

Determination

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

Applicant	The Hon Stephen Mullighan MP
Agency	Department of Treasury and Finance
Ombudsman reference	2019/06572
Agency reference	T&19/0189
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 documents, reports and correspondence received by the Department of Treasury and Finance regarding the 2019-20 Federal Budget. Date range: 1/03/2019 to 04/04/2019.

Background

2. For ease of reference, the procedural steps relating to the application 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, by my provisional determination dated 5 May 2020. 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 and interested parties provided submissions in response. I have considered these submissions in this 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

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

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. The following provisions are of relevance to this external review:

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.

5–Documents affecting inter-governmental or local governmental relations

- (1) A document is an exempt document if it contains matter—
- (a) the disclosure of which—
 - (i) could reasonably be expected to cause damage to intergovernmental relations; or
 - (ii) would divulge information from a confidential intergovernmental communication; and
 - (b) the disclosure of which would, on balance, be contrary to the public interest.

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) A document is an exempt document if it contains matter—
- (a) consisting of information concerning a person who is presently under the age of 18 years or suffering from mental illness, impairment or infirmity or concerning such a person's family or circumstances, or information of any kind furnished by a person who was under that age or suffering from mental illness, impairment or infirmity when the information was furnished; and
 - (b) the disclosure of which would be unreasonable having regard to the need to protect that person's welfare.

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.

Documents in issue

10. The agency identified 49 documents within the scope of the application.
11. The agency determined to:
 - grant access in full to 19 documents
 - grant access in part to 8 documents
 - refuse access in full to 22 documents.
12. Upon notification of external review, the agency revised its position to:
 - grant access in full to 21 documents
 - grant access in part to 9 documents
 - refuse access in full to 19 documents.
13. Documents 1, 6, 21, 24, 26, 28, 31 and 44 were determined to contain information concerning personal affairs and were partially released pursuant to clause 6(1).
14. Document 22 was determined to contain information that could damage intergovernmental relations and was partially released pursuant to clause 5(1)(a)(i).
15. Documents 2, 3, 4 and 23 were determined to be documents that would damage intergovernmental relations and contain confidential intergovernmental communication. The documents were refused access in full pursuant to clause 5(1)(a)(i) and (ii).
16. Documents 32, 33a, 34, 35, 36, 37, 42 and 43 were determined to contain matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet and were refused access in full pursuant to clause 1(1)(e). These documents were also determined to contain parts of or extracts of documents prepared for submission to Cabinet and were exempt pursuant to clause 1(1)(c).
17. Documents 37a and 38 to 40 were also determined to be exempt pursuant to clause 1(1)(c).
18. Documents 34a, 35a and 36a were determined to be drafts of documents that were created specifically for submission to Cabinet and were refused access in full pursuant to clause 1(1)(b).

Issues in this review

19. The issue for me to consider in this review is whether the agency has justified its determination to refuse access in full to 19 documents and to give partial access to 9 documents.

Consideration

Cabinet Documents

Clause 1(1)(b) - Draft Cabinet documents

Documents 34a, 35a and 36a

20. The agency determined that documents 34a, 35a and 36a are exempt pursuant to clause 1(1)(b).

21. In order for a document to be exempt pursuant to clause 1(1)(b), the document must be a preliminary draft of a document that has been specifically prepared for submission to Cabinet. Having read documents 34a, 35a and 36a, I am satisfied that they are preliminary drafts of documents specifically prepared for submission to Cabinet.
22. As such I consider that documents 34a, 35a and 36a are exempt pursuant to clause 1(1)(b) of the FOI Act.

Clause 1(1)(c) - Extracts of Cabinet Documents

Documents 32, 33a, 34, 35, 36, 37, 37a, 38 to 40, and 43

23. For a document to be exempt pursuant to clause 1(1)(c), the document must be a copy of or contain part of, or contains an extract from, a document that has been specifically prepared for Cabinet or a preliminary draft of a document that has been specifically prepared for Cabinet.
24. In considering the equivalent provision of clause 1(1)(c) in the Commonwealth *Freedom of Information Act 1982*, the Australian Information Commissioner (**the AIC**) was of the view that a copy or extract should be a quotation from, or exact reproduction of, the Cabinet submission, official record of the Cabinet or the Cabinet briefing.² I agree with this view.
25. The word 'copy' is not defined in the FOI Act or the *Acts Interpretation Act 1915*, and so should be accorded its ordinary meaning. The word 'copy' is defined in the Macquarie Dictionary to include 'a transcript, reproduction, or imitation of an original'.³
26. Based on this definition, I do not consider that documents 32, 34, 35, 36 and 37 contain parts of, or extracts from, documents submitted to Cabinet or preliminary drafts of documents submitted to cabinet. The documents are emails which contain descriptions of parts of such documents, but do not contain any exact reproductions of parts of those documents.
27. Accordingly I do not view documents 32, 34, 35, 36 and 37 as being exempt pursuant to clause 1(1)(c).
28. Documents 33a, 37a, 38 to 40, and 43 are spreadsheets which were created for the purpose of being presented as parts of Cabinet submissions. Accordingly I consider that documents 33a, 37a, 38, 39, 40 and 43 are exempt pursuant to clause 1(1)(c).

Clause 1(1)(e) - Documents revealing information concerning any decision or deliberation of Cabinet

Documents 32, 33a, 34 to 37, 42 and 43

29. As I have formed the provisional view that documents 33a and 43 are exempt pursuant to clause 1(1)(c), I will not be considering whether those documents are exempt under clause 1(1)(e).
30. The District Court of South Australia in *Department of State Development v Pisoni* (**Pisoni**)⁴ and, more recently, the South Australian Civil and Administrative Tribunal in *Department of the Premier and Cabinet v Dan van Holst Pellekaan* (**van Holst**

² <https://www.oaic.gov.au/assets/freedom-of-information/guidance-and-advice/foi-guidelines/foi-guidelines-combined-january-2019.pdf> (at 16 October 2019) See also: *Re Aldred and Department of Foreign Affairs and Trade (1990) 20 ALD 264*.

³ *Macquarie Dictionary Online* (Macmillan Publishers Australia, 2020), available at <https://www.macquariedictionary.com.au/>.

⁴ *Department of State Development v Pisoni* [2017] SADC 34.

Pellekaan)⁵ considered the test to be applied when considering whether a document is exempt pursuant to clause 1(1)(e).

31. In *Pisoni*, Judge Tilmouth observed:

There is highly persuasive, if not binding authority, to the effect that a document merely revealing a description of an event placed before Cabinet is not protected. Thus in *Secretary to the Department of Infrastructure v Louise Asher MP*, Buchanan JA wrote:

That is not to say that a document supplied to Cabinet for its consideration could never be exempt as disclosing a deliberation of Cabinet. It all depends upon the terms of the document. At one end of the spectrum, a document may reveal no more than that a statistic or description of an event was placed before Cabinet. At the other end, a document on its face may disclose that Cabinet required information of a particular point of view. The former would say nothing as to Cabinet's deliberations; the latter might say a great deal...

Vincent JA considered the question is 'what the document itself would convey in the circumstances, and providing that there is nothing in the document enabling one to draw any inferences as to what may or may not have been the subject of deliberation or decision', the document is unprotected. Redlich JA was of a similar view in *Secretary to the Department of Infrastructure v Asher*. His Honour considered that there was nothing on the face of the subject documents permitting the conclusion that their disclosure would involve disclosure of any "deliberation" or "decision" of the Cabinet.⁶

32. In *van Holst Pellekaan*, Executive Member Stevens adopted the meaning attributed to 'deliberation' by Tilmouth DCJ in *Pisoni*.⁷ Member Stevens considered that clause 1(1)(e) 'is broader than the equivalent provisions currently existing in other Australian jurisdictions' as a consequence of the inclusion of the words 'information concerning any' which do not appear in other jurisdictions' legislation;⁸

In other jurisdictions, the test is whether disclosure will "disclose the deliberations or decisions" (of Cabinet). Case law in those jurisdictions must be understood accordingly. Clause 1(1)(e) poses a broader test. It is whether disclosure will disclose "information concerning any deliberation or decision of Cabinet".

In *O'Connor v Leaw Pty Ltd* (1993) 42 NSWLR 285 at page 303, Rolfe JH stated:

'Concerning' has been defined as 'regarding', 'touching', 'in reference or relation to' and 'about'. It is, accordingly, a word of wide import...⁹

33. In *van Holst Pellekaan*, Executive Member Stevens considered that there were two questions to be addressed in the application of clause 1(1)(e):

1. Has there been a relevant deliberation or decision of Cabinet?
2. If so, do the documents contain matter the disclosure of which would disclose information concerning that deliberation or decision?¹⁰

34. Documents 34, 35, 36 and 37 are emails that accompany documents that I consider exempt under clause 1(1)(b) and 1(1)(c). The information contained in documents 34, 35, 36 and 37 summarises and reveals information contained in the exempt documents, and as such I consider that the release of these documents would disclose information concerning a deliberation or decision of Cabinet. As such I consider these documents are exempt under clause 1(1)(e).

⁵ *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56.

⁶ *Department of State Development v Pisoni* [2017] SADC 34, [20], citations omitted.

⁷ *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56, [70].

⁸ *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56, [66].

⁹ *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56, [67-68].

¹⁰ *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56, [81].

35. Document 42 is a letter which directly references and discusses information concerning a deliberation or decision of Cabinet and as such I consider that the document is exempt pursuant to clause 1(1)(e).
36. In my provisional determination I expressed that I was of the view that document 32 was not exempt under clause 1(1)(e) as it did not disclose information concerning a deliberation or decision of Cabinet.
37. In response to my provisional determination, the agency provided submissions explaining the nature of document 32 in greater detail. The agency stated that the email summarises key points and issues that were used in the February 2019 Monthly Monitoring report, which are specifically prepared for submission to the Budget Cabinet Committee each month. The agency drew attention to clause 1(3) of the FOI Act that within the meaning of clause 1, a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee to Cabinet.
38. Given the agency's additional submissions, I am satisfied that document 32 contains information that, if released, would disclose information concerning a deliberation of Cabinet. As such I consider that document 32 is exempt pursuant to clause 1(1)(e).
39. My Office has contacted the applicant who has agreed to accept that document 32 is exempt pursuant to clause 1(1)(e) without the need for a revised provisional determination inviting further submissions.

Clause 5(1) - Documents affecting inter-governmental or local governmental relations
Documents 2, 3, 4, 22, 23 and 42.

40. In the agency's submissions, it relied on both clauses 5(1)(a)(i) and 5(1)(a)(ii) in claiming that documents 2, 3, 4, 22, 23 and 42 are exempt.
41. In order for a document to be exempt pursuant to clause 5(1)(a) it must contain matter the disclosure of which:
 - could reasonably be expected to cause damage to intergovernmental relations, or would divulge information from a confidential intergovernmental communication; and
 - would, on balance, be contrary to the public interest.
42. Documents 2, 3 and 4 are emails between Treasuries of all jurisdictions. Document 22 is an email with an attached letter which was released in part.
43. Document 22 and 23 have unique circumstances surrounding them and I will consider them separately from the other documents that fall to be considered under clause 5(1).
44. As I have already considered that document 42 is exempt pursuant to clause 1(1)(e), it is unnecessary to determine whether it is exempt pursuant to clause 5(1).
45. In the agency's submissions it raised concerns that the release of document 2 would cause damage to intergovernmental relationships, and that documents 3 and 4 contain information from confidential intergovernmental communications. However given the nature of the documents, and the nature of the tests, I consider it appropriate to consider the applicability of both clause 5(1)(a)(i) and 5(1)(a)(ii) to all of the documents.

Damage to intergovernmental relations

46. What constitutes 'damage' to intergovernmental relationships was considered by the Federal Court in *Arnold v Queensland*.¹¹ Justice Wilcox considered that:

the words "relations between the Commonwealth and a State" refer to the total relationship between the Commonwealth and the relevant State. As is essential in a federation, there exists a close working relationship, over a wide spectrum of matters and at a multitude of levels, between representatives of the Commonwealth and representatives of each State. The word 'relations' includes all of those contacts. It would not normally be correct to describe a falling out between particular individuals on each side as constituting damage to "relations" between the two governments, even if there was some loss of co-operation between those individuals. But a dispute may have ramifications sufficiently extensive for it to affect "relations" between the governments as such. Questions of degree arise. They can only be considered in the light of the facts of each case¹²

47. Justice Wilcox also commented on the requirements of a 'reasonable expectation' of damage:

the words "could reasonably be expected" do not require the demonstration of probability of damage. In *Attorney-General's Department v Cockcroft* (1986) 64 ALR 97 a Full Court considered the meaning of the words "could reasonably be expected to prejudice the future supply of information" ... Bowen CJ and Beaumont J said that those words "require a judgement to be made by the decision maker as to whether it is reasonable, as distinct from something that it is irrational, absurd or ridiculous..."¹³

48. In the context of a relationship between the Commonwealth and the State of Queensland, the then Deputy President of the AAT observed in *Guy v the Department of Transport* that:

It would not, in my view, be an exaggeration to say that the relationship between the units of a Federation can be quite as complex and difficult as that between nation states, and that trust and confidence are vital to the nourishment of bodies... which are examples of Federal/State relationships based on mutual cooperation and not merely an assertion of legislative power.

It follows that I consider that a disclosure of the [document] against the wishes of the Government of Queensland could reasonably be expected to cause damage to relations between the Commonwealth and the State of Queensland.¹⁴

49. In regard to the objections of agencies, the Western Australian Information Commissioner in *Ravlich v Department of Productivity and Labour Relations* concurred with the conclusion of the AAT and observed that the reasonableness of the objections to disclosure were not relevant in assessing the likely impact of disclosure.¹⁵ That is, an agency's strong objection to disclosure, however irrational the views underpinning those objections, must be considered in assessing whether disclosure could reasonably be expected to damage intergovernmental relations.
50. In relation to document 2, the ACT Treasury advised that they objected to release on the basis that release would jeopardise the continued intergovernmental exchange of information under a confidential arrangement. Given that a third party has objected to disclosure, and is of the view that its release would jeopardise intergovernmental

¹¹ *Arnold on behalf of Australians for Animals v The State of Queensland; The Australian National Parks and Wildlife* [1987] FCA 148

¹² *Arnold on behalf of Australians for Animals v The State of Queensland; The Australian National Parks and Wildlife* [1987] FCA 148, per Wilcox J at [32].

¹³ *Arnold on behalf of Australians for Animals v The State of Queensland; The Australian National Parks and Wildlife* [1987] FCA 148, per Wilcox J at [33].

¹⁴ *Guy v Department of Transport* (1987) 12 ALD 358 at [14].

¹⁵ *Ravlich v Department of Productivity and Labour Relations* [2000] WAICmr 58 at [22].

relationships, I am of the mind to agree that there is a reasonable expectation that release could cause damage to intergovernmental relationships.

51. Given the claim that documents 3 and 4 are purported to contain confidential intergovernmental communications, I am also of the view that release of those documents could potentially cause damage to intergovernmental relations and that clause 5(1)(a)(i) applies.

Confidential intergovernmental communications

52. When determining whether communications between governments occur on a confidential basis, the following factors may be relevant:
- the nature of the information and its sensitivity¹⁶
 - the body from which it emanates and the relationship between the parties
 - the circumstances in which the communication took place.¹⁷

53. In the context of an international governmental relationship, President Davies in *Re Maher and Attorney-General's Department* observed that:

Moreover, as I have said, communications may be made not under any express agreement or even any necessarily implied agreement as to confidentiality but pursuant to a general understanding that communications of that nature will be treated in confidence.¹⁸

54. The approach in *Maher* appears to have been recently adopted by the South Australian District Court in *Hall v SA Police*¹⁹ though, again, that matter concerned an international relationship. Nevertheless, I consider that the approach in *Maher* is relevant and useful in this instance. As such, it is necessary, in my view, to consider the full circumstances surrounding the exchange of the information, and whether the information in particular was provided and received under such circumstances.
55. Document 3 and 4 are email communications between the Commonwealth Treasury and State Treasuries. The agency submitted that the communications reveal a confidential agreement between the Treasuries, and the content of the emails reveal that the emails were sent with the express notice that the communications are confidential. To that extent I am satisfied that the circumstances surrounding the communication attracted an understanding that the communications were confidential.
56. However I note that the schedule of documents provided by the agency with its determination reveals a significant aspect of the communications contained in the documents, both in the description of the documents and the date and time of the documents. The extent of which this information reveals the contents of the documents, to my mind, significantly reduces the likelihood that the communications have remained confidential, or that the nature of the communications are particularly sensitive.
57. Nevertheless out of an abundance of caution, I would treat the documents as confidential intergovernmental communications and tentatively conclude the documents satisfy the conditions of clause 5(1)(a)(ii).

¹⁶ *Smith, Kline and French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at 303.

¹⁷ *Re Maher and Attorney-General's Department* [1985] AATA 180 (17 July 1985) at [20]. The approach in *Re Maher* has recently been applied by the South Australian District Court in *Hall v SA Police* [2019] SADC 5 at [255].

¹⁸ *Re Maher and Attorney-General's Department* [1985] AATA 180 (17 July 1985) at [25].

¹⁹ *Hall v SA Police* [2019] SADC 5 at [255].

The public interest

58. In order for a document to be exempt pursuant to either clause 5(1)(a)(i) or 5(1)(a)(ii), the disclosure of the document must, on balance, be contrary to the public interest. In order to determine whether disclosure is contrary to the public interest, a balancing test between competing factors must be considered.
59. Factors in favour of disclosure include:
- fulfilling the objects of the FOI Act
 - enhancing scrutiny of government decision making
 - informing the public on budget considerations
 - promoting effective oversight of public expenditure
60. Factors against disclosure include:
- ensuring the efficient operation of government
 - ensuring that established confidential communication practices can continue
 - maintaining the flow of free and frank advice between government agencies
61. Having assessed the factors against my reading of the documents, I am not of the mind that disclosure of documents 2, 3 and 4 would be contrary to the public interest.
62. Whilst noting the agency's concern that release of the documents would adversely affect continued information sharing between governments, having considered the content of the document I do not consider that the documents reveal anything of a sensitive nature.
63. To the contrary, the documents reveal what could reasonably be expected of good practice in communication between the State and Commonwealth Treasuries. The information contained in document 2 is not of an apparent confidential nature, rather the agency has suggested that the communications should be treated as being under a confidential arrangement in order for such communications to continue unimpeded in future.
64. Whilst noting the agency's concern, I see nothing before me in the document that would warrant the conclusion that information sharing of this nature would reasonably be impeded by the prospect that it may potentially be open to public scrutiny.
65. As I noted previously, the contents of documents 3 and 4 have been significantly revealed by the description of the documents that the agency provided. In reviewing the documents, the confidential information does not appear to be particularly significant in light of what has been revealed, and what has also been subsequently published.
66. The agency has submitted that the disclosure of this information would affect future communications of such nature between not just the SA State Treasury and the Commonwealth Treasury, but all State and Territories.
67. In response to my provisional determination, the Commonwealth Treasury provided submissions as an interested party that release of documents 2, 3 and 4 would reduce its willingness to openly engage with States and Territories and that the release of the documents would make the provision of information between the Commonwealth, States and Territories in future 'considerably more difficult'²⁰. As such it stated that its position is that all three documents are exempt in full.
68. The submissions by the Commonwealth Treasury with respect to document 2 were supported by further submissions from the agency which rejected that there is any

²⁰ Email from *The Treasury* (Cth) dated 29/05/2020.

- public interest in disclosure of the document. The agency stated that release of the information contained does nothing to enhance scrutiny of government decisions, nor would it inform the public about the workings of government. I note that the test is not whether disclosure is in the public interest but whether disclosure is contrary to the public interest.
69. Despite the submissions put forward by the agency and the Commonwealth Treasury, I am still not of the view that release would be contrary to the public interest.
 70. The crux of the argument made by the Commonwealth Treasury and the agency is that release of the information, due to its confidential nature, would be detrimental to future ongoing communications. This is despite the acknowledgement that the information itself is not of any particular sensitivity, rather that damage would be caused because the Commonwealth Treasury would be less willing to engage in communication if there is a prospect that future confidential communications of such nature could be released under the FOI Act.
 71. I draw attention to the fact that clause 5 is a conditional exemption under the FOI Act rather than a restricted exemption such as Cabinet documents under clause 1. This also extends to confidential documents of any type, which are conditionally exempt under clause 13. To my mind, this evinces a view from Parliament that a document's confidential nature is not on its own enough to conclude that it should be an exempt document.
 72. The arguments put forward do not make a case for why the release of the information contained in documents 2, 3 and 4 would be contrary to the public interest other than stating that because the documents are considered confidential, the Commonwealth Treasury will take the release of any information, regardless of its nature, as a reason to reduce its communication with the States and Territories.
 73. I consider that the position taken by the Commonwealth Treasury is antithetical to the objects of the FOI Act. The objects of the FOI Act include the promotion of openness in government²¹ and conferring members of the public with a legally enforceable right to be given access to documents held by government, subject only to such restrictions as are consistent with the public interest.²² To suggest that any prospect of an agency complying with a conditional exemption of the FOI Act would lead to that agency inhibiting its own functions and that such reasoning alone is enough to conclude that a document's release would be contrary to the public interest is absurd.
 74. In light of the apparent lack of sensitivity of the information contained in the documents, and that the information has otherwise been disclosed or has since become known to the public, I do not believe that disclosure would, on balance, be contrary to the public interest.
 75. Consequently I do not consider documents 2, 3 and 4 are exempt pursuant to clause 5(1).
 76. The Commonwealth Treasury also provided submissions that two email addresses in Documents 2, 3 and 4 should be exempt under clause 16 as they are emails that are used solely for internal and interstate communications which are not known to the public. The Commonwealth Treasury suggested that the release of these email addresses would result in deluge of emails from the public that would have an adverse effect on its functions.

²¹ *Freedom of Information Act 1991*, section 3(1)(a).

²² *Freedom of Information Act 1991*, section 3(2)(b).

77. Without considering the merits of the Commonwealth Treasury's position, the applicant has agreed that the email addresses are not of interest to him and that he would accept the redactions of the two email addresses from the documents.
78. In keeping with the applicant's concession, I determine that the two email addresses noted by the Commonwealth Treasury are to be redacted from the release of documents 2, 3 and 4.

Document 23

79. Document 23 is a National Partnership Agreement (NPA) schedule that was provided by the Commonwealth Minister for Infrastructure, Transport and Regional Development to the South Australian Minister for Transport, Infrastructure and Local Government.
80. The agency submitted that a copy of the NPA schedule was publicly available online at the web address:
https://investment.infrastructure.gov.au/files/national_partnership_agreement/NPA_Schedule_SA_May_2018.pdf. However at the time the agency provided my Office with its submissions, the online document appeared to be an earlier version of document 23, and the later version still contained confidential information communicated by the Commonwealth government to the South Australian government.
81. My Office has searched online and found that an updated NPA is available at the web address
https://investment.infrastructure.gov.au/files/national_partnership_agreement/SA_Schedule_2019-20_Budget.pdf. Having viewed the document, I am satisfied that the publicly available document is now the same version as document 23.
82. I consider that document 23 no longer contains confidential information and that as it is publicly available, its release to the applicant would not damage inter-governmental relationships. As such I do not consider Document 23 to be exempt pursuant to clause 5(1).

Document 22

83. Document 22 is a letter between the Commonwealth Minister for Infrastructure and the SA Minister for Infrastructure. The document contains a section that draws reference to document 23.
84. The agency initially determined that document 22 was exempt in full, however as some information has since become public knowledge, the agency revised its position so that it now claims that document 22 is only partially exempt and is willing to release document 22 in part.
85. The agency suggested certain parts of the document should be released, chiefly information that has been revealed as part of the 2019/2020 budget. In light of my tentative view that document 23 should be released, I also consider that the section of document 22 which refers to document 23 should also be released.
86. Given that the letter is from a State Minister to a Commonwealth Minister discussing budget issues I am inclined to agree that there was an expectation of confidentiality to the contents of the letter, and that releasing that content could potentially damage intergovernmental relations or inhibit the frankness of communications in future.
87. As the agency has recognised that parts of the letter are free to be released, I am inclined to agree with its submission that release of the redacted information would, on balance, be contrary to the public interest. As the information contained in the redacted

sections does not appear to be publicly available, and does appear to comprise frank considerations of future budget concerns, I consider that the public interest factors favour non-disclosure.

88. For these reasons I agree with the agency's determination that document 22 is partially exempt, however my view is that any information that is related to document 23 be included in the content of the document that should be released.

Clause 6(1) - Documents affecting personal affairs

Documents 1, 6, 21, 24, 26, 28, 31 and 44

89. The agency determined that Documents 1, 6, 21, 24, 26, 28, 31 and 44 are exempt in part pursuant to clause 6(1).
90. For a document to be exempt pursuant to clause 6(1):
- it must contain information concerning the personal affairs of any person (not including the applicant); and
 - the disclosure of that information would be unreasonable.
91. The term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act. Among other things, it provides that 'personal qualities or attributes' are a person's personal affairs. The term has also been held to involve 'matters of private concern to an individual'²³ and the 'composite collection of activities personal to the individual concerned'.²⁴
92. The agency has determined to redact all names, work email addresses and phone numbers from the documents. The agency noted that whilst this is not its own standard practice to redact the names and work emails of South Australian public servants, the redactions of the names and work emails of interstate and federal workers were made in accordance with the standard practice of the Commonwealth Treasury.
93. Whilst accepting that this may be the standard practice of the Commonwealth Treasury, I am not of the view that this information is exempt under clause 6(1), and I do not consider the practice of the Commonwealth Treasury to be in line with the Australian Information Commissioner's FOI Guidelines.²⁵
94. At paragraph 6.130 of the guidelines it is noted that personal information can include a person's name, address and telephone number, referencing the decision of *Re Green and Australian and Overseas Telecommunications Corporation*.²⁶
95. However at paragraph 6.136 it is specified that the information needs to convey or say something about a person, rather than just identify them. There may be situations where depending on the context, a person's name or signature may be enough to reveal personal information about them.²⁷ Where the information does not say anything about a person, that information is not considered personal information.²⁸ I agree with this view.
96. On my reading of the documents, the inclusion of the names and email addresses does nothing to convey any personal information other than identifying the named people as

²³ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625 citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1986) 13 FCR 85 at 88-89.

²⁴ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

²⁵ *FOI Guidelines* (Office of the Australian Information Commissioner) available at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>.

²⁶ *Re Green and Australian and Overseas Telecommunications Corporation* [1991] AATA 252.

²⁷ *Re Veale and Town of Bassendean* [1994] WAICmr 4.

²⁸ *Penny Wong and Department of the Prime Minister and Cabinet* [2016] AICmr 27 [18].

public servants. There is no context that on my viewing would raise the information to the level of personal information.

97. My view is that the names and email addresses in the documents fails to meet the definition of information concerning the personal affairs of any person, and that even if it were to meet the definition for information concerning the personal affairs of any person, I cannot foresee any circumstances where the disclosure of this information would be unreasonable.
98. I do however accept that the release of telephone numbers that are not ordinarily available to the public, such as mobile phone numbers, would be an unreasonable disclosure of information and as such agree with the redaction of that information.
99. Accordingly my view is that documents are not partially exempt pursuant to clause 6(1) except for mobile telephone numbers.
100. I draw attention to my view that there are other documents containing emails which are not exempt under other clauses relied upon by the agency. Those documents are documents 2, 3, 4 and 32.
101. I am also of the view that the names and email addresses contained in those documents are not exempt pursuant to clause 6(1).
102. In response to my provisional determination the Commonwealth Treasury submitted that it considers the names and phone numbers of its staff are exempt pursuant to clause 6, reiterating that it is normal practice of the Treasury not to release information of this sort under FOI requests. I agree that any mobile phone numbers of staff members would be unreasonable and as such that information is exempt pursuant to clause 6.
103. However regarding names and email addresses, despite noting the Treasury's stance that redacting that information is common practice, I reiterate my view from paragraph 93 that I do not consider this practice to be in line with the Australian Information Commissioner's FOI Guidelines with which I agree. As such I do not consider this information to be exempt pursuant to clause 6.

Determination

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



Wayne Lines
SA OMBUDSMAN

2 July 2020

APPENDIX 1

Procedural steps

Date	Event
04/04/2019	The agency received the FOI application dated 04/04/2019.
04/05/2019	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
06/05/2019	The agency received the internal review application dated 06/05/2019.
21/06/2019	The agency varied the determination.
16/07/2019	The Ombudsman received the applicant's request for external review dated 16/07/2019.
19/07/2019	The Ombudsman advised the agency of the external review and requested submissions and documentation.
16/08/2019	The agency provided the Ombudsman with its submissions and documentation.
05/05/2020	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).

APPENDIX 2

Document in issue	Description	Agency's determination	Ombudsman's determination	Information to be released
1	Email	Partially exempt	Partially exempt with fewer redactions	Names and email addresses
2	Email	Exempt in full	Partially exempt	All information except mobile numbers and specified email addresses
3	Email	Exempt in full	Partially exempt	All information except mobile numbers and specified email addresses
4	Email	Exempt in full	Partially exempt	All information except mobile numbers and specified email addresses
6	Email	Partially exempt	Partially exempt with fewer redactions	Names and email addresses
21	Email	Partially exempt	Partially exempt with fewer redactions	Names and email addresses
22	Letter from Deputy Prime Minister to SA Minister	Partially exempt	Partially exempt with fewer redactions	All information related to Document 23
23	Schedule of Commonwealth Infrastructure payments	Exempt in full	Full release	Entire document
24	Email	Partially exempt	Partially exempt with fewer redactions	Names and email addresses
26	Email	Partially exempt	Partially exempt with fewer redactions	Names and email addresses
28	Email	Partially exempt	Partially exempt with fewer redactions	Names and email addresses
31	Email	Partially exempt	Partially exempt with fewer redactions	Names and email addresses
32	Email	Exempt in full	Exempt in full	
33	Email	Exempt in full	Exempt in full	
33a	Spreadsheet	Exempt in full	Exempt in full	
34	Email	Exempt in full	Exempt in full	
34a	Draft Cabinet submission	Exempt in full	Exempt in full	

35	Email	Exempt in full	Exempt in full	
35a	Draft Cabinet submission	Exempt in full	Exempt in full	
36	Email	Exempt in full	Exempt in full	
36a	Draft Cabinet submission	Exempt in full	Exempt in full	
37	Email	Exempt in full	Exempt in full	
37a	Spreadsheet	Exempt in full	Exempt in full	
38	Spreadsheet	Exempt in full	Exempt in full	
39	Spreadsheet	Exempt in full	Exempt in full	
40	Spreadsheet	Exempt in full	Exempt in full	
42	Letter from Federal Minister to Treasurer	Exempt in full	Exempt in full	
43	Spreadsheet	Exempt in full	Exempt in full	
44	Email	Partially exempt	Partially exempt with fewer redactions	Names and email addresses