reference	
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 to:

The report by Professor Stephen Lamb from Victoria University regarding a review of SA's state school funding.

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 21 July 2016. 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 parties did not provide submissions in response to 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

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

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. The Department for Education and Child Development (**the agency**) has refused access to the document pursuant to clause 9(1) and clause 16(1)(a)(iv) of the FOI Act, which provide as follows:

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.

16—Documents concerning operations of agencies

- (1) A document is an exempt document if it contains matter the disclosure of which—
- (a) could reasonably be expected—
 - (iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions;
 - (b) would, on balance, be contrary to the public interest.

8. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
9. 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

10. The agency identified one (1) document within the scope of the application (**the document**).

Issues in this review

11. I must consider whether the agency has justified its determination to refuse access to the document.

Consideration

Clause 9(1) - Internal working documents

12. To justify their claim of clause 9(1) as a basis for withholding access to the documents, the agency must show that the document satisfies paragraphs (a) and (b) in clause 9(1), namely that:
- the matter in the document relates to any opinion, advice or recommendation that has been obtained, prepared or recorded or 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
 - release of which, on balance, would be contrary to the public interest.

13. In *Re Smith and Aboriginal and Torres Strait Islander Commission*,² Deputy President Forgie held that, in interpreting the similar provisions of the Commonwealth FOI Act, the terms ‘opinion, advice or recommendation ... [and] consultation’ should be given their ordinary dictionary meanings. Deputy President Forgie also considered the meaning of the word ‘deliberation’ and held that it:

...encompasses the notion of consideration. That consideration may involve consultation or discussion amongst more than one persons. Equally, a person who considers a matter on his or her own can be said to have deliberated upon it. Whether or not the deliberation leads in either case to the formation of an opinion, advice or recommendation is another matter.³

14. In *Re Pratt Consolidated Holdings Pty Ltd and Commissioner of Taxation*, in considering the meaning of the words ‘in the course of’ and ‘for the purposes of’ the deliberative processes ‘involved in’ the functions of an agency, Minister or Government under the similar provision of the Commonwealth FOI Act, it was held that:

In order to claim an exemption under s 36, it is not enough that the agency or Minister has a document containing an opinion, advice or recommendation or consultation or deliberation referring to matters for which the agency or Minister has responsibility. **It must be matter of that sort that has been obtained, prepared or recorded or, in the case of a consultation, has taken place in the course of, or for the purposes of the deliberative processes involved in their functions.**⁴ (emphasis added)

15. The wording of clause 9(1) clearly shows that the agency is required to consider the contents of the particular document (‘the matter’) under consideration, in making its claims. The District Court has commented:

In each case the documents must be viewed in the light of all relevant circumstances, their contents and purposes assessed, and that done, the question of balance decided.⁵

Agency submissions

16. In its original determination, the agency said:

In consideration of clause 9(1) of the FOI Act, I have established this document contains matter that constitutes advice and recommendation, following consultation and deliberation. The report was commissioned specifically for the purpose of the decision-making functions of the Department for Education and Child Development. No decisions on future directions have been made. The report recommendations have yet to be

² [2000] AATA 512.

³ [2000] AATA 512 at [54]-[56].

⁴ [2011] AATA 907 at [44] per Deputy President Forgie.

⁵ *Everingham v Director -General of Education*, D2959, 13 November 1992 per Judge Bowering.

considered by the Minister. After this process it is then required to undertake wider consultation with internal and external stakeholders.⁶

17. In its internal review determination, the agency said:

Further enquiries have been made within the Department and the Minister's Office who confirmed the report recommendations have yet to be considered by the Minister. After this process it is then required to undertake wider consultation with internal and external stakeholders. ... I have considered all relevant factors and hereby confirm the original determination ...⁷

18. I acknowledge that the scope of clause 9(1)(a) is wide, particularly given the use of the words 'that relates to'. I have perused the document. The agency submits that the document is a 'discussion paper, with many of the suggested options to be explored further, subject to seeking further advice as part of the consultative process.'⁸ I have noted that the document contains handwritten notations throughout, which suggests that it is not in its final form. I also note that the document has not yet been considered by the Minister, and that consultation with stakeholders is forthcoming. With these factors in mind, I am inclined to accept the agency's submission.
19. In my view therefore, I am persuaded that the matter in the document relates to advice that has been obtained in the course of, or for the purpose of the decision-making functions of the agency.

Public interest test

20. Therefore I must now turn to consider whether the release of the document, on balance, would be contrary to the public interest.
21. In order to satisfy clauses 9(1)(b) the agency must show that disclosure of the documents would 'on balance, be contrary to the public interest.' Clause 9(1)(b) requires the agency to balance the public interest factors for and against disclosure of a document, and show that the factors against disclosure outweigh those in favour of disclosure. The District Court of South Australia has commented on the requirement under paragraph (b), to engage in a 'public interest balancing process':
- This does not mean merely showing that there is something adverse to the public interest likely to flow from disclosure of the document, but that on balance the factors in the public interest against disclosure outweigh the factors in favour of disclosure.⁹
22. Further, the court has commented that 'the achievement of the objectives of the [FOI] Act is conducive to the public interest. It is a factor - ... a fairly weighty factor - to be taken into account when determining where the balance lies.'¹⁰
23. The agency has made the following submissions in favour of non-disclosure:

I have considered the objects of the FOI Act, which favour release. However, I have determined that the release of the review document '*Professor Stephen Lamb Report*' would affect the viability of the Department's decision making functions. This document is required to effectively evaluate and explore options within the Department. Release could

⁶ Determination dated 10 May 2016.

⁷ Internal review determination dated 6 June 2016.

⁸ Letter from agency dated 17 July 2016.

⁹ *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54 at page 70 per Judge Lunn.

¹⁰ *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54 at page 70 per Judge Lunn.

be detrimental to the methodology applied and advice provided and would, on balance, be contrary to the public interest at this time.¹¹

24. In considering whether or not disclosure of the document would, on balance, be contrary to the public interest I have had regard to the parties' submissions above, along with the following factors in favour of disclosure:
- fulfilling the objects of the FOI Act, particularly the public interest in promoting openness and accountability
 - facilitating an appropriate level of scrutiny of the government's strategies
 - promoting transparency and informed debate about the findings of the review
 - disclosure may enhance scrutiny of the agency's or the government's decision-making processes and improve government.

25. The agency made submissions to my Office relating specifically to the application of clause 16(1)(a)(iv) and 16(1)(b). However, I consider that those submissions, insofar as they make arguments pertinent to the public interest test, are relevant to my consideration of the clause 9(1)(b):

The document in question is a report on the review of school funding. It contains options formulated to assist in the high-level decision-making functions in relation to the evaluation of DECD funding reform options. It is intended as a discussion paper, with many of the suggested options to be explored further, subject to seeking further advice as part of the consultative process. It does not contain matter contained within DECD policy documents.

The document provides options for the deliberative process being considered by the agency, prior to any decision being made. Views of external stakeholders are yet to be taken into account. Work relating to the evaluation is currently underway and should be protected from disclosure before being fully formulated. The premature release would impede DECD's ability to carry out its decision making and implementation functions.

Disclosing proposals which may or may not be adopted would lead to unnecessary unrest for persons affected both within the agency and externally and prejudice the effectiveness of the evaluation process.

It is not in the public interest to release the document because it includes options and suggestions that may or may not be implemented, has not been subject to consultation, nor have resourcing implications been considered.

I have balanced the above against the general public interest of access to documents and the importance and relevance of the document. I determine that the public interests favouring non-disclosure carry greater weight.¹²

26. I consider that the importance and primacy of Ministerial consideration and stakeholder consultation is a strong, prevailing factor favouring non-disclosure at this stage. I accept that the release of the document in advance of this consideration occurring could impede the agency's ability to effectively evaluate and explore options, which is, I understand, the purpose of commissioning the creation of the document in the first place. Ultimately, having weighed up the submissions of the agency which favour non-disclosure, I am satisfied that disclosure of the document at this time would, on balance, be contrary to the public interest, as required by clause 9(1)(b).
27. In forming this view, I note that the agency has suggested that the applicant submits a new application for access to the document under the FOI Act at a later date, once the appropriate consultation process has taken place.¹³ I consider this to be a reasonable

¹¹ Determination dated 10 May 2016.

¹² Letter from agency dated 17 July 2016.

¹³ Letter from agency dated 6 June 2016.

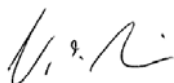
and practical step for the applicant to take.

Clause 16 - Documents concerning operations of agencies

28. I consider it unnecessary, given my findings above, to also consider the application of clause 16(1)(a)(iv).

Determination

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



Wayne Lines
SA OMBUDSMAN

12 August 2016

APPENDIX

Procedural steps

Date	Event
11 March 2016	The agency received the FOI application dated 7 March 2016.
10 May 2016	The agency determined the application.
23 May 2016	The agency received the internal review application dated 19 May 2016
6 June 2016	The agency confirmed the determination.
17 June 2016	The Ombudsman received the applicant's request for external review dated 15 June 2016.
29 June 2016	The Ombudsman advised the agency of the external review and requested submissions and documentation.
14 July 2016	The agency provided the Ombudsman with its submissions and documentation.
21 July 2016	The Ombudsman provided the parties with his provisional determination.
4 August 2016	The applicant confirmed he did not wish to make any submissions.
11 August 2016	The agency confirmed it did not wish to make any submissions.