

Determination

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

Applicant	Mr Tim Swaine
Agency	Department of State Development
Ombudsman reference	2017/05526
Agency reference	BRIEFC/17/363
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 Department of State Development (the **agency/ DSD**) to:
 1. Copies of any agreement or contract evidencing or recording the \$2.4million joint venture between Adelaide City Council, the State Government, Australian Trade Alliance and The Social Creative in relation to the Royal Adelaide Club at the Qingdao International Beer Festival held in Shandong in 2016.
 2. Copies of all documents (i.e. emails, letters, notes of meeting) evidencing or recording a dispute between The Social Creative and/or Australian Trade Alliance and one or more of the other joint venture parties following the Qingdao International Beer Festival held in Shandong in 2016, including but not limited to any claim by The Social Creative and/or Australian Trade Alliance following the Qingdao International Beer Festival seeking compensation for damages and loss arising out of or in connection with their involvement in the festival.

Background

2. For ease of reference, the procedural steps relating to the application are set out in the appendix.

Provisional determination

3. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 12 September 2017. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.
4. The applicant and the agency both advised my Office that they did not have any submissions to make in response. Accordingly, this determination is in the same terms as my provisional determination.

Jurisdiction

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

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
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. The agency claims that the single document in issue is exempt under clause 17(c), which provides:

17—Documents subject to contempt etc

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

...

(c) infringe the privilege of Parliament.

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 one document within the scope of the application, namely a parliamentary briefing note last updated on 9 September 2016 (**the document**).

Issues in this review

12. It is for me to consider whether the agency has justified its determination to refuse access to the document.

Consideration

13. During the course of the external review, the agency proffered the following reasons in support of its claim that the document is exempt:

The document is a Parliamentary Briefing Note prepared for the use of the Minister in Parliament and DPC [the Department of the Premier and Cabinet] for appearance at Budget and Finance Committee. Release of this information would infringe the privilege of Parliament... [T]his document was created by DPC and provided to DSD upon specific request.

14. In response to queries raised by my Office, the agency explained that 'the Briefing was prepared for the current round of Budget and Finance and Estimates and has subsequently been updated for future use as a PBN [Parliamentary Briefing Note].'²

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

15. The concept of parliamentary privilege has developed from the *Bill of Rights 1688* (UK), Article 9,³ which says that ‘freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament.’ The intention behind the privilege is *inter alia* to allow Parliament to proceed with the business of making legislation without undue interference. In South Australia, there is no statute specifically defining the privilege (as there is in other jurisdictions in Australia); 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.⁴ In the case of *O’Chee v Rowley*, ‘proceedings in Parliament’ was considered to mean ‘all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee’, including the ‘preparation of a document for purposes of or incidental to the transacting of any such business’.⁵
17. It is clear from the case of *O’Chee v Rowley* that parliamentary privilege ‘attaches when, but only when, a member of Parliament does some act with respect to documents for purposes of, or incidental to, the transacting of House business’.⁶
18. In order to assess whether such a nexus exists between the document and parliamentary proceedings, I have had particular regard to extracts from *Hansard* dated 15 November 2016, 21 June 2017 and 2 August 2017.⁷
19. At my Office’s request, the agency also provided a version of the document updated after 9 September 2016 (**the subsequent version of the document**). The agency, on advice from the Department of the Premier and Cabinet, has submitted that the Premier relied on the subsequent version of the document when providing information to Parliament.⁸
20. Having regard to the document itself, the subsequent version of the document, and extracts from *Hansard*, I am satisfied that the requisite nexus exists between the document and parliamentary proceedings.
21. The protection of Parliament’s privilege developed from Article 9 is a broad protection. It has been suggested that the term ‘impeach’ can mean ‘hinder, challenge or censure’.⁹ My counterpart in Queensland, the Information Commissioner, has considered the privilege in the context of the Queensland *Freedom of Information Act 1992* (Qld):

An unauthorised disclosure of ‘proceedings in Parliament’ will constitute an infringement of the privileges of Parliament, and hence, if the matter in issue can properly be characterised as a ‘proceeding in Parliament’, it will be exempt matter under s.50(c)(i) [the

² Email from the agency to my Office dated 3 August 2017.

³ This is applicable to South Australia by virtue of the *Constitution Act 1934* (SA), section 38.

⁴ See *Australian Broadcasting Corporation v Chatterton* (1986) 46 SASR 1, 31-32 per Prior J, citing comments by Aylesworth JA in the Ontario Court of Appeal case of *Roman Corp Ltd v Hudsons Bay Oil & Gas Ltd* (1972) 23 DLR (3d) 292, 298 and *Rann v Olsen* (2000) 76 SASR 450.

⁵ *O’Chee v Rowley* (1997) 142 FLR 1, per McPherson JA, 17-19. The term ‘proceedings in Parliament’ is not defined in the *Bill of Rights 1688*. In *O’Chee*, the Court considers the *Bill of Rights 1688*, Article 9 and the *Parliamentary Privileges Act 1987*, section 16(2), and concludes that the definition of ‘proceedings in Parliament’ quoted above applies equally to both: *O’Chee v Rowley* (1997) 142 FLR 1, per McPherson JA, 17. Accordingly, my view is that the definition is applicable in the South Australian context.

⁶ *O’Chee v Rowley* (1997) 142 FLR 1, per McPherson JA, 27. See also per McPherson JA, 20.

⁷ South Australia, *Parliamentary Debates*, House of Assembly, 15 November 2016, 7818 (Hon JW Weatherill); South Australia, *Parliamentary Debates*, House of Assembly, 21 June 2017, 10177 to 10179 (various speakers); *Parliamentary Debates*, House of Assembly, 2 August 2017, 10643 (Hon JW Weatherill), all accessed 29 August 2017.

⁸ In accordance with *Freedom of Information Act 1991*, section 39(15), I have refrained from specifying the date of subsequent version of the parliamentary briefing note and the date of the relevant parliamentary proceedings to avoid reveal claimed exempt matter.

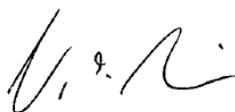
⁹ *The First Report Joint Select Committee on Parliamentary Privilege* (UK), First Report March, 1999, [36].

equivalent of clause 17(c)] of the FOI Act, unless its public disclosure has been authorised ...¹⁰

22. I agree with this view, and consider that it applies equally to the FOI Act.
23. Accordingly, I am satisfied that disclosure of the document would infringe the privilege of Parliament, and it is therefore exempt under clause 17(c).

Determination

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



Wayne Lines
SA OMBUDSMAN

19 September 2017

¹⁰ *Ainsworth Nominees Pty Ltd and the Criminal Justice Commission* (1999) 5 QAR 284, [59].

APPENDIX - 2017/05526

Procedural steps

Date	Event
16 March 2017	The agency received the FOI application dated 10 March 2017.
	The agency failed to determine the application within the 30 day period required by the FOI Act, ¹¹ and is deemed to have refused access to the documents. ¹²
1 May 2017	The agency received the internal review application dated 24 April 2017.
	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ¹³
29 May 2017	The Ombudsman received the applicant's request for external review by email.
6 June 2017	The Ombudsman advised the agency of the external review and requested submissions and documentation.
14 June 2017	The agency provided the Ombudsman with its submissions and documentation.
31 July 2017	By telephone, Ombudsman SA requested additional information from the agency.
3 August 2017	The agency provided additional information, by email.
29 August to 7 September 2017	By email and telephone, Ombudsman SA sought and the agency provided additional information.
12 September 2017	The Ombudsman issued his provisional determination to the parties.
13 September 2017	By email, the agency responded to the provisional determination.
15 September 2017	The applicant responded to the provisional determination, by email.

¹¹ *Freedom of Information Act 1991*, section 14(2).

¹² *Freedom of Information Act 1991*, section 19(2).

¹³ *Freedom of Information Act 1991*, section 29(5).