

Determination

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

Applicant	Mr Chris Picton MP
Agency	Department for Health and Wellbeing
Ombudsman reference	2019/10219
Agency reference	FOI2019-00102
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:

A copy of the Department's briefing material for the 2019 Estimates hearing.

2. In a series of emails between the parties, the applicant narrowed the scope of the original request and defined the 'briefing material' he sought as:

All documents contained within the folders the Chief Executive took to the Estimates hearing.¹

Background

3. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.

Jurisdiction

4. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

5. My Deputy provided her tentative view about the agency's determination to the parties, by her provisional determination dated 18 June 2020. She informed the parties that subject to receipt and consideration of submissions from the parties she proposed to confirm the agency's determination.
6. Neither the applicant nor the agency provided submissions in response. This final determination is therefore in substantially the same terms as the provisional determination.

¹ Email from applicant to agency dated 11 September 2019.

Relevant law

7. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.²
8. 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.
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 124 documents within the scope of the application and claimed that all were exempt pursuant to clause 17(c) of Schedule 1 of the FOI Act.
12. Clause 17(c) provides:

A document is an exempt document if it contains matter the public disclosure of which would, but for an immunity of the Crown -

...

(c) infringe the privilege of Parliament.

Issues in this review

13. The issue to be determined in this review is whether each of the documents in issue is exempt pursuant to clause 17(1)(c).

Consideration

14. The agency claims that the documents are briefings prepared specifically for the 2109 Estimates Committee hearings. The agency submits that their disclosure would infringe the privilege of Parliament.
15. The concept of Parliamentary privilege has developed from Article 9 of the *Bill of Rights 1688*, which states that 'freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court of place out of Parliament'. The intention behind the privilege is, inter alia, to allow Parliament to proceed with parliamentary business without undue interference. In South Australia, there is no statute specifically defining the privilege (as there is in other Australian jurisdictions) and thus the words in Article 9 are the appropriate guide.
16. The 'proceedings of Parliament' are protected by the privilege. Case law in South Australia suggests that the meaning of 'proceedings in Parliament' is broad.³

² *Freedom of Information Act 1991*, section 12.

³ See *Australian Broadcasting Corporation v Chatterton* (1986) 46 SASR 1 per Pryor J, citing comments by Aylesworth JA in the Ontario Court of Appeal in *Roman Corp Ltd v Hudsons Bay Oil & Gas Ltd* (1972) 23 DLR (3d) 292 at 298. See also *Rann v Olsen* (2000) 76 SASR 450 per Doyle CJ at 461.

Documents will be exempt under clause 17(c) of Schedule 1 if they contain information that is 'so close and directly connected' to the business of Parliament that disclosure of the same would undermine the level of autonomy that Parliament is entitled to in conducting that business.⁴ The business of Parliament is investigating, deliberating and legislating.⁵

17. Estimates Committee hearings are held annually following the introduction of the Appropriation Bill (the budget). The hearings are an opportunity for the Parliament to examine the Bill in greater detail than the procedure of the committee stages of a Bill would otherwise permit, and to question Ministers and senior departmental officers about their portfolios' proposed expenditures. Hearings are an integral part of the process of ensuring executive accountability to the legislature.⁶
18. In my opinion, documents prepared for Estimates Committee hearings concern 'proceedings in Parliament', provided the proximity between the documents and the hearings is sufficient.
19. Proceedings in Parliament must not be 'questioned or impeached ... in any place outside Parliament'; this is a broad protection. It has been suggested that the term 'impeach' can mean 'hinder, challenge or censure'.⁷
20. I consider that disclosure of 'proceedings in Parliament' under the FOI Act may amount to an 'unauthorised disclosure' and thus offend against Article 9. Although disclosure in this case would be to the applicant who is a Member of Parliament, I note that disclosure under the FOI Act is potentially disclosure to the world at large.
21. In an email to my Office, the applicant submitted that it was highly unlikely that all the documents prepared for the Estimates hearings were utilised by the agency's Chief Executive during his appearance. The applicant questioned whether briefing materials that were prepared but not used at the hearings would be protected by Parliamentary privilege.
22. I take the view that preparation by a witness to give evidence before Parliament is so closely and directly connected to the business of Parliament that documents created in the course of such preparation are protected by Parliamentary privilege.

Determination

23. In light of my views above, I confirm the agency's determination in the manner set out in Appendix 2.



Wayne Lines
SA OMBUDSMAN

7 August 2020

⁴ *President of the Legislative Council v Kosmas* [2008] SAIRC 41.

⁵ *Ibid.*

⁶ See

<http://www.parliament.sa.gov.au/HouseofAssembly/BusinessoftheAssembly/Programs/EstimatesCommittee/Pages/Estimates%20Committee.aspx>.

⁷ *The First Report Joint Select Committee on Parliamentary Privilege* (UK), First Report, March 1999, paragraph 36.

APPENDIX 1

Procedural steps

Date	Event
20 August 2019	The agency received the FOI application dated 20 August 2019.
19 September 2019	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
4 October 2019	The agency received the internal review application dated 4 October 2019.
17 October 2019	The applicant granted the agency an informal extension until 18 November 2019 to determine the internal review application.
18 November 2019	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³
19 December 2019	The Ombudsman received the applicant's request for external review dated 17 December 2019.
14 February 2020	The Ombudsman advised the agency of the external review and requested submissions and documentation.
7 April 2020	The agency provided the Ombudsman with its submissions and documentation.
18 June 2020	The Deputy Ombudsman issued her 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).

APPENDIX 2

Document in issue	Description	Agency's determination	Ombudsman's determination	Information to be released
1	Parliamentary Estimates Briefing No.1	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
2	Parliamentary Estimates Briefing No.2	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
3	Parliamentary Estimates Briefing No. 3	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
4	Parliamentary Estimates Briefing No. 4	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
5	Parliamentary Estimates Briefing No. 5	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
6	Parliamentary Estimates Briefing No. 6	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
7	Parliamentary Estimates Briefing No. 7	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
8	Parliamentary Estimates Briefing No. 8	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
9	Parliamentary Estimates Briefing No. 9	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
10	Parliamentary Estimates Briefing No. 10	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
11	Parliamentary Estimates Briefing No. 11	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
12	Parliamentary Estimates Briefing No. 12	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
13	Parliamentary Estimates Briefing No. 13	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
14	Parliamentary Estimates Briefing No. 14	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
15	Parliamentary Estimates Briefing No. 15	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
16	Parliamentary Estimates Briefing No. 16	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil

Document in issue	Description	Agency's determination	Ombudsman's determination	Information to be released
17	Parliamentary Estimates Briefing No. 17	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
18	Parliamentary Estimates Briefing No. 18	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
19	Parliamentary Estimates Briefing No. 19	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
20	Parliamentary Estimates Briefing No. 20	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
21	Parliamentary Estimates Briefing No. 21	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
22	Parliamentary Estimates Briefing No. 22	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
23	Parliamentary Estimates Briefing No. 23	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
24	Parliamentary Estimates Briefing No. 24	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
25	Parliamentary Estimates Briefing No. 25	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
26	Parliamentary Estimates Briefing No. 26	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
27	Parliamentary Estimates Briefing No. 27	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
28	Parliamentary Estimates Briefing No. 28	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
29	Parliamentary Estimates Briefing No. 29	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
30	Parliamentary Estimates Briefing No. 30	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
31	Parliamentary Estimates Briefing No. 31	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
32	Parliamentary Estimates Briefing No. 32	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
33	Parliamentary Estimates Briefing No. 33	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil

Document in issue	Description	Agency's determination	Ombudsman's determination	Information to be released
34	Parliamentary Estimates Briefing No. 34	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
35	Parliamentary Estimates Briefing No. 35	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
36	Parliamentary Estimates Briefing No. 36	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
37	Parliamentary Estimates Briefing No. 37	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
38	Parliamentary Estimates Briefing No. 38	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
39	Parliamentary Estimates Briefing No. 39	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
40	Parliamentary Estimates Briefing No. 40	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
41	Parliamentary Estimates Briefing No. 41	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
42	Parliamentary Estimates Briefing No. 42	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
43	Parliamentary Estimates Briefing No. 43	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
44	Parliamentary Estimates Briefing No. 44	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
45	Parliamentary Estimates Briefing No. 45	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
46	Parliamentary Estimates Briefing No. 46	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
47	Parliamentary Estimates Briefing No. 47	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
48	Parliamentary Estimates Briefing No. 48	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
49	Parliamentary Estimates Briefing No. 49a	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
50	Parliamentary Estimates Briefing No. 49b	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil

Document in issue	Description	Agency's determination	Ombudsman's determination	Information to be released
51	Parliamentary Estimates Briefing No. 49c	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
52	Parliamentary Estimates Briefing No. 50	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
53	Parliamentary Estimates Briefing No. 51	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
54	Parliamentary Estimates Briefing No. 52	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
55	Parliamentary Estimates Briefing No. 53	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
56	Parliamentary Estimates Briefing No. 54	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
57	Parliamentary Estimates Briefing No. 55	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
58	Parliamentary Estimates Briefing No. 56	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
59	Parliamentary Estimates Briefing No. 57	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
60	Parliamentary Estimates Briefing No. 58	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
61	Parliamentary Estimates Briefing No. 59	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
62	Parliamentary Estimates Briefing No. 60	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
63	Parliamentary Estimates Briefing No. 61	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
64	Parliamentary Estimates Briefing No. 62	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
65	Parliamentary Estimates Briefing No. 63	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
66	Parliamentary Estimates Briefing No. 64	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
67	Parliamentary Estimates Briefing No. 65	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil

Document in issue	Description	Agency's determination	Ombudsman's determination	Information to be released
68	Parliamentary Estimates Briefing No. 66	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
69	Parliamentary Estimates Briefing No. 67	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
70	Parliamentary Estimates Briefing No. 68	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
71	Parliamentary Estimates Briefing No. 69	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
72	Parliamentary Estimates Briefing No. 70	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
73	Parliamentary Estimates Briefing No. 71	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
74	Parliamentary Estimates Briefing No. 72	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
75	Parliamentary Estimates Briefing No. 73	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
76	Parliamentary Estimates Briefing No. 74	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
77	Parliamentary Estimates Briefing No. 75	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
78	Parliamentary Estimates Briefing No. 76	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
79	Parliamentary Estimates Briefing No. 77	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
80	Parliamentary Estimates Briefing No. 78	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
81	Parliamentary Estimates Briefing No. 79	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
82	Parliamentary Estimates Briefing No. 80	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
83	Parliamentary Estimates Briefing No. 81	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
84	Parliamentary Estimates Briefing No. 82	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil

Document in issue	Description	Agency's determination	Ombudsman's determination	Information to be released
85	Parliamentary Estimates Briefing No. 83	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
86	Parliamentary Estimates Briefing No. 84	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
87	Parliamentary Estimates Briefing No. 85	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
88	Parliamentary Estimates Briefing No. 86	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
89	Parliamentary Estimates Briefing No. 87	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
90	Parliamentary Estimates Briefing No. 88	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
91	Parliamentary Estimates Briefing No. 89	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
92	Parliamentary Estimates Briefing No. 90	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
93	Parliamentary Estimates Briefing No. 91	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
94	Parliamentary Estimates Briefing No. 92	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
95	Parliamentary Estimates Briefing No. 93	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
96	Parliamentary Estimates Briefing No. 94	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
97	Parliamentary Estimates Briefing No. 95	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
98	Parliamentary Estimates Briefing No. 96	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
99	Parliamentary Estimates Briefing No. 97	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
100	Parliamentary Estimates Briefing No. 98	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
101	Parliamentary Estimates Briefing No. 99	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil

Document in issue	Description	Agency's determination	Ombudsman's determination	Information to be released
102	Parliamentary Estimates Briefing No. 100	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
103	Parliamentary Estimates Briefing No. 101	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
104	Parliamentary Estimates Briefing No. 102	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
105	Parliamentary Estimates Briefing No. 103	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
106	Parliamentary Estimates Briefing No. 104	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
107	Parliamentary Estimates Briefing No. 105	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
108	Parliamentary Estimates Briefing No. 106	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
109	Parliamentary Estimates Briefing No. 107	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
110	Parliamentary Estimates Briefing No. 108	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
111	Parliamentary Estimates Briefing No. 109	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
112	Parliamentary Estimates Briefing No. 110	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
113	Parliamentary Estimates Briefing No. 111	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
114	Parliamentary Estimates Briefing No. 112	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
115	Parliamentary Estimates Briefing No. 113	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
116	Parliamentary Estimates Briefing No. 114	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
117	Parliamentary Estimates Briefing No. 115	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
118	Parliamentary Estimates Briefing No. 116	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil

Document in issue	Description	Agency's determination	Ombudsman's determination	Information to be released
119	Parliamentary Estimates Briefing No. 117	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
120	Parliamentary Estimates Briefing No. 118	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
121	Parliamentary Estimates Briefing No. 119	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
122	Parliamentary Estimates Briefing HT No.01	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
123	Parliamentary Estimates Briefing HT No.2	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil
124	Parliamentary Estimates Briefing HT No.03	Exempt under clause 17(c)	Exempt under clause 17(c)	Nil