

Determination

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

Applicant	The Honourable Robert Brokenshire
Agency	Department of Environment, Water and Natural Resources
Ombudsman reference	2012/10298
Agency reference	DEWNR 01/12/0873
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**) received by the agency on 3 May 2012, the applicant requested access to:
 1. The report and all correspondence (including emails on the SAGEMS system or otherwise) concerning the Brinkworth animal welfare case (but only those documents arising during the time-frame) - including any Report commissioned investigating the RSPCA's handling of the case.
 2. All executive level communications (including emails on the SAGEMS system or otherwise) mentioning the RSPCA or the Brinkworth Case.

TIME FRAME: 2010, 2011 and 2012 Calendar years (to date) [to 30 April 2012].

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, including the Royal Society for the Prevention of Cruelty to Animals SA Inc. (**the RSPCA**) as an interested party, by my provisional determination dated 21 February 2014. 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. The agency provided submissions in response. For the most part, the agency agreed with my provisional view. It identified some additional portions of documents 5, 6, 11, 19, 20 and 21 which it considered should be exempt pursuant to clause 6(2). As a result

of the submissions, I made some minor additions to the redactions in the documents. The agency also identified a portion of document 11 which it considers to be exempt pursuant to clause 10(1) of Schedule 1 to the FOI Act. I agree with this submission and have altered my determination accordingly.

6. The applicant advised that he agreed with my provisional views in relation to clause 7(1)(c) of Schedule 1 of the FOI Act. He also submitted that the reliance on legal professional privilege should be read as strictly as possible. The applicant also queried whether the agency had identified all relevant documents, noting that he considers it likely the matter was reported to Cabinet at some stage but that the agency did not identify any such documents. I am advised by the agency that no documents were prepared for Cabinet in relation to this issue.
7. The RSPCA advised it has no objection to the release of the redacted documents attached to the provisional determination.
8. I then provided a copy of the (revised) redacted versions of the documents to the Brinkworths as interested parties and sought comments about whether the documents (as redacted) are 'exempt' under the FOI Act. The Brinkworths, through their solicitors, advised they objected to the release of any of the documents, submitting that the files of the department 'contain sensitive material, which in the normal course would be considered of legal and professional privilege.'

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.

Documents in issue

13. The agency identified 21 documents within the scope of the application consisting of emails, minutes to the Minister and a report prepared by the Solicitor-General about an investigation and prosecution by the RSPCA (**the Solicitor-General's report**).

Issues in this review

14. The issue to consider is whether the documents are exempt documents under Schedule 1 to the FOI Act, in particular:
 - clause 6(2) - information containing allegations or suggestions of criminal or other improper conduct
 - clause 7(1)(c) - information concerning business affairs
 - clause 10(1) - information subject to legal professional privilege.

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

Consideration

15. Documents 1 - 4, 7, 9, 10 and 12 - 18 are emails between agency staff regarding the Solicitor General's review of the RSPCA's investigation and prosecution processes.
16. Documents 5, 6, 8, 11, 19 and 20 are minutes to the Minister regarding the RSPCA review.
17. Document 20 includes an attachment, namely, an A5 sized copy of the Solicitor-General's report. Document 21 is a full size copy of the Solicitor-General's report. My views expressed below in relation to document 21, apply equally to the attachment to document 20.
18. In the context of document 21 (and the attachment to document 20), on 7 November 2013, Mr Rikki Lambert, on behalf of the applicant, confirmed that he did not wish to pursue access to the identities of parties other than the RSPCA's Chief Executive. In light of this, names (and positions in the case of RSPCA staff) other than the Chief Executive, should be deleted from documents 20 and 21.
19. I have provided the agency with a copy of the relevant documents with the identifying information that can be deleted highlighted in green.
20. I have considered whether the remainder of the documents are exempt under Schedule 1 to the FOI Act below.

Clause 6(2)

21. Clause 6(2) provides that a document is exempt if it contains allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead), the truth of which has not been established by judicial process and the disclosure of which would be unreasonable.
22. I am satisfied that the following documents contain information that is exempt under clause 6(2):

5	6	10	11	19	20	21
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23. The documents listed above contain allegations or suggestions of criminal or other improper conduct on the part of a former RSPCA employee and other parties. In my view, and in accordance with section 20(4), the identities and details of the allegations should be deleted before these documents are released to the applicant.
24. I have provided the agency with a copy of the relevant documents with the parts I consider to be exempt under clause 6(2) highlighted in blue.

Clause 7(1)(c)

25. Clause 7(1)(c) provides:
 - (1) A document is an exempt document—
 - (c) if it contains matter—
 - (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
 - (ii) the disclosure of which—

- (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
- (B) would, on balance, be contrary to the public interest.
26. The documents captured by the scope of the application concern an investigation and prosecution conducted by the RSPCA against cattle farmers in the state's south-east. The matter has become known as the 'Brinkworth' matter, named after the family of farmers concerned. In my view, any reference to the 'Brinkworth' matter tends more towards the business affairs of the Brinkworths, rather than the personal affairs of any individual. In the context of the RSPCA investigation and prosecution, the name 'Brinkworth' has gone beyond the realm of concerning any one individual.
27. In my view, the documents concern the business affairs of the Brinkworths in so far as they identify the fact that the Brinkworths were charged with breaching the *Animal Welfare Act 1985*.
28. I also consider that the documents contain information concerning the business affairs of the RSPCA as they focus on the Solicitor-General's review of the RSPCA's investigation and prosecution practices in relation to the Brinkworth matter.
29. The question for me to answer is whether the release of the documents could reasonably be expected to have an adverse effect on those affairs and would, on balance, be contrary to the public interest.
30. I have not been provided with any evidence to demonstrate that the release of the documents (with the information exempt under clause 6(2) deleted) could reasonably be expected to have an adverse effect on the parties business professional, commercial or financial affairs. In my view, disclosure would not, on balance, be contrary to the public interest.

The public interest

31. For the documents to be exempt under clause 7(1)(c), it must be shown that the public interest factors against disclosure of the information outweigh the factors in favour of disclosure. This does not mean merely showing that something adverse to the public interest is likely to flow from disclosure of the document.²
32. The current legal position is that while the concept of the public interest cannot be clearly defined, the following factors are relevant:³
- the age of the document
 - the importance/significance/sensitivity of the issues discussed
 - the continuing relevance of the issues in relation to matters under consideration
 - the extent to which the subject matter of the documents is already in the public domain
 - fulfilling the objects of the FOI Act
 - whether disclosure would contribute to debate on a matter of public interest
 - whether disclosure would enhance scrutiny of government decision making processes and improve accountability and public participation.

² Ipex Information Technology Group Pty Ltd v Department of Information Technology Services South Australia (1997) 192 LSJS 54, 70.

³ See *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* [1993] QICmr2 (30 June 1993); *Re Lianos and the Department of Social Security* (1985) 7 ALD 475, *Re Hulls and Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

33. In my view, the release of the documents would not, on balance, be contrary to the public interest. I base this view after having considered:
- the extent to which the information is already in the public domain, by way of media reports⁴ and discussion in Parliament⁵
 - the documents focus on the RSPCA's administrative investigation and prosecution processes, rather than the details of the alleged breach of the Animal Welfare Act
 - the RSPCA, at least to some extent, is funded by public money
 - it appears that the Auditor-General originally intended the report to be made public
34. Having balanced the factors above against the agency's submissions, I am not satisfied that disclosure of the documents⁶ would harm the public interest. Indeed, disclosure of the documents may well dispel community concern regarding the RSPCA's internal processes in respect of prosecutions. This is a compelling public interest factor in favour of disclosure.
35. In my view, the documents are not exempt under clause 7(1)(c).

Clause 10(1)

36. Clause 10(1) states:

10—Documents subject to legal professional privilege

- (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.

37. Legal professional privilege exists to protect the confidentiality of communications between a lawyer and client. 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 legal proceedings on the grounds of legal professional privilege. The information must be:
- confidential
 - communication between a client and their lawyer
 - created for the dominant purpose of obtaining or giving legal advice or made for the dominant purpose of use in existing or anticipated legal proceedings.⁷
38. In my view, documents 1, 11, 20 and 21 contain information subject to legal professional privilege and therefore exempt under clause 10(1). Document 1 is an email chain between the agency and the Crown Solicitor's Office and appears to contain legal advice from the Crown and exempt in full. Document 11 is a minute to the Minister regarding the RSPCA review, a portion of which contains legal advice. Documents 20 and 21 are both copies of the Solicitor-General's report and appear to contain extracts of legal advice.
39. In my view, and in accordance with section 20(4), the privileged information should be deleted before documents 11, 20 and 21 are released to the applicant.

⁴ See <http://www.theaustralian.com.au/news/brinkworth-family-graziers-charged-with-animal-cruelty/story-e6frg6n6-1225715386766>; <http://www.adelaidenow.com.au/news/millionaire-pastoralist-tom-brinkworth-wants-court-costs-from-rspca/story-e6frea6u-1225856910671>; <http://www.adelaidenow.com.au/news/south-australia/rspca-botches-sa-cruelty-case/story-e6frea83-1225822903005>; <http://www.news.com.au/national/secret-deal-over-brinkworth-alleged-cruelty-case/story-e6frfkp9-1225896200296>; http://www.animalsaustralia.org/media/in_the_news.php?article=1076

⁵ See South Australia, *Parliamentary Debates*, House of Assembly, 17 May 2012, 1731 (Mr Pederick MP).

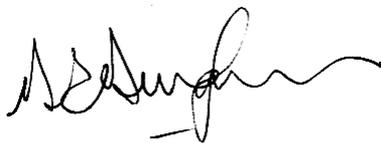
⁶ With the 'personal affairs' information deleted.

⁷ *Eso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

40. I have provided the agency with a copy of the relevant documents with the parts I consider to be exempt under clause 10(1) highlighted in yellow.

Determination

41. In light of my views above, I vary the agency's determination.

A handwritten signature in black ink, appearing to read 'Richard Bingham', with a long, sweeping horizontal stroke at the end.

Richard Bingham
SA OMBUDSMAN

23 May 2014

APPENDIX

Procedural steps

Date	Event
3 May 2012	The agency received an FOI application from Ms Toop dated 24 April 2012.
16 May 2012	In accordance with section 14A(1)(a) of the FOI Act, the Chief Executive of the agency extend the period within which the application would otherwise have to be dealt with until 2 July 2012.
	The agency failed to determine the application within the extended period required by the FOI Act, ¹ and is deemed to have refused access to the documents. ²
16 July 2012	The agency received the applicant's internal review applications dated 11 July 2012.
	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³
13 December 2012	The Ombudsman received the applicant's requests for external review dated 12 December 2012.
19 December 2012	The Ombudsman advised the agency of the external reviews and requested submissions and documentation.

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).