

Determination

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

Applicant	Mr Chris Picton MP
Agency	Department of Treasury and Finance
Ombudsman reference	2019/02113
Agency reference	T&18/0833
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:

All advice to the Treasurer (including but not limited to notes, memos, minutes, briefings, emails, meeting notes, reports and documents) relating to KordaMentha's review and subsequent administration of the Central Adelaide Local Health Network. From 1 July 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 11 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.
5. Neither the applicant nor the agency provided submissions in response. Therefore this determination is in the same terms as the provisional determination.

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. 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.

Cabinet

10. 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–
 - (i) disclose information concerning any deliberation or decision of Cabinet; or
 - (ii) relate directly to a contract or other commercial transaction that is still being 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.

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

Personal Affairs

11. Clause 6 of Schedule 1 of the FOI Act states:

6—Documents affecting personal affairs

- (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).
- (2) A document is an exempt document 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.
- (3) A document is not an exempt document by virtue of subclause (1) or (2) merely because it contains information concerning the person by or on whose behalf an application for access to the document is made.
- (3a) ...

12. Personal affairs is defined by the Act in section 4:

personal affairs of a person includes that person's—

- (a) financial affairs;
- (b) criminal records;
- (c) marital or other personal relationships;
- (d) employment records;
- (e) personal qualities or attributes,

but does not include the personal affairs of a body corporate;

13. Section 26 of the FOI Act states the process for dealing with documents affecting personal affairs:

26—Documents affecting personal affairs

- (1) This section applies to a document that contains information concerning the personal affairs of any person (whether living or dead).
- (2) An agency must not give access under this Act to a document to which this section applies (except to the person concerned) unless the agency has taken such steps as are reasonably practicable to obtain the views of the person concerned as to whether or not the document is an exempt document by virtue of clause 6 of Schedule 1.
- (3) If—
 - (a) —
 - (i) an agency determines, after having sought the views of the person concerned, that access to a document to which this section applies is to be given; and
 - (ii) the views of the person concerned are that the document is an exempt document by virtue of clause 6 of Schedule 1; or
 - (b) after having taken reasonable steps to obtain the views of the person concerned—
 - (i) the agency is unable to obtain the views of the person; and
 - (ii) the agency determines that access to the document should be given, the agency must—
 - (c) forthwith give written notice to the person concerned—
 - (i) that the agency has determined that access to the document is to be given;

- and
 - (ii) of the rights of review conferred by this Act in relation to the determination;
 - and
 - (iii) of the procedures to be followed for the purpose of exercising those rights;
 - and
 - (d) defer giving access to the document until after the expiration of the period within which an application for a review under this Act may be made or, if such an application is made, until after the application has been finally disposed of.
- (4) ...
- (5) A reference in this section to the person concerned is, in the case of a deceased person, a reference to the personal representative of that person or, if there is no personal representative, the closest relative of that person of or above the age of 18 years.

Internal Working Documents

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.

Infringing the Privilege of Parliament

15. Clause 17 of Schedule 1 of the FOI Act states:

Clause 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.

Documents in issue

16. The agency identified 17 documents within the scope of the application.
17. It gave access in full to four documents, partial access to four documents and refused access to nine documents.

18. I note that the agency determined that matter contained within documents 5,7 and 8 was beyond the scope of the application. This is not a matter which can be considered in this review.²
19. Documents 1a, 2a, 6, 6a, 9, 10, 11, 12, 13 and 14 are at issue in this review.

Issues in this review

20. The issues in this review are whether the agency has justified its determination that:
- document 2a is partially exempt pursuant to clause 6(1) of Schedule 1 of the FOI Act
 - document 6 is partially exempt pursuant to clause 1(1)(c) of Schedule 1 of the FOI Act
 - documents 6a and 13 are wholly exempt pursuant to clause 1(1)(b) of Schedule 1 of the FOI Act
 - document 14 is wholly exempt pursuant to clause 1(1)(c) of Schedule 1 of the FOI Act
 - documents 9, 10, and 12, are wholly exempt pursuant to clause 1(1)(b) of Schedule 1 of the FOI Act
 - documents 1a and 11 are wholly exempt pursuant to clause 17(c) of Schedule 1 of the FOI Act.

Consideration

Document 2a

21. Document 2a is an email containing the personal email and telephone number of Mr Raymond Spencer. The agency determined to refuse access to this information pursuant to clause 6(1) of Schedule 1 of the FOI Act.
22. I consider the direct contact details of a person including a person's mobile number and direct personal email to be the personal affairs of that person.
23. The exemption is made out where disclosure of the information would be unreasonable. Unreasonable disclosure involves public interest considerations,³ such as protection of personal privacy (the FOI Act generally does not restrict the use of information once it is released), the objects of the legislation being satisfied, and ensuring transparency and accountability within representative government.
24. In considering unreasonableness, the South Australian District Court has held that a decision maker should consider:
- ...not merely the content of the information which is sought to be disclosed, although in some circumstances that may be sufficient, but, as well, its relationship with other material known to the applicant, its level of sensitivity, the attitude of the person affected by the disclosure, the circumstances in which the information was originally obtained, whether it was already known to the applicant, the nature of the applicant's interest in it and any disclosed intentions with respect to its use.⁴
25. Therefore, deciding whether the disclosure of 'personal affairs' information would be unreasonable requires consideration of all the circumstances, including:
- the nature of the information that would be disclosed

² *El-Shafei v Central Adelaide Local Health Network* [2017] SACAT 5.

³ *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 249 at 438 per Lockhart J.

⁴ *Treglown v SA Police* [2011] SADC 139, paragraph [133] quoting *Re Chandra and Minister for Ethnic Affairs* (1984) 6 ALD 257 at 259.

- the circumstances in which the information was obtained
 - the likelihood of the information being information that the person concerned would not wish to have disclosed without consent
 - whether the information has any current relevance.⁵
26. I have considered these principles in assessing the reasonableness of disclosure of the information claimed as exempt. Having regard to the nature of the information, I consider that disclosure of the mobile number and direct email of Mr Spencer would be unreasonable in the circumstances at hand. I outline my reasons below.
27. I must bear in mind that as the FOI Act does not place restrictions on disclosure of information that has been released to applicants, release of documents under the FOI Act must be taken to be to the world at large.
28. Mr Spencer has a significantly high profile in the community, and I consider that release of his direct contact details could potentially expose him to a high volume of correspondence from persons to whom he would not have voluntarily provided his direct contact details. In light of this, I do not consider that Mr Spencer would wish to have his contact details disclosed to the world at large nor that it would be reasonable to do so.
29. I also do not consider that Mr Spencer's direct contact details have particular relevance to the community. The email is otherwise unredacted and the substance of the email is otherwise disclosed, including Mr Spencer's identity.
30. In light of the above, I consider that disclosure of the redacted portions of the email would be unreasonable in the circumstances.

Document 6

31. Document 6 is an email with an updated version of a Cabinet Submission attached. The attachment is dealt with separately as document 6a. The agency determined to provide partial access to document 6, redacting two significant portions of the document, which it claimed as exempt pursuant to clause 1(1)(c). The first redaction relates to the draft of the submission itself and the second redaction relates to a procedural issue.
32. I consider that the first redaction contains a reference to the drafting status of the submission rather than its content. I therefore do not consider that it contains a 'part of' or an 'extract from' a preliminary draft of a document that has been specifically prepared for submission to Cabinet.
33. The second redaction merely relates to a ministerial decision by the Treasurer that is not a 'part of' or an 'extract from' a preliminary draft of a document specifically prepared for submission to Cabinet.
34. I also do not consider that the redactions are exempt pursuant to the other paragraphs in clause 1(1). I therefore do not consider that the documents attract any exemption under clause 1 of Schedule 1 of the FOI Act.
35. I turn to consider whether the matter in the second redaction in document 6 contains matter which is exempt pursuant to clause 9(1) of Schedule 1 of the FOI Act.
36. The scope of clause 9(1)(a) is wide, particularly given the words 'that relates to'.

⁵ *Treglown v SA Police* [2011] SADC 139, paragraph [133] referring to *Re Chandra and Minister for Ethnic Affairs* (1984) 6 ALD 257 at 259.

37. The 'opinion, advice or recommendation' must nevertheless 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'.
38. I consider that the second redaction contains 'consultation [and] deliberation' for the purpose of the decision making function of the agency and the Treasurer.
39. Accordingly, my view is that the agency has satisfied clause 9(1)(a).
40. Clause 9(1) requires that, for a document to be exempt, disclosure would, on balance, be contrary to the public interest.
41. Public interest factors in favour of disclosure, include that disclosure:
 - would be consistent with the objects of the FOI Act, in particular transparency and openness of government
 - would assist the public in understanding the processes of Cabinet (albeit, minimally)
 - would allow the public to appreciate the deliberation involved in recommending decisions to the Treasurer.
42. Public interest factors against disclosure, include that disclosure would:
 - discourage candid and considered discussions between public officers in advising the Treasurer, in particular in relation to Cabinet processes
 - be inconsistent with the normal sensitivity about Cabinet submissions (however, the FOI Act does not treat Cabinet procedure itself as exempt).
43. I consider that on balance that the factors against disclosure weigh more heavily than those in favour of disclosure.
44. In light of the above, I consider that the matter in the second redaction is exempt pursuant to clause 9(1) of Schedule 1 of the FOI Act.
45. I do not consider that the matter in the first redaction attracts any exemption.

Document 6a & 13

46. Documents 6a and 13 are claimed by the agency to be exempt pursuant to clause 1(1)(b) of Schedule 1 of the FOI Act.
47. A document that is a preliminary draft of a document that has been specifically prepared for submission to Cabinet, is exempt pursuant to clause 1(1)(b). I have read and considered the contents of documents 6a and 13 and I consider that both documents are preliminary drafts of documents specifically prepared for Cabinet submissions.
48. I therefore conclude that documents 6a and 13 are exempt pursuant to clause 1(1)(b) of the FOI Act.

Document 14

49. Document 14 is claimed to be exempt, pursuant to clause 1(1)(c) of Schedule 1 of the FOI Act, however, for the reasons below, I consider it to be exempt pursuant to clause 1(1)(f).

50. Under clause 1(1)(f), a document is exempt if it is a document that has been specifically prepared for use by the Minister in relation to a submission before Cabinet.
51. The language of paragraph (f), is similar to the language of subparagraph (c) in that it uses the phrase 'specifically prepared'. I consider that the phrase has a corresponding meaning. The word 'specifically' means 'specially' prepared for use by the Minister. It will be sufficient if use by the Minister in relation to a submission before Cabinet was 'the dominant purpose or one of a number of significantly contributing purposes' for the document's creation.⁶
52. The document was evidently drafted for use by the Minister in relation to a submission to the Budget Cabinet Committee. It is in its final form and contains a signature. As such, I consider that document 14 is exempt pursuant to clause 1(1)(f).
53. Had I not concluded that document 14 is exempt pursuant to clause 1(1)(f), I would have considered it to be exempt pursuant to clause 9(1), as the document contains 'opinion [and] advice' for the Minister and, through the Minister, to the Budget Cabinet Committee and, on balance, it would be contrary to the public interest to disclose this opinion or advice. I consider that there is a strong public interest in protecting the candour of advice to Cabinet or for purposes of Cabinet submissions.

Documents 9, 10, 12

54. The agency claims that documents 9, 10 and 12 are exempt pursuant to clause 1(1)(f).
55. I refer to my reference to the terms of clause 1(1)(f) in my consideration of document 14.
56. The agency claims that the documents were specifically prepared for the 'use of the Minister' in relation to a matter to be submitted to Cabinet. In light of the content of documents 9 and 10, I accept this.
57. Document 12 is an email chain. I consider that for the purpose of the FOI Act, an email may constitute a 'briefing paper' if it is intended for use by a Minister in relation to submissions before Cabinet. However, in this case, document 12 is not addressed to the Minister but rather to his staff. I consider that this email was not prepared for the use of the Minister, despite being connected to submissions before Cabinet. Instead, I will consider whether document 12 is exempt pursuant to clause 1(1)(c).
58. I consider that document 12 contains 'extract[s] from' document 13, which I have determined is exempt pursuant to clause 1(1)(b). I therefore consider that document 12 is exempt pursuant to clause 1(1)(c).
59. I therefore consider that documents 9, 10 and 12 are exempt documents.

Document 1a and 11

60. Document 1a and 11 were both determined by the agency to be exempt pursuant to clause 17(c) of Schedule 1 of the FOI Act. Document 1a is a Parliamentary Estimates Briefing Note and document 11 is a Parliamentary Briefing Note.
61. The agency submits that both documents were prepared specifically for use in Parliament. The agency submits that their disclosure would infringe the privilege of Parliament.

⁶ *Secretary to the Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11, [13] per Buchanan JA.

62. The concept of parliamentary privilege developed from the *Bill of Rights 1688* (UK), Article 9,⁷ 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 basis.
63. The ‘proceedings of Parliament’ are protected by the privilege. Case law in South Australia suggests that the meaning of ‘proceedings in Parliament’ is broad.⁸ 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’.⁹
64. 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.’¹⁰
65. In *Re Saffioti and Minister for Transport; Housing* the Western Australian Information Commissioner referred to a decision in which the UK Information Commissioner listed the types of information that would normally fall within the parliamentary privilege exemption, including:
- ...
 - correspondence between Members, Officers, Ministers and Government Officials directly related to House proceedings;
 - ... and
 - bills, amendments and motions, including those in draft, where they originate from Parliament or a Member rather than from parliamentary counsel or another government department.¹¹
66. In *Sportsbet Pty Ltd v New South Wales (No 3)*, the Federal Court accepted that notes for a Minister’s use in Parliament were protected by parliamentary privilege,¹² and found that the privilege protects such documents ‘from disclosure and not mere use’.¹³
67. In a subsequent decision, *Sportsbet Pty Ltd v Harness Racing Victoria (No 4)*, the Federal Court found that documents concerning a ‘proceeding of a Joint Committee of the Victorian Parliament directly or by reference to what there took place, or ... notes prepared for the Minister for Racing for use in that Parliament’ were ‘so closely connected to the business of the Victorian Parliament so as to fall within the aegis of parliamentary privilege’.¹⁴
68. 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

⁷ This is applicable to South Australia by virtue of the *Constitution Act 1934* (SA), section 38.

⁸ 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.

⁹ *O’Chee v Rowley* (1997) 142 FLR 1, 11 (McPherson JA). 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* (Cth), 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, 11 (McPherson JA). Accordingly, my view is that the definition is applicable in the South Australian context.

¹⁰ *O’Chee v Rowley* (1997) 142 FLR 1, 16 (McPherson JA). See also 12-15 (McPherson JA).

¹¹ *Re Saffioti and Minister for Transport; Housing* [2012] WAICmr 10 (11 April 2012), [32]. See also [33-34].

¹² *Sportsbet Pty Ltd v New South Wales (No 3)* [2009] FCA 1283, [21] (Jagot J).

¹³ *Sportsbet Pty Ltd v New South Wales (No 3)* [2009] FCA 1283, [21] (Jagot J), cited with approval in *Sportsbet Pty Ltd v Harness Racing Victoria (No 4)* [2011] FCA 196, [20] (Mansfield J).

¹⁴ *Sportsbet Pty Ltd v Harness Racing Victoria (No 4)* [2011] FCA 196, [21-22] (Mansfield J).

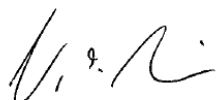
censure'.¹⁵ My counterpart in Queensland, the Information Commissioner, considered the privilege in the context of the now repealed *Freedom of Information Act 1992* (Qld):

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 equivalent of clause 17(c)] of the FOI Act, unless its public disclosure has been authorised ...'¹⁶

69. I agree with this view, and consider that it applies equally to the South Australian FOI Act.
70. In order to assess whether such a nexus exists between the document and parliamentary proceedings, I have had particular regard to extracts from *Hansard* in which the matter was deliberated and questioned in proceedings in both the Estimates Committee of the House of Assembly and the Legislative Council.¹⁷
71. I therefore consider that disclosure of documents 1a and 11 would impinge the privilege of Parliament.
72. I consider that documents 1a and 11 are exempt pursuant to clause 17(c) of Schedule 1 of the FOI Act.

Determination

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



Wayne Lines
SA OMBUDSMAN

5 September 2019

¹⁵ *The First Report - Joint Select Committee on Parliamentary Privilege* (UK), March, 1999, [36].

¹⁶ *Ainsworth Nominees Pty Ltd and the Criminal Justice Commission* (1999) 5 QAR 284, [59].

¹⁷ South Australia, *Parliamentary Debates*, Legislative Assembly, 27 November 2018, 2181 - 2185 & 2188 - 2190 (Wade MLC) South Australia, *Estimates Committee B*, House of Assembly, 21 September 2018, 8 - 10.

APPENDIX 1

Procedural steps

Date	Event
3 December 2019	The agency received the FOI application.
2 January 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
16 January 2019	The agency made a belated determination to grant access further access to four documents and partial access to four documents. ³
4 February 2019	The agency received the internal review application.
18 February 2019	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ⁴
19 February 2019	The agency belatedly gave notice of a purported determination on internal review.
25 February 2019	The Ombudsman received the applicant's request for external review.
27 February 2019	The Ombudsman advised the agency of the external review and requested submissions and documentation.
14 February 2019	The agency provided the Ombudsman with its submissions and documentation.
11 July 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 19(2a).

⁴ *Freedom of Information Act 1991*, section 29(5).

APPENDIX 2

Document in issue	Agency's determination	Ombudsman's determination	Information to be released
Document 1a	Exempt pursuant to clause 17(c)	Confirmed	None
Document 2a	Partially exempt pursuant clause 6(1)	Confirmed	The whole document aside from the direct contact details of Mr Spencer.
Document 6	Partially exempt pursuant clause 1(1)(c)	Vary, first redaction not exempt and second redaction exempt per clause 9(1).	The whole document is to be released aside from the agency's second redaction (covering two paragraphs).
Document 6a	Exempt pursuant to clause 1(1)(b)	Confirmed	None
Document 9	Exempt pursuant to clause 1(1)(f)	Confirmed	None
Document 10	Exempt pursuant to clause 1(1)(f)	Confirmed	None
Document 11	Exempt pursuant to clause 17(c)	Confirmed	None
Document 12	Exempt pursuant to clause 1(1)(f)	Varied, exempt pursuant to clause 1(1)(c)	None
Document 13	Exempt pursuant to clause 1(1)(b)	Confirmed	None
Document 14	Exempt pursuant to clause 1(1)(c)	Varied, exempt pursuant to clause 1(1)(f)	None