

Determination

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

Applicant	The Hon Stephen Mullighan MP
Agency	Department of Treasury and Finance
Ombudsman reference	2018/09633
Agency reference	TF18/0305
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 minutes, briefings, notes, emails and correspondence from Department of Treasury and Finance to the Treasurer and the Treasurer's Office regarding infrastructure funding and the 2018-19 Commonwealth budget. Date range: 19/03/2018 to 30/05/2018.

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 revised provisional determination dated 10 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. The applicant and the agency did not respond to my request for submissions. The interested party responded to advise it did not wish to make submissions.

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. Clauses 1 and 5 are relevant in this matter.

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
 -
 - (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.
- (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.

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.

8. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
9. I am mindful of my obligations pursuant to section 39(15) to avoid disclosing in my reasons any matter that the agency claims is exempt matter.
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 eight documents within the scope of the application and released documents 1, 3, 4, 5 and 7. The agency refused access to documents 2, 6 and 8.

12. After communication with one of my legal officers the applicant conceded that document 2, which is a Parliamentary Briefing Note, was properly claimed as exempt by the agency.
13. Documents 6 and 8 are in issue in this review.

Issues in this review

14. The issue to be determined is whether the agency has justified its determination to refuse access to documents 6 and 8.

Consideration

Document 6

15. Document 6 is a briefing paper with an attachment. The agency determined that document 6 was exempt pursuant to clause 1(1)(e) and submitted to me that it would also be exempt pursuant to clause 1(1)(f). The agency also asked that I consider whether document 6 was exempt under clause 5.
16. I have considered the application of subclause 1(2)(ab) to document 6. Subclause 1(2)(ab) provides that a document is not an exempt document merely because it was attached to a document described in subclause 1(1). The wording of the briefing paper makes it clear that the purpose of the attachment is to inform the reader of detail relating to the matters outlined in the briefing paper. I am therefore of the view that the briefing paper and attachment can be read as one document.
17. In my original provisional determination I stated that I was satisfied that the briefing paper was exempt pursuant to clause 1(1)(f) on the basis that it was prepared specifically for the use of a Minister in relation to a matter that was submitted, or proposed to be submitted to Cabinet.
18. In response to that provisional determination the applicant submitted

In your provisional determination, it is stated that it has been claimed by the author of the document that the briefing was "specifically" prepared for use by the Minister in a manner meeting the requirements of clause 1(1)(f) of the Act, and, according to the provisional determination, "details" of the submission (but presumably not the submission itself) have been provided to you, and the date of the cabinet meeting at which the submission was considered.

There are two issues for consideration here: whether the document was indeed prepared "specifically prepared for the use of a Minister in relation to a matter submitted or proposed to be submitted to Cabinet" consistent with clause 1(1)(f), and also whether an assurance from the author of the document of the document's nature is sufficient for the provisional determination to rely upon.

On the first matter, the provisional determination does not provide sufficient comfort that the document was prepared "specifically prepared for the use of a Minister in relation to a matter submitted or proposed to be submitted to Cabinet".

It may be that some of the information contained in the document was pertinent to a matter subsequently considered by Cabinet. It may be that the contents of the minute informed the Treasurer, or indeed another Minister, about a matter to be considered by Cabinet. It may even be that the contents of the minute were reported to cabinet, perhaps by the Treasurer. Or it could be that the minute formed the basis of a Cabinet submission or note that was subsequently considered by Cabinet.

But none of these circumstances satisfies the requirement of the Act that a document is prepared "specifically prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet", as clause 1(1)(f) requires.

If clause 1(1)(f) was to be interpreted in the manner the agency appears to have here (and indeed to multiple other determinations being appealed to external review), it could prohibit the disclosure of any document that contains information pertinent to a matter that has, at some stage, been submitted, or about to be submitted, to Cabinet; instead of a document that satisfies the "specifically" test of clause 1(1)(f).

The agency is likely to provide briefing material and information that is relevant to matters considered by Cabinet. The Act does not prevent such documents from being released under the Act.

Instead, it would be for the agency to demonstrate the "specific" nature of the document and its preparation. It is not enough for the subject material of the document to be relevant to a Cabinet submission, or the timing of the document's production to be coincidental to the date of the Cabinet meeting where a submission with relevant material is considered. The test of the document being prepared "specifically" is a higher bar than that.

Unless the agency, through producing the records of the document's existence (for example, the records of the document's existence in the agency's document management system), the document itself, the Cabinet submission itself and the Cabinet decision recording the document's likely impact on Cabinet's deliberation, the agency cannot demonstrate the document satisfies the test of "specifically" of clause 1(1)(f).

On the second matter, this then raises an unfortunate situation. The provisional determination is relying on the confirmation of the document's author that the document does indeed satisfy clause 1(1)(f) of the Act, apparently without the determination actually having the document, the cabinet submission and the record of the Cabinet meeting to make a completely informed judgement that the document is, as both the agency initially determined, and its author subsequently confirmed, one which meets the requirements of clause 1(1)(f).

This raises a much larger issue; that of whether the Ombudsman and the provisional determination can rely on the assurances of an agency and its officers, without accessing and interrogating all primary source material from the agency.

This is a matter for you to determine, as to whether, under the Act, you are entitled to rely on such assurances, without requiring the agency to provide to you all necessary primary source material.

Given the topicality of the information it purportedly contains regarding Commonwealth Infrastructure Grants, and the perceivable routine nature of this minute from the Department to its Treasurer following the release of the Commonwealth budget, I put it that this document has not been "specifically" prepared in the manner which the Act requires for it to be excluded.

In this matter, the agency must demonstrate to the provisional determination that this document was prepared "specifically prepared for the use of a Minister in relation to a matter submitted or proposed to be submitted to Cabinet".

It does not appear to have done that, and as such clause 3A (2) becomes relevant for the agency in making its determination to release the document.

Last, under Schedule 1, clause 1(2) of the FOI Act, a document is not an exempt document if it merely consists of factual and statistical material that does not disclose information concerning any deliberation or decision of Cabinet. Therefore, I submit that even in the event that the agency is able to demonstrate to you the

document is exempt from release, the any factual or statistical material the document contains that does not disclose the deliberations or decision of Cabinet, contained in Document 6, should be released.

19. The applicant also submitted that the content of the document is a matter of public interest and disclosure of the document is in accordance with the objects of the FOI Act and that any factual or statistical material contained in the document that does not disclose the deliberations or decision of Cabinet should be released.
20. I agree with the applicant that exemption cannot be claimed for a document merely because it has some connection with Cabinet or because it has some 'Cabinet 'aroma' about it'². The document in question must fit the criteria of one of the exemptions set out in clause 1.
21. I am satisfied that the briefing paper does not merely consist of factual or statistical material.
22. I consider that in the context of clause 1(1)(f) the word 'specifically' means 'specially' prepared. Whether a briefing paper has been specifically prepared for a Minister's use in relation to such a matter is to be ascertained by reference to the events at the time the document was created.³ It is a question of fact.
23. The agency has stated in relation to document 6 that it was '... a briefing paper specially prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet' and that '[t]he intended outcome of the briefing made it into the Budget Cabinet Submission as one of the submitted budget adjustments for which Cabinet ultimately approved' and that the meeting took place on 6 August 2018.
24. I note the following matters:
 - a. The applicant's original application for access to the documents under the FOI Act was made on 31 May 2018
 - b. Document 6 is dated 17 May 2018
 - c. On the face of it document 6 is a briefing note to the Treasurer regarding matters to be discussed with the Federal Minister of Finance
 - d. The date of the Treasurer's proposed discussion with the Federal Minister of Finance is not disclosed but I have inferred that it was imminent at the time document 6 was created
 - e. The agency did not make a determination on the applicant's initial FOI application within 30 days from receipt of his FOI request (i.e. by 30 June 2018)
 - f. The Budget Cabinet Committee meeting in question took place on 6 August 2018
 - g. The agency's internal review determination is dated 5 September 2018.
25. I have considered the applicant's submission that it may not be appropriate for me to rely on assurances from the agency as to the purpose for which document 6 was created. I am of the opinion that I should not do so in this case. I base my view on the content of document 6 as well as the context in which it was brought into existence and its proximity to the handing down of the Federal Budget. I take into account that the Budget Cabinet Committee meeting which is claimed to have considered document 6 did not take place for almost three months after the document was created. For these reasons, I am of the view that document 6 was not 'specifically prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet' and is consequently not exempt pursuant to subclause 1(1)(f).

² *Birnbaumer v Department of Industry Technology and Resources (No. 2)* (1986) 1 VAR 279, 286.

³ *Re Fisse and Department of Treasury* (2008) 101 ALD 424, 434

26. In coming to this view, I have also had regard to the wording of the agency's submission that it was the 'intended outcome of the briefing' that was included in a Budget Submission to Cabinet and not the briefing itself.

27. The agency also submitted that document 6 is exempt pursuant to clause 1(1)(e) of Schedule 1 of the FOI Act. The agency provided no evidence to support that submission other than the statements outlined in paragraph 25 above.

28. The applicant submitted that:

To satisfy the requirement of clause 1(1)(e) it would be necessary for the document itself and the Cabinet minutes, and decisions, to clearly show how the document informed the Cabinet discussion (deliberation as it is described in 1(1)(e) of the Act) and decision.

29. I do not accept the applicant's submission accurately sets out the test to be applied when considering whether a document is exempt under clause 1(1)(e). The test was set out by the District Court of South Australia in *Department of State Development v Pisoni* [2017] SADC 34 (**Pisoni**) and more recently considered by the South Australian Civil and Administrative Tribunal in *Department of the Premier and Cabinet v Dan van Holst Pellekaan*⁴ (**van Holst Pellekaan**).

30. In *Pisoni*, Tilmouth J noted that '... it is an established principle that documents prepared for future submission to Cabinet can be protected from disclosure...'⁵ He also noted⁶

There is highly persuasive, and 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 Louse 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 any 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 on to 'draw any inferences as to what may 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 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

(references omitted).

31. In *Pisoni*, Tilmouth J also considered the meaning of the phrase 'deliberation ... of Cabinet'. He noted '... speaking generally the protection is aimed at preventing the disclosure of documents that shed light on the decision making process in Cabinet'⁷ and '... "deliberation" is referable to Cabinet's "thinking processes" ... the content of discussions taking place in the Cabinet room ... what Cabinet ministers "had on their minds" ... the content of Cabinet consideration with a view to making a decision...'⁸ (references omitted).

⁴ [2018] SACAT 56

⁵ [2017] SADC 34 at [19]

⁶ *ibid* at [20]

⁷ *ibid* at [25]

⁸ *ibid* at [26]

32. In *van Holst Pellekaan*, Executive Senior Member Stevens adopted the meaning attributed to 'deliberation' by Tilmouth J in *Pisoni*.⁹
33. 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.¹⁰

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* (1994) 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...¹¹

34. Both *Pisoni* and *van Holst Pellekaan* confirm that the exemption provided in clause 1(1)(e) can apply to documents created prior to the relevant Cabinet deliberations.¹²
35. Document 6 is stated to capture material presented to Cabinet (or a Cabinet Committee), although it is not apparent on the face of the document that this is the case. The only suggestion within the document itself that it might have found its way to Cabinet is the marking 'Sensitive: SA Cabinet' in its footer. That in itself is not determinative of the nature of the document or that its content would disclose a deliberation or decision of Cabinet. The marking in the footer designates the document's security classification for the purpose of risk management of sensitive material rather than addressing the specific criteria of clause 1(1) of the FOI Act.
36. While I consider it likely the subject matter of document 6 (Commonwealth infrastructure grants) would have been considered by Cabinet at some point, there is nothing on the face of document 6 that discloses information concerning a deliberation or decision of Cabinet. Further the agency has provided no evidence from which I could conclude that any of the content of document 6 was considered in a deliberation or decision of Cabinet.
37. In *van Holst Pellekaan*, 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?¹³
38. I have adopted these questions as the relevant test for the application of clause 1(1)(e) to document 6 .
39. In relation to the first question, I accept that Cabinet (or a Cabinet Committee) did have deliberations about matters that are addressed in document 6.
40. In relation to the second question, I have considered the content of the document itself in light of the agency's submission that connects the document to the deliberations of

⁹ [2018] SACAT 56 at [70]

¹⁰ *ibid* at [66]

¹¹ *ibid* at [67] - [68]

¹² [2017] SADC 34 at [19] and [2018] SACAT 56 at [74] - [76]

¹³ at para 81.

Cabinet. Having done so, I am not satisfied that disclosure of the briefing paper will reveal information concerning the deliberation of Cabinet.

41. I am therefore satisfied that the briefing paper is not exempt pursuant to subclause 1(1)(e).
42. It is also submitted by the agency that I should consider whether document 6 is exempt under clause 5 of Schedule 1 of the FOI Act.
43. Document 6 does no more than outline points for discussion between the Treasurer and the Commonwealth Minister for Finance. The subject for discussion concerned timing of payment of Commonwealth infrastructure grants. The fact of the Commonwealth's commitment to providing the funding had been announced or confirmed in the (then) recently delivered Federal Budget and were consequently public knowledge.
44. Section 25 of the FOI Act provides (relevantly):

25—Documents affecting inter-governmental or local governmental relations

 - (1) This section applies to a document that contains matter concerning the affairs of—
 - (a) the Government of the Commonwealth or of another State; or
 - (b) a council (including a council constituted under a law of another State).
 - (2) An agency must not give access under this Act to a document to which this section applies unless the agency has taken such steps as are reasonably practicable to obtain the views of the Government or council concerned as to whether or not the document is an exempt document by virtue of clause 5 of Schedule 1.
45. To satisfy the requirements of section 25, I sought the views of the Commonwealth Minister of Finance in relation to my revised provisional determination and the disclosure of document 6. I was advised by the Minister's office that that 'the [Minister] has no objections to [my revised provisional] determination, and will not be making any submissions in regards to this matter'.
46. I determine that document 6 neither contains matter that could reasonably be expected to cause damage to intergovernmental relations if disclosed nor divulges information from a confidential intergovernmental communication. Accordingly document 6 does not meet the criteria for exemption under clause 5(1)(a).
47. The applicant has submitted that the content of document 6 is a matter of public interest and that any factual or statistical material contained in document 6 that does not disclose the deliberations or decision of Cabinet should be released. In response to this submission I note that while the public interest is a relevant consideration in whether a document should be exempt under clause 5 of Schedule 1 to the FOI Act, the Act does not include a public interest test in relation to exemptions claimed under clause 1.
48. In relation to clause 5, consideration of the public interest comes into play where the criteria set out clause 5(1)(a) have been met. In this case they have not and I have accordingly not considered the public interest in the content of document 6.

Document 8

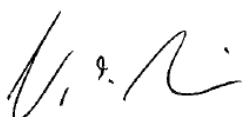
49. Document 8 is described by the agency as *Agency Performance Report - May 2018*.
50. In relation to document 8 the applicant submitted as follows:

It is hard to understand how an "Agency Performance Report" ...would "disclose information concerning a deliberation or decision of cabinet. These reports are provided by the department to monitor an agency's operating performance, on the basis of financial and other metrics. An Agency Performance Report contains factual and statistical material, which itself is permitted to be released under clause 1(2) and (ab).

51. I appreciate that in making his submissions the applicant is limited to the information available to him. I am mindful of my obligations not to reveal matter claimed as exempt by the agency, however the applicant's summation of the content of the document based on its title is incorrect. In my view document 8 does more than contain just factual and statistical material.
52. The agency has claimed the document is exempt pursuant to clause 1(1)(a) of Schedule 1. It has submitted that the document was specifically prepared for submission to Cabinet and has provided evidence that document 8 was considered at the meeting of the Budget Cabinet Committee on 23 May 2018. Clause 1(3) provides that a reference to Cabinet includes a reference to a committee of Cabinet.
53. I accept the agency's submissions in this regard. I am of the opinion that I should be able to rely on uncontroverted evidence of public servants who have obligations under the *Public Sector Act 2009* and the *Code of Ethics for the South Australian Public Sector*. Given that I have no information before me to suggest that I should doubt the officers' statements, I accept that document 8 was specifically prepared for submission to the Budget Cabinet Committee.
54. I am therefore satisfied, subject to any further submissions that I may receive, that document 8 is an exempt document under clause 1(1)(a).

Determination

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



Wayne Lines
SA OMBUDSMAN

1 August 2019

APPENDIX 1

Procedural steps

Date	Event
31 May 2018	The agency received the FOI application dated 31 May 2018.
2 July 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
23 August 2018	The agency received the internal review application dated 22 August 2018.
5 September 2018	The agency varied the determination.
10 September 2018	The Ombudsman received the applicant's request for external review dated 10 September 2018.
13 September 2018	The Ombudsman advised the agency of the external review and requested submissions and documentation.
24 September 2018	The agency provided the Ombudsman with its submissions and documentation.
8 November 2018	Ombudsman SA requested that the agency provide further evidence.
13 November 2018	The agency provided further information to Ombudsman SA.
15 January 2019	The Ombudsman issued a provisional determination.
29 January 2019	The applicant provided submissions to Ombudsman SA in response to the provisional determination.
10 July 2019	The Ombudsman issued a revised provisional determination varying the agency's determination.
26 July 2019	The interested party advised that it did wish to make submissions in relation to the revised provisional determination. The applicant and the agency did not respond to the Ombudsman's invitation to make submissions.

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
Document 6	Briefing paper to the Treasurer from Department of Treasury and Finance dated 17 May 2018 titled Commonwealth Infrastructure Grants	Exempt in full pursuant to clause 1(1)(e) of Schedule 1	Agency's determination reversed – document to be released in full	Briefing paper and attachment outlining proposed Commonwealth funding for infrastructure projects
Document 8	Agency Performance Report - May 2018	Exempt in full pursuant to clause 1(1)(a) of Schedule 1	Agency's decision confirmed	Not applicable