

Determination

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

Applicant	Ms Bernadette Mulholland
Agency	Department of Treasury and Finance
Ombudsman reference	2019/00516
Agency reference	2019/00516
Determination	The determination of the agency is reversed.

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:

Emails from Director Enterprise Bargaining, Department of Treasury and Finance, Mr Simon Johnson to Ministers for Health and Wellbeing and the Treasurer regarding doctor's Right of practice, - email from Director Enterprise Bargaining, Department of Treasury and Finance, Mr Simon Johnson to the SA Health Chief Executive, Dr Chris McGowan and the SA Health Deputy Chief Executive Mr Don Frater regarding doctor's (sic) Right of Private Practice [Date Range: 20/08/2018 to 20/09/2018].

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. The Ombudsman provided his tentative view about the agency's determination to the parties, by the Ombudsman's provisional determination dated 11 September 2019. This Office informed the parties that subject to receipt and consideration of submissions from the parties, this office proposed to reverse the agency's determination.
5. Neither the agency nor the applicant provided any submissions to the Ombudsman's 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.
10. The following provisions are relevant to this determination:

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.

11—Documents relating to judicial functions etc

- A document is an exempt document if it contains matter—
- (a) relating to the judicial functions of a court or tribunal; or
 - (b) prepared for the purposes of proceedings (including any transcript of the proceedings) that are being heard or are to be heard before a court or tribunal; or
 - (c) prepared by or on behalf of a court or tribunal (including any order or judgment made or given by the court or tribunal) in relation to proceedings that are being heard or have been heard before the court or tribunal

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

Documents in issue

11. The agency identified one document (**the document**) within the scope of the application and refused disclosure.
12. The document comprises an email thread consisting of two emails. For the purpose of this review I will refer to these emails as email 1 and email 2. The first email is dated 10 September 2018 and is time stamped 10:44 am and the second email is also dated 10 September 2018 and is time stamped 11:49 am.

Issues in this review

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

Consideration

14. The agency has claimed that emails 1 and 2 are exempt pursuant to clause 9(1) and clause 11(b).

Email 1

15. Email 1 was sent by the Deputy Chief Executive of Health SA to a number of State government employees, including at least one who is employed in the agency as Director, Enterprise Bargaining. The content comprises a radio transcript of an interview between David Bevan of ABC Radio and the applicant.
16. The content of email 1, being a transcript of a radio interview, was, at the time of the agency's determination, already in the public domain and was also known to the applicant who was the interviewee.
17. I am not satisfied that either clause 9(1) or clause 11(b) apply to email 1.
18. In light of the above, I am of the view that email 1 can be disclosed to the applicant in full.

Email 2

19. Email 2 is a response from the Director, Enterprise Bargaining to the author and other recipients of email 1 with content that relates to the relationship between the *SA Health Salaried Medical Officers Enterprise Agreement 2017* and the *Department of Health Salaried Medical Officers Private Practice Agreement 2008*. Both of these agreements are publically available through the SA Health website.
20. It thus contains an opinion provided by the Director, Enterprise Bargaining to Senior Executives in SA Health regarding matters which the agency submits were, at the time of the determination dated 6 December 2018, before the South Australian Employment Tribunal (**SAET**).
21. I will first consider clause 11(b) and then consider clause 9(1).

Clause 11(b) - Documents relating to judicial functions etc.

22. Clause 11 (b) provides that a document is exempt if it contains matter 'prepared for the purposes of proceedings (including any transcript of the proceedings) that are being heard or are to be heard before a court or tribunal'.
23. The terms 'court' and 'tribunal' are both defined in section 4(1) of the FOI Act. Relevantly:
- tribunal* means any body (other than a court) invested by the law of the State with judicial or quasi-judicial powers.
- I am satisfied that SAET is a 'tribunal' within the meaning of section 4(1) of the FOI Act.
24. On 20 May 2019, a representative of the agency informed this Office that, at present, there are no ongoing or anticipated court or tribunal proceedings concerning the matters discussed in email 2.
25. However, the agency informed this Office that:
- on 24 October 2018, SASMOA, an association represented by the applicant, lodged a 'Notification of an Industrial Dispute or Grievance' with SAET
 - on 23 December 2018 SASMOA filed a 'General Application'
 - on 26 March 2019 SASMOA filed a 'Notice of Withdrawal' with SAET
 - on 28 March 2019 orders from SAET were distributed to the parties confirming the withdrawal of the matter.
26. When considering clause 11(b), the South Australian District Court held:
- ...that the relevant time for undertaking the enquiry by clause 11(b) is the time of the creation of the document rather than the time at which application for access is made under the FOI Act. Such a construction- or interpretation - creates a single point in time for agencies to undertake the relevant assessment and is productive of certainty.²
27. I consider that the critical time in respect of clause 11(b) is the time at which email 2 was prepared. For the clause to have operation it is sufficient if the proceedings were being heard or were to be heard before the tribunal at that time.
28. At the time email 2 was created, being 10 September 2018, there were no proceedings being heard by any court or tribunal. The agency submitted that the document was created in anticipation that proceedings would be instigated by SASMOA.
29. It is apparent from the nature and content of the document that it was not prepared for the purpose of proceedings. Email 2 provides an opinion about the content of email 1 and is clearly intended as an internal Government communication rather than a document prepared for the purpose of proceedings.
30. Clause 11(b) operates to exclude access to documents created for proceedings and to promote the administration of justice. I am not satisfied that this email was created for that purpose. Email 2 is not a letter of advice for settlement negotiations or the department seeking instructions or information for the purposes of proceedings as was the case in *DPC v Thomas*.³
31. I am not satisfied that email 2 is exempt pursuant to clause 11(b) as the document was not created for the purposes of proceedings, nor is it a tribunal document.

² *Department of the Premier and Cabinet v Thomas* [2014] SADC 56, [23].

³ *Department of the Premier and Cabinet v Thomas* [2014] SADC 56, [18, 21].

32. I now turn to consider whether email 2 is exempt pursuant to clause 9(1) of the FOI Act.

Clause 9(1) - Internal working documents

33. The scope of clause 9(1) is wide, particularly given the words 'that relates to'.

34. 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'.⁴

35. The first question is whether email 2 is a document which, if released, 'would disclose matter in the nature of any opinion, advice, or recommendation that has been obtained, prepared or recorded, or 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'

36. In order to understand the meaning and intended operation of the clause I refer to the explanatory memorandum circulated with the Commonwealth Freedom of Information Act (Cth), relating to section 47C(1), which is in substantially the same terms as clause 9 of the FOI Act (SA). The explanatory memorandum states that 'deliberative process' there generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes - the process of reflection.⁵

37. In *Re Waterford and Department of Treasury* (No 2) (1985) 5 ALD 588, the Commonwealth Administrative Tribunal held that:

...the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.⁶

38. The Deputy Chief Executive of Health forwarded the radio transcript (email 1) to several senior executives within SA Health. He did not request a response. It is this Office's opinion that he was merely informing his colleagues of comments made by the applicant in the course of her radio interview.

39. The last dot point of the email is a statement expressed as the opinion of Director, Enterprise Bargaining. He was not asked to provide any advice, rather he provided advice of his own initiative, merely to provide context to email 1. He expressed a view on the comments made by the applicant in the course of the interview. The advice was not prepared, obtained or recorded for the purposes of any decision-making function of the agency.

40. Documents do not contain deliberative material merely because they have been considered by an agency or because they contain material that was generated before the thinking process of an agency has commenced. In order to be exempt, the document must reflect the active deliberative process undertaken by an agency.⁷

41. At the time email 2 was created, no particular decision had to be made in relation to the comments made by the applicant or in relation to SASMOA as litigation was not on foot at the time.

⁴ Schedule 1, clause 9(1)(a) *Freedom of Information Act* 1991.

⁵ *FOI Guidelines, Combined January 2019* at [11] <<https://www.oaic.gov.au/assets/freedom-of-information/guidance-and-advice/foi-guidelines/foi-guidelines-combined-january-2019.pdf>> Guidelines Issued by the Australian Information.

⁶ See also *Harris v Australian Broadcasting Corporation* (1983), 78 FCR 236

⁷ *Re Susic & Australian Institute of Marine Science* (1994) 52 FOIR 54

42. I am satisfied that the agency did not actively seek the information provided by the Director, Enterprise Bargaining. The information was freely provided without a request by the agency.
43. In light of the above evidence and the availability of the information in the public domain, I am not satisfied that the opinion in email 2 was provided in course of, or for the purpose of, the agency's or the government's decision-making functions.
44. I will nevertheless consider whether or not the public interest test set out in clause 9(1)(b) has been met.

The public interest test

45. As for the manner in which the public interest test for or against disclosure is to be weighed under clause 9(1), the Administrative Appeals Tribunal has observed:

Relevant matters include matters such as:

- the age of the documents;
- the importance of the issues discussed;
- the continuing relevance of those issues in relation to matters still under consideration;
- the extent to which premature disclosure may reveal sensitive information that may be "misunderstood or misapplied by an ill-informed public";
- the extent to which the subject matter of the documents is already within the public knowledge;
- the status of the persons between whom and the circumstances in which the communications passed;
- the need to preserve confidentiality having regard to the subject matter of the communication and the circumstances in which it was made.

Underlying all these factors is the need to consider the extent to which disclosure of the documents would be likely to impede or have an adverse effect upon the efficient administration of the agency concerned.⁸

46. The agency claims that it would be contrary to the public interest to disclose email 2, because disclosure is outweighed by the need to ensure that public servants are able to provide advice without inhibiting frankness and candour. Disclosure of this document would hinder free communication and would impede the agency's deliberative process.
47. I have considered factors in favour and contrary to disclosure.

In favour of disclosure:

- fulfilling the objects of the FOI Act
- promoting openness and accountability of the agency and its senior staff
- facilitating more effective participation in, and scrutiny of, the agency's and the Government's decision-making processes
- four of the five points relate to content of publically available documents. Disclosure would complete the picture of what is known about the matter
- the applicant's particular interest given her position within SASMOA.

Contrary to disclosure:

- the agency's objections to disclosure
- the need to ensure that public servants are able to provide frank and candid opinion and advice without fear that their opinions and advice will be disclosed.

48. The agency has not satisfied me that disclosure of email 2 would impede the agency's deliberative process. While I accept that there can be a need for some confidentiality to

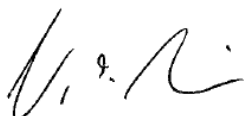
⁸ *Re Lianos and Secretary to the Department of Social Security* [1985] AATA 38 at [8].

allow the agency to operate effectively it is not apparent to me that any such 'need' extends to email 2, especially since four out of the five points relate to content of publically available documents.

49. I am not satisfied that the document is exempt under clause 11(b) or 9(1).

Determination

50. In light of my views above, I reverse the agency's determination.

A handwritten signature in black ink, appearing to read 'W. Lines', written in a cursive style.

Wayne Lines
OMBUDSMAN

8 October 2019

APPENDIX 1

Procedural steps

Date	Event
24 September 2018	The agency received the FOI application dated 24 September 2018.
6 December 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
1 November 2018	The agency received the internal review application dated 1 November 2018.
6 December 2018	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³
18 December 2018	The agency received the internal review application dated 18 December 2018.
11 January 2019	The agency confirmed the determination.
15 January 2019	The Ombudsman received the applicant's request for external review dated 15 January 2019.
17 January 2019	The Ombudsman advised the agency of the external review and requested submissions and documentation.
7 February 2019	The agency provided the Ombudsman with its submissions and documentation.
8 May 2019	The Ombudsman requested further information on the circumstances around the creation of the document.
20 May 2019	The agency provided its response.
11 September 2019	The Ombudsman provided his provisional determination to 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
Email one	Radio transcript	Exempt by virtue of clause 9(1) and 11(b)	Agency's determination reversed	Whole document
Email two	Response	Exempt by virtue of clause 9(1) and 11(b)	Agency's determination reversed	Whole document