



Freedom of Information and the Nyrstar lead smelter at Port Pirie

Over the past year, my office has reviewed nine determinations by the Environment Protection Authority (EPA) and the Department for Manufacturing, Innovation, Trade, Resources and Energy (DMITRE) to refuse requests under the FOI Act for access to documents concerning communications with the state government about:

- an alleged breach by Nyrstar of the serious environmental harm provisions of the *Environment Protection Act 1993* (SA) arising from high emissions of lead in Port Pirie between 2009 and 2010 (4 reviews - EPA - Ref nos 2012/08071, 2012/08074, 2012/08076 & 2012/07146)
- potential legal action relating to Nyrstar's operations or altered licence conditions on Nyrstar operations between 2011 - 2012 (2 reviews - EPA - Ref nos 2012/05775 & 2012/05833)
- ministerial briefs and correspondence with Nyrstar between 2010 - 2012 regarding the smelter (2 reviews - DMITRE - Ref nos 2012/08625 & 2012/08630)
- Bespoke Approach (Hon Kevin Foley/Ian Smith/Hon Alexander Downer/Hon Nick Bolkus) and Nyrstar operations at Port Pirie (1 review - EPA - Ref no 2013/06815)

In the first six reviews above, I accepted that the EPA could claim exemptions under the Act relating to Cabinet, parliamentary privilege, legal privilege and breach of confidentiality under the Environment Protection Act.

However, I did not accept the EPA's reliance on an exemption claiming that its investigations into Nyrstar's operations and alleged breach of the EP Act would be prejudiced if the documents were disclosed or that disclosure would be contrary to the public interest. While I agreed that there was a public interest in the EPA being able to investigate and prosecute breaches of the EP Act, I considered that there were persuasive countervailing public interest arguments to justify disclosure of the documents. These were that disclosure of the documents may contribute to public debate on an ongoing significant public health issue and also enhance scrutiny and accountability of the EPA's and the government's decision making processes.

In relation to following two reviews, DMITRE claimed exemptions in the Act with a public interest component, and submitted that release of many of the documents would, on balance, be contrary to the public interest.

I provisionally informed DMITRE that I was not persuaded that this was the case; and I noted the following public interest reasons for disclosure of the documents:

- negotiations between the government and private organisations take place against the setting of the FOI Act, which has the objects of promoting accountability of government
- disclosure of the documents may allow public scrutiny of the government's expenditure and decision-making in relation to the smelter
- the operations of the smelter impact on economic, environmental, health and employment issues, and there had been media coverage about related concerns.

The Minister for the Public Sector subsequently provided to me his assessment of the public interest under section 39(9) of the FOI Act, which says:

If, in determining an application for a review under this section-

- (a) the relevant review authority is advised that the determination of the agency was made on grounds of public interest; and
- (b) the Minister administering this Act makes known to the relevant review authority the Minister's assessment of what the public interest requires in the circumstances of the case subject to review,

the relevant review authority must, in determining the application, uphold that assessment unless satisfied there are cogent reasons for not doing so.

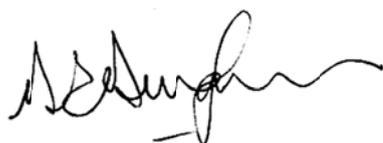
The Minister's assessment and the agency's (later) submissions referred in particular to the deleterious impact of disclosure of the documents on:

- Nyrstar and the confidence of future investors
- the state economy, and the regional economy of the Port Pirie area
- the future ability for continued confidential discussions regarding financial sustainability between businesses that make substantial contributions to the state's economic and social welfare and government.

In my determinations, I maintained my views about the public interest; but I did not consider they reached the threshold of being 'cogent reasons' to depart from the Minister's assessment in relation to the documents.

I was mindful of the significance of the Nyrstar project to the South Australian economy;¹ the passing of the *Port Pirie Smelting Facility (Lead-in-air Concentrations) Act 2013*; the desirability of Nyrstar attracting private investors in the project; and the ongoing negotiations between the state government and Nyrstar about the upgrading of the smelter to allow its continued operation. I was persuaded that there was a public interest in withholding the documents from disclosure at this stage; and that it is likely that this will change after negotiations in relation to the project have concluded.

In respect of the last review, I was satisfied that the EPA had conducted reasonable searches for documents and that none could be located.



Richard Bingham
SA Ombudsman

11 November 2013

¹ Report of the Select Committee on the Port Pirie Smelting Facility (Lead-in-air Concentrations) Bill July 2013. Tabled in the House of Assembly, published pursuant to Standing Order 346, 25 July 2013.