

Determination

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

Applicant	Mr Chris Picton MP
Agency	Department for Health and Wellbeing
Ombudsman reference	2019/00115
Agency reference	FOI2018-00053
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 (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 the re-establishment of elective surgery procedures at the Repatriation General Hospital site, from 18 March 2018.

Background

2. For ease of reference, the procedural steps relating to the application 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.
4. I have exercised my discretion under section 39(4) of the FOI Act to extend the time for making an application for external review.
5. As I have set out in appendix 1, the agency failed to complete its initial and internal review determinations within the period required by the FOI Act. The agency did however provide belated notices of purported determinations in both instances. Had the purported determination on internal review been valid, the application for external review would have been within time. However as there is no power in the FOI Act for an agency to make a belated determination to refuse access to documents it was not. Consequently, the external review application was more than a month late.

6. I have considered numerous factors in considering whether to extend the time for applying for external review. I accept that the applicant had believed he was within time, as he lodged his application within 30 days of the agency's purported internal review determination. It appears that the applicant has awaited the agency's determination in good faith. I do not consider that granting an extension would prejudice the agency. In these circumstances, I do not consider that the applicant should be disadvantaged because of the agency's delay in processing the application. I consider that granting this extension is consistent with the objects of the FOI Act.

Provisional determination

7. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 10 July 2019. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
8. The agency and the applicant did not make submissions in response to 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.
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.
13. Clause 1 of Schedule 1 of the FOI Act states:

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.
- (2) A document is not an exempt document by virtue of this clause—
 - (a) if it merely consists of factual or statistical material (including public opinion polling) that does not—

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

- being
- (i) disclose information concerning any deliberation or decision of Cabinet;
or
 - (ii) relate directly to a contract or other commercial transaction that is still negotiated; or
- (ab) merely because it was attached to a document described in subclause (1); or
 - (b) if 20 years have passed since the end of the calendar year in which the document came into existence.
- (2a) A document is not an exempt document by virtue of this clause if–
- (a) the document has been submitted to Cabinet by a Minister; and
 - (b) a Minister has certified that Cabinet have approved the document as a document to which access may be given under this Act.
- (3) In this clause, a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee of Cabinet.

14. Clause 9 of Schedule 1 of the FOI Act states:

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.

Documents in issue

15. The agency identified five documents within the scope of the application.

16. Access to all five documents was refused in full.

Issues in this review

17. The issue in this review is whether the agency has justified its determination that documents 1,2,3,4 and 5 are exempt pursuant to clause 1(1)(a) Schedule 1 of the FOI Act.

Consideration

18. On internal review, the agency ceased to rely on clause 1(1)(e), because it considered that it need only rely on clause 1(1)(a).

19. I note that there is no disclosure of Cabinet deliberation in any of the documents.

20. I do not consider that the documents are exempt pursuant to clause 1(1)(a). Rather I consider that the documents are exempt pursuant to clause 9.

Clause 1(1)(a)

21. The agency contends that the documents are exempt pursuant to clause 1(1)(a), because the document was prepared for submission to Cabinet. However, the agency did not specify exactly how they were prepared for Cabinet.
22. Under clause 1(1)(a), a document may be considered exempt if it is a document that has been specifically prepared for submission to Cabinet (whether or not it has been so submitted).
23. In providing reasons for my decision, I am required not to disclose information claimed by the agency to be exempt.
24. Observations of the documents identify a number of relevant facts:
- documents 1,3,4 and 5 are classified as ‘Sensitive: SA Cabinet’
 - document 1 and 3 are both marked ‘Prepared for incoming Minister’
 - document 4 also alludes to it being prepared for the ‘incoming minister’
 - there is nothing in the content of the documents that suggest that they were specifically prepared for submission to Cabinet
 - the dates of the documents are consistent with their connection to the last State election
25. Having read the documents, I consider that it is likely that documents 1, 2, 3 and 4 were prepared for the incoming Minister and relate to the incoming Government’s election commitments. I consider that document 5 is related to documents 1, 2, 3, and 4 in content and purpose.
26. A document is not exempt pursuant to clause 1, simply because it was attached to an exempt document. The effect of this is that a document provided to Cabinet is not exempt under clause 1(1) unless the conditions are met as set out in paragraphs (a) to (c), (e) or (f).
27. I consider that the word ‘prepared’ means ‘drafted’ rather than merely attached, enclosed, annexed or compiled. If each of the documents was written for submission to Cabinet, it will meet this exemption’s requirements. If the documents were simply compiled together or annexed to a Cabinet submission, then the requirement of the exemption will not be met unless they disclose the deliberations or decisions of Cabinet.
28. In the context of clause 1(1)(a) the word ‘specifically’ means ‘specially’ prepared for submission to Cabinet. It will be sufficient if submission to Cabinet was ‘the dominant purpose or one of a number of significantly contributing purposes’ for the document’s creation.² For this reason, the agency must show that the purpose of drafting the document was to provide it to Cabinet (whether or not this eventuated).
29. The condition of paragraph (a) is not satisfied simply because the document is marked “Sensitive: SA Cabinet”. The reasons why a document may be classified as such, may often differ from the specific exemption for Cabinet documents provided under the FOI Act. The classification of information is calibrated towards risk management of sensitive material rather than towards the specific criteria of clause 1(1)(a).

² *Secretary to the Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11, [13] per Buchanan JA.

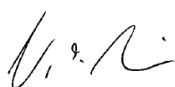
30. There is nothing in the documents to suggest that they were actually prepared with submission to Cabinet in mind. The submission of the agency that it was 'prepared' for submission to Cabinet does not appear to be consistent with the contents of the documents.
31. Therefore, I do not accept that the documents were specifically prepared for submission to Cabinet.

Clause 9

32. I consider however that the documents are exempt pursuant to clause 9(1). I provide my reasons below.
33. The scope of clause 9(1)(a) is wide, particularly given the words 'that relates to'.
34. I have read documents 1, 2, 3, 4 and 5 and consider that they contain 'opinion, advice or recommendation[s]' in respect of how election promises may be fulfilled.
35. The 'opinion, advice or recommendation' must have been obtained, prepared or recorded, or the 'consultation or deliberation' must have taken place, 'in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency'.
36. Having considered the contents of documents 1, 2, 3, 4 and 5, I am satisfied that the documents contain matter that relates to:
 - opinions, advice and recommendations obtained; and/or
 - deliberations that took place,in the course of, or for the purposes of, the agency's and/or a Minister's decision-making functions.
37. Accordingly, the criteria of clause 9(1)(a) are met.
38. I consider that, on balance, it would be against the public interest to disclose these documents. It is clear that the documents form part of the handover that Ministers receive when forming new government, about which there is a high level of conventional confidentiality attached.
39. In light of the above, I consider that documents 1, 2, 3, 4, and 5 are exempt pursuant to clause 9 of Schedule 1 of the FOI Act.

Determination

40. I consider that documents 1, 2, 3, 4, and 5 are exempt under clause 9(1).
41. In light of my views above I vary the agency's determination by substituting clause 9(1) in place of clause 1(1) as the basis for the refusal to grant access to the documents.
42. In light of my views above, I vary the agency's determination in the manner set out in Appendix 2.



Wayne Lines
SA OMBUDSMAN
8 August 2019

APPENDIX 1

Procedural steps

Date	Event
18 July 2018	The agency received the FOI application.
17 August 2018	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
13 September 2018	The agency issued a belated notice purporting to determine the application.
15 October 2018	The agency received the internal review application.
29 October 2018	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³
28 November 2019	The time limit for the applicant to seek external review expired.
11 December 2018	The agency issued a belated notice purporting to determine the application.
3 January 2019	The Ombudsman received the applicant's request for external review.
4 January 2019	The Ombudsman advised the agency of the external review and requested submissions and documentation.
18 January 2019	The agency provided the Ombudsman with its submissions and documentation.
10 August 2019	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).

APPENDIX 2

Document in issue	Description	Agency's determination	Ombudsman's determination
Document 1	Election Commitment Briefing	Clause 1(1)(a) and 1(1)(e)	Varied, document exempt pursuant to clause 9(1)
Document 2	Election Commitment Briefing	Clause 1(1)(a) and 1(1)(e)	Varied, document exempt pursuant to clause 9(1)
Document 3	Election Commitment Briefing	Clause 1(1)(a) and 1(1)(e)	Varied, document exempt pursuant to clause 9(1)
Document 4	Incoming Minister's Briefing	Clause 1(1)(a) and 1(1)(e)	Varied, document exempt pursuant to clause 9(1)
Document 5	Portfolio Deliverable	Clause 1(1)(a) and 1(1)(e)	Varied, document exempt pursuant to clause 9(1)