

## Determination

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

Applicant	Mr Chris Picton MP
Agency	Department for Health and Wellbeing
Ombudsman reference	2019/00031
Agency reference	FOI2018-00049
Provisional determination	The determination of the agency is reversed.

## 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 (including but not limited to physical, electronic, or written advice and briefs, minutes, emails and any other correspondence) held by any health entity, including the Chief Executive, regarding upgrades and/or additional resourcing for cardiac services at the Queen Elizabeth Hospital, from 18 March 2018.

### 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 2 March 2020. 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. The agency has not provided submissions in response to my provisional determination.

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## 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.<sup>1</sup>
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. 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 three documents within the scope of the application:
  - Document 1 - Minute from Chief Executive to Minister for Health and Wellbeing, dated 21 June 2018.
  - Document 2 - Minute from Chief Executive to Minister for Health and Wellbeing, dated 7 August 2018
  - Document 3 - Minute from Chief Executive to Minister for Health and Wellbeing, dated 21 March 2018
11. All three documents are at issue in this review.

## Issues in this review

12. In its letter to the applicant dated 13 September 2018, the agency sought to rely on clause 1(1)(c) and clause 9 of Schedule 1 of the FOI Act in relation to all three documents. The agency characterised its letter as a determination. However, under the FOI Act the agency is taken to have determined the application by refusing access because it failed to determine the application within 30 days of receiving that application.<sup>2</sup>
13. For the purposes of this review, my Office sought clarification regarding the basis of the agency's claims for exemption on both grounds, namely clause 1(1)(c) and clause 9.<sup>3</sup> The agency responded that it no longer intends to rely on a claim for exemption under clause 9, seeking to rely on clause 1(1)(c) alone in respect of all three documents.<sup>4</sup>
14. Further, in respect of document 2, the agency amended its previous claim that the document was exempt in its entirety. It now says that due to the elapse of time since its initial determination, partial release to the applicant can occur. Nevertheless, it maintains its claim for exemption under clause 1(1)(c) in respect of the portion of the document containing costing comments.<sup>5</sup> In respect of all documents it says that the redacted material comprises 'figures submitted to Cabinet as part of the budget submissions for the redevelopment', and on that basis again says that clause 1(1)(c) is applicable.

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<sup>1</sup> *Freedom of Information Act 1991*, section 12.

<sup>2</sup> *Freedom of Information Act 1991*, section 19(2)(d).

<sup>3</sup> Email from Ombudsman to agency, 13 January 2020.

<sup>4</sup> Email from agency to Ombudsman, 13 February 2020.

<sup>5</sup> Email from agency to Ombudsman, 13 February 2020

15. In summary, and as a consequence of the agency's more recent submissions, I consider that the issues in this review are whether the agency is able to justify its claim that:
- document 1 is partially exempt pursuant to clause 1(1)(c) of Schedule 1 of the FOI Act
  - document 2 is partially exempt pursuant to clause 1(1)(c) of Schedule 1 of the FOI Act
  - document 3 is partially exempt pursuant to clause 1(1)(c) of Schedule 1 of the FOI Act

### Consideration

16. The 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.<sup>6</sup> Agencies must link the exemptions claimed to the actual contents of the documents, rather than make 'blanket' claims over the documents. This issue was discussed in the Ombudsman's 2014 FOI audit.<sup>7</sup>
17. I point out at this time that the same grounds for exemption were claimed by the agency to apply in respect of all three documents under review, although documents 1 and 3 were released in part with exemptions claimed for redacted portions, while exemptions were claimed over the whole of document 2.
18. In the agency's letter dated 13 September 2018, it submitted in respect of clause 1(1)(c) as follows:
- Cabinet documents**  
I have determined that the documents which are exempt in full and partially exempt contain information that if released could disclose information concerning any deliberation or decision of Cabinet and is (sic) therefore exempt by virtue of Schedule 1 Clause 1(1)(c) of the FOI Act which provides: (my emphasis)
19. In my opinion, the reasoning provided by the agency and the statutory provision that it seeks to rely upon are difficult to reconcile. I discuss this in some detail below.
20. On 12 October 2018 the applicant sought internal review of the agency's decision.
21. The agency's Chief Executive wrote to the applicant on 5 December 2018 in response to his request for internal review. Although the letter purports to constitute an internal review, section 29(5) of the FOI Act provides that an agency that fails to determine an application within 14 days after it is received by the agency is, for the purposes of the Act, taken to have confirmed the determination in respect of which a review is sought.
22. The letter of 5 December 2018 contained further submissions in relation to the agency's determination, including a statement that 'the documents in question were in fact Cabinet documents' and on that basis asserted that the information within these documents is exempt pursuant to Clause 1(1)(c) of the FOI Act.
23. On 3 January 2019 my Office wrote to the agency seeking additional information to assist in the conduct of my external review, including submissions from the agency in support of its determination. On 16 January 2019 I received materials in response to the above letter, including a covering letter dated 15 January 2019 from the Director, Legal

<sup>6</sup> *Freedom of Information Act 1991*, section 23(2)(f).

<sup>7</sup> 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>.

and Legislative Policy of the agency, Ms Reid. In support of the claim for exemption under clause 1(1)(c) Ms Reid stated that '[t]he documents contain information that was considered exempt as the release could disclose information concerning Cabinet'.

24. I have also noted above that in my most recent communication with the agency, it submitted that the redacted material was exempt under clause 1(1)(c) because 'the figures are submitted to Cabinet as part of the budget submissions for the redevelopment'.
25. I observe that the submissions of the determining officer on 13 September 2018, the Chief Executive on 5 December 2018, those of Ms Reid on 16 January 2019 and those of Ms Brecknell on 13 February 2020 appear somewhat inconsistent. To paraphrase these respectively, an exemption has been claimed because the documents:
  - contain information concerning a deliberation or decision of Cabinet (13/9/18)
  - were in fact Cabinet documents (5/12/18)
  - could disclose information concerning Cabinet (15/1/19)
  - contain figures submitted to Cabinet as part of budget submissions.
26. On each occasion, despite the differences of wording between these claims, clause 1(1)(c) has been consistently cited as providing the basis for exemption.
27. In my opinion, paragraph (c) must be read in context, in particular in relation to preceding paragraphs (a) and (b):
  - (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);
28. According to the Australian Information Commissioner considering the equivalent provision of clause 1(1)(c), a copy or extract should be a quotation from, or exact reproduction of, the Cabinet submission, official record of the Cabinet or the Cabinet briefing.<sup>8</sup> I agree with this view.
29. The word 'copy' is not defined in the FOI Act or the *Acts Interpretation Act 1915*, and so should be accorded its ordinary meaning. The word 'copy' is defined in the Macquarie Dictionary to include 'a transcript, reproduction, or imitation of an original'.<sup>9</sup>
30. The agency has not provided any Cabinet submission to my Office in support of its contentions that the documents are Cabinet documents.
31. Some consideration of the documents is necessary having regard to these matters. In doing so, I am mindful of my obligations under section 39(15) that I should avoid disclosing in my reasons for a determination any matter that the agency claims is exempt matter (whether or not I agree with that claim). I nevertheless consider that I can describe the documents in sufficient detail to address the claims for exemption, without disclosing any claimed exempt material itself. My description and characterisation of these is, in any event, largely based on non-exempt material that has already been disclosed to the applicant.

<sup>8</sup> <https://www.oaic.gov.au/assets/freedom-of-information/guidance-and-advice/foi-guidelines/foi-guidelines-combined-january-2019.pdf> (at 16 October 2019) See also: *Re Aldred and Department of Foreign Affairs and Trade (1990) 20 ALD 264*.

<sup>9</sup> *Macquarie Dictionary Online* (Macmillan Publishers Australia, 2017), available at <https://www.macquariedictionary.com.au/>.

32. To that end, I describe the documents as follows:

- Document 1 is a Minute from the Chief Executive to the Minister for noting, written on 21 June 2018 to provide an update on recommencement of the 24/7 services at the Queen Elizabeth Hospital (TQEH). It provides advice on future services at the hospital, a history of services and information on capacity and advice on required upgrades to the equipment and staff. The redacted material - i.e. the material for which an exemption is claimed - is comprised of two portions. The first of these (the final dot point of the summary) is related to details of works, which the agency initially claimed was exempt under clause 9 of Schedule 1. As discussed earlier, the agency has subsequently abandoned its claim of exemption under clause 9 and on that basis, has amended its view that this dot point is exempt.<sup>10</sup> The second portion is costing information in relation to the proposed services, for which the agency claims exemption under clause 1(1)(c).
- Document 2 is a Minute from the Chief Executive to the Minister on 6 August 2018 to provide additional advice on the upgrade on Stage 3 Redevelopment of TQEH. It refers to a feasibility study regarding the cardiac catheterisation laboratories including machines to be recommended. The material that the agency wishes to redact, as exempt under clause 1(1)(c), is costing information. Again as with document 1, this is essentially financial information.
- Document 3 is a Minute from the Chief Executive to the Minister dated 21 March 2018 for noting, which in fact was noted by the Minister on 5 May 2018. Its expressed purpose is to provide information to the Minister in relation to the progress of cardiac services at TQEH. It provides information regarding planning, staffing and equipment. The material that the agency claims is exempt under clause 1(1)(c) is again in relation to costing.

33. These documents on their face do not appear to comprise documents that fall within the scope of clause 1(1)(c). In particular, the agency has not provided evidence to this Office to support its contention that the three minutes are documents that are a copy of or part of, or contain an extract from, a document referred to in paragraph (a) or (b) namely documents that have been specifically prepared for submission to Cabinet, or comprise a preliminary draft of a document specifically prepared for submission to Cabinet.

34. Despite the agency's claim that the documents are partially exempt under clause 1(1)(c), it may be possible to infer that the agency intended that another paragraph or paragraphs within clause 1 of Schedule 1 might apply in the alternative. However, I do not propose to provide the agency with suggestions for potential alternative grounds of exemption that it might wish to claim. Although I may have a discretion in that regard I am not obligated to do so<sup>11</sup>. In the present case I am not fully apprised of all information regarding the circumstances of the creation of the documents, nor of the matters that the agency says that Cabinet considered or deliberated upon. Moreover, in any event, under the FOI Act the burden of establishing the agency's determination lies with the agency<sup>12</sup>.

35. Having regard to the agency's burden of establishing that its determination is justified, I do not consider that the agency has done so on the basis of the material provided to my Office.

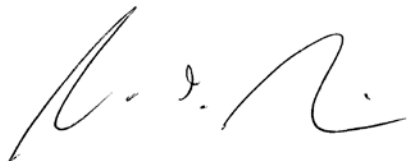
<sup>10</sup> Email V Brecknell 28 February 2020.

<sup>11</sup> *Department of The Premier and Cabinet v Redford* [2005] SADC 58.

<sup>12</sup> *Freedom of Information Act 1991*, s.48.

**Determination**

36. In light of my views above, I reverse the agency's determination that documents 1, 2, and 3 are partially exempt under clause 1(1)(c) of Schedule 1 of the FOI Act. All three documents should be released in full to the applicant.

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

Wayne Lines  
**SA OMBUDSMAN**

24 March 2020

## APPENDIX 1

### Procedural steps

Date	Event
18 July 2018	The agency received the FOI application.
13 September 2018	The agency wrote to the applicant, identifying three documents within scope and proceeded to make a determination. As the agency did not determine the application within the 30 day period required by the FOI Act, <sup>1</sup> it is deemed to have refused access to the documents. <sup>2</sup>
12 October 2018	The applicant requested internal review of the determination.
5 December 2018	The agency wrote to the applicant confirming application for internal review. The letter states that it is has confirmed the original determination. However, as the agency did not deal with the internal review within the statutory time frame of 14 days, it is taken to have confirmed the original determination. <sup>3</sup>
3 January 2019	The Ombudsman advised the agency of the external review and requested submissions and documentation.
16 January 2019	The agency provided documents and submissions to the Ombudsman.
13 February 2020	The agency provided the Ombudsman with further submissions and documentation.
2 March 2020	The Ombudsman issued his provisional determination and invited submissions from the parties.

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<sup>1</sup> *Freedom of Information Act 1991*, section 14(2).

<sup>2</sup> *Freedom of Information Act 1991*, section 19(2).

<sup>3</sup> *Freedom of Information Act 1991*, section 29(5).

## APPENDIX 2

<b>Document in issue</b>	<b>Description</b>	<b>Agency's determination</b>	<b>Ombudsman's determination</b>	<b>Information to be released</b>
Minute	Chief Executive to the Minister dated 21 June 2018	Partially exempt under Schedule 1, clause 1(1)(c)	Not exempt	Entire document
Minute	Chief Executive to the Minister dated August 2018	Partially exempt under Schedule 1, clause 1(1)(c)	Not exempt	Entire document
Minute	Chief Executive to the Minister dated 21 March 2018	Partially exempt under Schedule 1, clause 1(1)(c)	Not exempt	Entire document