

Determination

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

Applicant	The Hon Stephen Mullighan MP
Agency	The Treasurer
Ombudsman reference	2019/03889
Agency reference	TRS19D0421
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:

Any documents, minutes, briefings, emails, notes or correspondence provided to the Treasurer and Treasurer's Office regarding the termination of employment contracts in the Public Service, from 1 April 2018 to 22 February 2019, inclusive.

Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.

Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 14 November 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 agency 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.

8. Relevant to this external review are the following clauses in Schedule 1:

1—Cabinet documents

(1) A document is an exempt document—

...

- (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.

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.

16—Documents concerning operations of agencies

(1) A document is an exempt document if it contains matter the disclosure of which—

(a) could reasonably be expected—

...

(iii) to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or

...

(v) to have a substantial adverse effect on the conduct of industrial relations by an agency; and

(b) would, on balance, be contrary to the public interest.

17—Documents subject to contempt etc

A document is an exempt document if it contains matter the public disclosure of which would, but for any immunity of the Crown—

...

(c) infringe the privilege of Parliament.

9. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.

10. Section 39(9) provides that:

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 the 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 the review,

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

11. 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

12. The agency identified four documents within the scope of the application:
- a. document 1 is a Parliamentary Briefing Note to the Treasurer created on 26 April 2018
 - b. document 2 is a Parliamentary Briefing Note to the Treasurer created on 16 October 2018
 - c. document 3 is a Minute to the Treasurer from the Commissioner for Public Sector Employment dated 18 July 2018 and attachment
 - d. document 4 is a Minute to the Premier from Commissioner for Public Sector Employment dated 6 April 2018 and attachments.

Issues in this review

13. The issue is whether the agency has correctly determined that the four documents are exempt under the FOI Act.
14. In his application for external review the applicant has specifically raised the issue of whether clause 1(1)(f) properly applies to documents 3 and 4.
15. The applicant has also questioned the basis on which the agency has asserted that the release of documents 3 and 4 would be contrary to the public interest in connection with its determination that the documents are exempt under clause 9(1).
16. A further issue has arisen in relation to the scope of my external review as a consequence of submissions from the agency on my external review and further submissions in response to my Provisional Determination. The agency contends that I should consider only those parts of document 3 that the agency has identified as being specifically within the scope of the applicant's request for access in my external review, notwithstanding that the agency's determination related to the whole of the document.

Consideration

Documents 1 and 2

17. Documents 1 and 2 are Parliamentary Briefing Notes prepared for the Treasurer. The agency determined both documents to be exempt pursuant to clause 17(c) of Schedule 1 to the FOI Act.

Clause 17(3)

18. Clause 17(c) provides that a document is an exempt document if it contains matter that would, if disclosed to the public, infringe the privilege of Parliament.

19. The term 'privilege of Parliament' is not defined in the FOI Act.
20. The scope of the privilege is set out in section 38 of the *Constitution Act 1934* (SA):

38 - Privileges, powers etc of Council and Assembly

The privileges, immunities, and powers of the Legislative Council and House of Assembly respectively, and of the committees and members thereof respectively, shall be the same as but no greater than those which on the twenty-fourth day of October, 1856, were held, enjoyed, and exercised by the House of Commons and by the committees and members thereof, whether such privileges, immunities, or powers were so held, possessed, or enjoyed by custom, statute, or otherwise.

21. Thus the concept of Parliamentary privilege as it applies in South Australia is that developed by the common law including Article 9 of the *Bill of Rights 1688* (UK)²:

Freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament.
22. The protection of Parliament's privilege developed from Article 9 is a broad protection. It has been suggested that the term 'impeach' can mean 'hinder, challenge or censure'.³ My counterpart in Queensland, the Information Commissioner, considered the privilege in the context of the now repealed *Freedom of Information Act 1992* (Qld):

An unauthorised disclosure of 'proceedings in Parliament' will constitute an infringement of the privileges of Parliament, and hence, if the matter in issue can properly be characterised as a 'proceeding in Parliament', it will be exempt matter under s.50(c)(i) [the equivalent of clause 17(c)] of the FOI Act, unless its public disclosure has been authorised ...⁴
23. I agree with this view, and consider that it applies equally to the South Australian FOI Act.
24. In *President of the Legislative Council v Kosmas* the court noted that the direct business of [Parliament] included 'investigation, debate and legislating'⁵.
25. In *Sportsbet Pty Ltd v New South Wales (No 3)*, the Federal Court accepted that notes for a Minister's use in Parliament were protected by parliamentary privilege,⁶ and found that the privilege protects such documents 'from disclosure and not mere use'.⁷
26. In the case of documents 1 and 2 it is evident from the nature of the documents that they were prepared for the purpose of a Minister's use in connection with Parliamentary investigation or debate and accordingly their disclosure is protected by Parliamentary privilege.
27. I determine that documents 1 and 2 are exempt pursuant to clause 17(c) of Schedule 1 of the FOI Act.

² The privilege is not confined to that stated in the Bill of Rights - see *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at [36]; *President of the Legislative Council v Kosmas* [2008] SAIRC 41 at [36]

³ *The First Report - Joint Select Committee on Parliamentary Privilege* (UK), March, 1999, [36].

⁴ *Ainsworth Nominees Pty Ltd and the Criminal Justice Commission* (1999) 5 QAR 284, [59].

⁵ 2008] SAIRC 41 at [40]

⁶ *Sportsbet Pty Ltd v New South Wales (No 3)* [2009] FCA 1283, [21] (Jagot J).

⁷ *Sportsbet Pty Ltd v New South Wales (No 3)* [2009] FCA 1283, [21] (Jagot J), cited with approval in *Sportsbet Pty Ltd v Harness Racing Victoria (No 4)* [2011] FCA 196, [20] (Mansfield J).

Document 3

Scope

28. In its determination dated 6 April 2019, the agency identified the whole of document 3, comprising 82 pages, as being within the scope of the applicant's request for access dated 22 February 2019, and refused access to the document in its entirety on the basis that it was exempt under clause 1(1)(f) of Schedule 1 to the FOI Act.
29. In its submissions on this external review, the agency contended only certain paragraphs of document 3 concern the subject matter of the applicant's FOI request and argues that, notwithstanding its determination related to the entire document, I should, in my external review, consider only those parts of the document that the agency has now identified as being relevant to the applicant's request.
30. The basis of the agency's submission is that:
 - the agency erred in identifying the whole of the document as being within the scope of the applicant's FOI request;
 - the agency's obligation to disclose documents under the FOI act is only enlivened when a proper application is made for the documents;
 - because the applicant has not applied for access to those parts of the document that the agency contends are out of the scope of the FOI request, there is no obligation on the agency to disclose those parts of the document and further, if it were to do so, the agency would be unable to rely on the protections in sections 50-52 of the FOI Act; and
 - consequently the jurisdiction of the Ombudsman and the South Australian Civil and Administrative Tribunal to make a determination on external review with respect to those parts of the document is not enlivened.
31. Having reviewed document 3 in its entirety I make the following observations:
 - document 3 is in fact a "... briefing ... provided to the Treasurer [which includes information] regarding the termination of employment contracts in the Public Service' which was created within the date range specified by the applicant, and therefore falls within the terms of the applicant's request for access;
 - a significant amount of the document relates to matters other than the termination of employment contracts in the Public Service.
32. The FOI Act is concerned with providing access to an agency's documents⁸ and does not provide for an agency either to read down an application so that it is treated as applying for access only to 'relevant' parts of documents that fall within the terms of the request or to provide the applicant with access only to 'relevant' parts of such documents.
33. My jurisdiction under the FOI Act does not extend to reviewing the agency's interpretation of the scope of the request or to considering whether the agency correctly identified a document as being within scope. These are not 'determinations' of the agency for the purposes of the FOI Act⁹.
34. My jurisdiction under section 39 of the FOI Act is to review the determination made by the agency in relation to documents the agency identified to be within scope in its original determination and/or on internal review. In this case the agency's determination related to the whole of document 3.

⁸ *Freedom of Information Act 1991*, section 12

⁹ *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5

35. If I am to confirm the agency's determination that document 3 is exempt under clause 1(1)(f), I must make that determination in relation to the whole document and not an extract or extracts from the document. This is apparent when one considers the wording of clause 1(1) which starts with the words ' a *document* is an exempt document ...' (emphasis added). The exemption, if made out, will apply to the entire document.
36. The exemption under clause 1(1)(f) is enlivened by the purpose of the document itself, rather than its content. The document must be considered as a whole in order to determine the purpose for which it was prepared and consequently whether the exemption can apply.
37. This interpretation is further supported by section 20 of the FOI Act. Subsection 20(1) provides that 'an agency may refuse access to a document (a) if it is an *exempt document*...' (emphasis added) and subsection 20(4) provides that (where practicable to do so) an agency must not refuse access to a copy of a document from which the *exempt matter* has been deleted. Thus it is clear that the exemption applies to the *whole* document, notwithstanding it is only a portion of the content that renders it exempt.
38. I turn now to consideration of whether the exemption in clause 1(1)(f) can apply to document 3.

Clause 1(1)(f)

39. Document 3 comprises of a one page minute from the Commissioner for Public Sector Employment to the Treasurer dated 18 July 2018 with an attached document which is described as a 'Discussion, Recommendations and Options Paper' (**discussion paper**). The minute includes a recommendation that the Treasurer consider the content of the discussion paper with a view to, *inter alia*, drafting a Cabinet submission. The discussion paper is more precise in its recommendation indicating that the preparation of a Cabinet submission and drafting instructions for amendments to the *Public Sector Act 2009 (PS Act)* and *Public Sector Regulations 2010* is the primary recommendation, and that consultation with affected parties is recommended to occur following Cabinet endorsement of proposed amendments.
40. In claiming this document is exempt under clause 1(1)(f) the agency contends that the minute and attached discussion paper is a briefing paper prepared for use by the Treasurer in relation to a matter proposed to be submitted to Cabinet.
41. In its submissions to my Office the agency stated

The authorities on cl. 1(1)(f) and equivalent clauses in freedom of information legislation in other jurisdictions make it clear that what is relevant here is the purpose of the preparation of the document. The purpose of preparation must be for the use of a Minister in relation to a matter submitted or proposed to be submitted, to Cabinet. It need not be the sole purpose, but it must be clear from the evidence that it was a substantial purpose.
42. In support of this submission the agency relies on the decision of the Supreme Court of Victoria - Court of Appeal in *Secretary to the Department of Treasury and Finance v Dalla-Riva*¹⁰ and in particular the following extract:

¹⁰ [2007] VSCA 11

... the Tribunal proceeded upon the basis that each of the purposes referred to in paragraphs (b) and (ba) in s.28(1) of the Act need not be the sole purpose for the preparation of the document. The purpose could be one of a number of purposes provided it was a substantial purpose. Although this Court has not had the benefit of full argument on the point, I am inclined to think that the Tribunal's approach was correct. The purpose identified in the relevant paragraph of s.28(1) may be the dominant purpose or one of a number of significantly contributing purposes. Notwithstanding that the objects of the Act set out in s.3 appear to me to warrant construing the rights conferred by the Act liberally and the exceptions narrowly, in my view, as long as a purpose meeting the statutory description was causative in the sense that, but for its presence, "the power would not have been exercised", it need not have been the sole purpose for the preparation of the document in question. I do not think that the Act requires release of a document disclosing material considered and dealt with by Cabinet merely because the document, which was principally prepared for submission to Cabinet or to brief a Minister in relation to Cabinet issues, also served another purpose or other purposes.¹¹¹²

43. The decision in *Dalla-Riva* relied upon by the agency concerns s28(1)(ba) of the Victorian *Freedom of Information Act 1982*. This provision is worded differently to clause 1(1)(f) of the South Australian Act. Importantly, the word 'specifically' [prepared for the use of the Minister...] does not appear in s28(1)(ba). In my view *Dalla-Riva* can be distinguished on this point.
44. Regardless, my view is that document 3 was clearly specifically prepared for use by the Treasurer in connection with a matter that is recommended to be submitted to Cabinet.
45. When initially reviewing document 3, I had two reservations about the application of clause 1(1)(f) to it. First the document does not accord with the generally understood concept of a briefing paper and secondly, whether it could properly be said that the discussion paper relates to a matter *proposed* to be submitted to Cabinet when, to put it at its highest, it contains recommendations that the matters canvassed by it should be submitted to Cabinet.
46. With regard to the first concern, I have considered the content of the discussion paper carefully and have concluded that it does in fact provide a briefing to the Treasurer on the proposed amendments to legislation and regulations.
47. With regard to the second issue, I conclude that the agency has provided evidence through its submissions of an intent that, if not all, then at least some of the recommendations in the discussion paper will be submitted to Cabinet for approval and it is my view that this is sufficient to establish the exemption in clause 1(1)(f).

Clause 9(1)

48. The agency also relies on clause 9(1) in relation to document 3. The agency submits that the document comes within the scope of clause 9(1)(a)(i) in that the document is an internal working document that contains advice and recommendations for the purpose of the decision-making functions of the Treasurer and more broadly the Government through Cabinet.
49. I accept that document 3 contains opinion, advice and recommendations prepared for the purpose of consideration by the Treasurer in connection with his decision-making functions concerning proposals to amend the PS Act. I also accept that the opinion, advice and recommendations in document 3 were prepared with the intent that they be considered by Cabinet in connection with its decision-making functions.

¹¹ references omitted

¹²¹² *ibid* at [13]

50. In order for me to find that the exemption in clause 9(1) applies to document 3, I must be satisfied that its disclosure would be, on balance, contrary to the public interest. I have addressed the public interest considerations in relation to both documents 3 and 4 later in this determination.

Clause 16

51. Although not relied upon in its determination or on internal review, the agency has submitted that the exemptions outlined in sub-clauses 16(1)(a)(iii) and (v) also apply to document 3.
52. Clause 16 provides relevantly that a document is an exempt document if it contains matter the disclosure of which could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or to have a substantial adverse effect on the conduct of industrial relations by an agency.
53. In its submissions on the application of clause 16 the agency contends that there is a reasonable expectation that the adverse effects would apply to, not only the agency which is the subject of this external review, but to other agencies within Government and that references to 'an agency' in clause 16 are not intended to be confined to the agency to which the application for release of information has been made. I accept these submissions.

54. In relation to clause 16(1)(a)(iii), the agency submitted as follows:

The words, "could reasonably be expected" must be given their ordinary meaning and the claimed effects must not be fanciful, imaginary or contrived, nor irrational, absurd or ridiculous. "Substantial adverse effect" has been held to mean an effect that is sufficiently serious or significant to cause concern to a properly informed, reasonable person.

The phrases in cl. 16(1)(a)(iii), "management of personnel" or the "assessment of personnel" are defined in the Guidelines of the Australian Information Commissioner in respect of the equivalent provision in the *Freedom of Information Act 1982* (Cth), which have previously been cited with approval in various determinations of your Office, as follows:

the management of personnel - includes the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety

the assessment of personnel - includes the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance.

I accept these submissions.

55. I also accept the agency's submission that there would likely be an adverse effect on agencies' management and assessment of personnel if document 3 is disclosed at this present time as it would create considerable uncertainty among both agencies and employees in relation to matters involving recruitment, promotion, demotion and termination of employees, and performance management.
56. Further, agencies, employees and potential employees may make decisions relating to retention or recruitment based on, either the recommendations in document 3, or the underlying policies outlined in the document, when the government is yet to accept the recommendations or adopt the policies.

57. In relation to clause 16(1)(a)(v) the agency submits that disclosure could reasonably be expected to have a substantial adverse effect on future industrial negotiations with the public service, including enterprise bargaining negotiations, particularly since such a disclosure would relate to a proposal that is yet to be adopted by the Government. Further, disclosure could also be reasonably expected to cause considerable industrial unrest within the public sector workforce.
58. I accept these submissions and conclude that disclosure of document 3 would consequently have an adverse impact on the conduct of industrial relations by agencies.
59. Clause 16(1)(b) also requires that I consider the balance of public interest in determining whether a document is exempt under clause 16(1)(a). I have addressed the public interest considerations later in this determination.

Document 4

60. Document 4 is a minute from the Commissioner for Public Sector Employment to the Premier dated 6 April 2018. It has annexed two attachments.
61. Attachment 2 is a draft Direction of the Premier under section 10 of the PS Act. A Direction, in substantially the same form as the draft in attachment 2, was executed by the Premier on 10 April 2018 and is publicly available via a link on the policy page of the website of the Office of the Commissioner for Public Sector Employment. The differences between the draft in attachment 2 and the published version are minor and not material. My view consequently is that attachment 2 to document 4 is not exempt from disclosure under the FOI Act.

Clause 1(1)(f)

62. Turning to the balance of document 4, the agency claims firstly that it is exempt under clause 1(1)(f). The basis for this claim appears to be a recommendation in the covering minute that a cabinet submission be prepared, if the Premier wished to consider the possibility of changes to the PS Act.
63. I consider that document 4 is not exempt under clause 1(1)(f). At the time it was written there was no cabinet submission, or even a proposed cabinet submission; there was no more than a statement to the effect that a cabinet submission would be required if the Premier accepted one of the recommendations in the minute. I do not think that there is sufficient nexus between document 4 and a 'matter submitted or proposed to be submitted to Cabinet' to bring it within the exemption in clause 1(1)(f).

Clause 9

64. The agency also submits that document 4 is exempt under clause 9 of Schedule 1.
65. I am satisfied that document 4 satisfies the requirements of clause 9(1)(a) in that it contains advice and recommendations that have been prepared for the purpose of the decision-making functions of the Premier.
66. As mentioned earlier, clause 9(1)(b) contains a public interest test which must be satisfied in order for the exemption to apply. I have addressed the public interest considerations later in this determination.

Clause 16

67. The agency has also claimed, in its submissions in response to this external review, that document 4 is exempt under sub-clauses 16(1)(a)(iii) and (v).
68. I am unable to agree with the agency that disclosure of document 4 could give rise to a reasonable expectation of a substantial adverse effect on the management or assessment by an agency of its personnel for the following reasons:
- The recommendations in document 4 are relevant to only a small percentage of employees in any agency being those engaged at the highest level.
 - One of the recommendations in document 4 has been adopted and in operation since 10 April 2018.
 - The other recommendation does not reflect a developed policy of the government at that time, rather a suggestion that a policy could be developed. Given the lack of policy detail, there is little basis for speculation as to any possible adverse effect it might have on agencies' management or assessment of personnel.
69. I consider it more likely that disclosure of document 4 would have a substantial adverse effect on the conduct of industrial relations by State government agencies as it would promote uncertainty about conditions of employment and thus would likely impact on future industrial negotiations including enterprise bargaining negotiations. For this reason I determine, subject to satisfaction of the public interest test, that the exemption in sub-clause 16(1)(a)(v) would apply to document 4.

Public Interest

70. Both clauses 9(1) and 16(1) require that I form the view that disclosure of the documents would, on balance, be contrary to the public interest in order for the documents to be exempt under the respective clauses.
71. The agency has provided comprehensive submissions on the public interest in response to this external review. I have taken those submissions into consideration.
72. Additionally the Attorney-General, being the Minister who has the administration of the FOI Act, has made it known to me by letter dated 5 July 2019 of her assessment of the public interest in relation to [parts of] document 3 and document 4 for the purposes of section 39(9) of the FOI Act.
73. The Attorney-General has advised me that, in her assessment, disclosure of [parts of] document 3 and document 4 in its entirety is contrary to the public interest, and that the public interest requires the documents be exempt from disclosure.
74. Section 39(9) requires that I uphold the Attorney-General's assessment unless there are cogent reasons for not doing so. According to the Full Court of the Supreme Court of South Australia 'cogent' means 'compelling, convincing, powerful'¹³.
75. I do not consider that there are cogent reasons for not upholding the Attorney-General's assessment and I accept her assessment insofar as it applies to document 3, and in relation to document 4, with the exception of attachment 2.

¹³ *Registrar of Firearms v Marksman Training Systems Pty Ltd (No. 2)* [2016] SASCFC 72 at [315]

76. In my view the balance of public interest lies in favour of disclosure of attachment 2, given that the document is already in the public domain. I find this a cogent reason for departing from the Attorney-General's assessment.
77. I have noted above that the Attorney-General's assessment extended only to parts of document 3, specifically those parts that the agency submitted to me were within the scope of the applicant's request for access.
78. I now turn to consider the public interest in relation to the balance of document 3. In doing so, I have taken into account the views expressed by the Attorney-General in her letter of 5 July 2019 and consider them persuasive.
79. As noted above, the agency provided comprehensive submissions regarding matters to be taken into account in considering the balance of public interest in disclosure of internal working documents, including the factors identified by Davies J *Re John Howard and the Treasurer of the Commonwealth of Australia*:¹⁴
- The higher the office of the persons between whom the communications pass and the more sensitive the issues involved the more likely it will be that the communications should not be disclosed.
 - The disclosure of communications made in the course of the development and consequent promulgation of policy tends not to be in the public interest.
 - Disclosure that will inhibit frankness and candour in future communications is likely to be contrary to the public interest.
 - A further consideration is that disclosure may lead to confusion and unnecessary debate resulting from the disclosure of possibilities that are being considered.
 - Other factors which may need to be taken into account are whether the document is directed to an expert reader and thus assumes an understanding of the subject matter, the extent to which it contains outdated material and whether there has been any publication of the material in other forms.
 - Disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to the decision-maker and may prejudice the integrity of the decision-making process.
80. In *Attorney-General for the State of South Australia v Seven Network (Operations) Ltd* the Full Court of the Supreme Court of South Australia noted that although the *Howard* factors have been seen as relevant, courts have been careful not to treat them as mandatory or exhaustive of the public interest.¹⁵
81. The Victorian Supreme Court has held, that the public interest considerations underlying the exemption (in the Victorian *Freedom of Information Act 1982*) for internal working documents include:
- ... the efficient and economical conduct of government, protection of the deliberative processes of government, particularly at high levels of government and in relation to sensitive issues, and the preservation of confidentiality so as to promote the giving of full and frank advice.¹⁶

¹⁴ (1985) 7 ALD 626 at 634 - 635

¹⁵ [2019] SASFC 36 at [127] and [132]

¹⁶ *Secretary, Department of Justice v Osland* [2007] VSCA 96 per Maxwell P at [77]

82. Additionally, the Victorian Civil and Administrative Tribunal in *Re Hulls and Victorian Casino and Gaming Authority*¹⁷ added several other considerations that may be taken into account in determining where the public interest lies, relevantly including:

- The degree of sensitivity of the issues involved in the deliberation;
- The state of the policy development process when the document was created;
- The likelihood that disclosure would create mischief in one way or another.

83. Based on the above, I consider the following factors weighing against disclosure of document 3 particularly relevant:

- the communication in document 3 is at a very high level, from the Commissioner of Public Sector Employment to the Treasurer
- the communication was made at an early stage in the course of development of government policy
- the subject matter of document 3 is highly sensitive
- disclosure would likely inhibit frankness and candour in future communications
- disclosure is likely to lead to confusion and unnecessary debate concerning the options outlined
- disclosure has the potential to cause considerable 'mischief' in the nature of industrial action by parties that may be impacted by proposed changes, or their representatives.

84. In balancing these factors against factors in support of disclosure:

- promoting openness in government and accountability of Ministers
- facilitating effective participation by members of the public in processes involved in the making and administration of laws and policy,

and having had regard to the agency's submissions and to the content of document 3, I have formed the view that, on balance, the public interest lies against disclosure.

Determination

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



Wayne Lines
SA OMBUDSMAN

6 January 2020

¹⁷ (1998) 12 VAR 483

APPENDIX 1

Procedural steps

Date	Event
22 February 2019	The agency received the FOI application dated 22 February 2019.
6 April 2019	The agency's Principal Officer determined the application.
15 April 2019	The Ombudsman received the applicant's request for external review dated 15 April 2019.
23 April 2019	The Ombudsman advised the agency of the external review and requested submissions and documentation.
9 July 2019	The agency provided the Ombudsman with its submissions and documentation.
14 November 2019	The Ombudsman issued his provisional determination and invited submissions from the parties.

APPENDIX 2

Document in issue	Description	Agency's determination	Ombudsman's determination	Information proposed to be released
1	Parliamentary Briefing Note created 26 April 2018	Exempt clause 17(c)	Exempt clause 17(c)	Nil
2	Parliamentary Briefing Note created 16 October 2018	Exempt clause 17(c)	Exempt clause 17(c)	Nil
3	Minute to the Treasurer from the Commissioner for Public Sector Employment dated 18 July 2018 and attachment	Exempt clause 1(1)(f) clause 9(1)	Exempt clause 1(1)(f) clause 9(1) clause 16(1)(a)(iii) clause 16(1)(a)(v)	Nil
4	Minute to the Premier from Commissioner for Public Sector Employment dated 6 April 2018 and attachments	Exempt clause 1(1)(f) clause 9(1)	Partially exempt clause 9(1) clause 16(1)(a)(v)	Attachment 2