OmbudsmanSA

Determination

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

Applicant	Mr Jeffrey Morrall
Agency	Department of the Premier and Cabinet
Ombudsman reference	2013/00183
Agency reference	DPC12/2677
Determination	The determination of the agency is varied.

REASONS

Background

1. On 25 August 2009 the agency responded to a letter from the applicant by providing the following information about the position of General Manager of the Oak Valley, Maralinga Tjarutja lands:

> The Department for the Premier and Cabinet's Aboriginal Affairs and Reconciliation Division undertook six months consultation with the Maralinga Tjarutja and Oak Valley Councils to determine the best organisational and management structure to meet the human service, community development and well-being needs of the Oak Valley community.
>
> The revised organisational structure and General Manager Oak Valley position, as advertised on the 8 August 2009, was agreed to by the Oak Valley community in June 2009, and endorsed by the Maralinga Tjarutja and Oak Valley Councils on 3 July 2009. The Maralinga Tjarutja Council's Lawyer, Mr Andrew Collett, supports their endorsement.

2. By application under the *Freedom of Information Act 1991* (the FOI Act) received by the agency on 14 November 2012, and with reference to the above letter, the applicant requested access to:

> 1. Briefing paper supplied to Minister Weatherill pertaining to the Maralinga Tjarutja Land Rights (Miscellaneous) Amendment Bill presented to Parliament 17th November 2009.
> 2. Details of outcomes of six month consultation with Maralinga Tjarutja and Oak Valley Councils.
> 3. Names of Council members constituting both Maralinga Tjarutja and Oak Valley Councils respectively who endorsed the revised organisation structure in June 2009.
> 4. Date of appointment of successful applicant to the position of General Manager of Oak Valley.
> 5. Names of any independent negotiators involved in the consultation process.
> 6. Details of terms and conditions agreed to by State and Federal Governments pertaining to the hand back of Sec 400 and associated compensation.

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3. The agency failed to determine the application within the 30-day period required by the FOI Act.[1] Therefore in accordance with section 19(2) of the FOI Act it was taken to have determined the application by refusing access.

4. The applicant requested an internal review of this 'deemed' refusal, by application received by the agency on 19 December 2012.

5. The agency failed to determine the application within the 14-day period required by the FOI Act, and is therefore taken to have again determined the application by refusing access to the documents[2] (**the agency's determination**).

External review

6. By application dated 5 January 2013, the applicant requested my external review of the agency's determination under section 39 of the FOI Act.

7. By letter dated 9 January 2013, I notified the agency of my review. I requested all relevant documents, including additional evidence and argument which the agency considered justified its determination, in light of the provisions of section 48 of the FOI Act.

Provisional determination

8. I provided my tentative views about the agency's determination to the parties by my provisional determination dated 19 March 2013. I informed the parties that subject to my receipt and consideration of submissions from them, I proposed to vary the agency's determination pursuant to section 39(11) of the FOI Act, to enable documents 2, 3, 8, 9 and 10 to be released to the applicant in their entirety, and documents 1, 11 and 12 to be released to the applicant in part.

9. The agency, applicant, and interested parties provided submissions in response to my provisional determination. They are discussed below. I have considered these submissions in the reasons for my determination.

10. Following receipt of the applicant's response dated 24 March 2013, one of my legal officers wrote to the agency and requested:

    1. a brief response to the applicant's claims [questioning the sufficiency of the agency's searches for documents]

    2. a summary of the searches conducted in an attempt to locate relevant documents, including the search terms used to conduct any electronic searches and how far back the agency's electronic records are dated.

11. On 12 April the agency provided an internal email dated 8 April 2013 describing the searches it had conducted for documents.

Relevant provisions of the FOI Act

12. The objects of the FOI Act are set out in section 3, to 'promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State'; and 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'.

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[1] Section 14(2), FOI Act.
[2] Section 29(5), FOI Act.

13. It is further stated in section 3(2) that the means by which these objects are intended to be achieved are:

> (a) ensuring that information concerning the operations of government (including, in particular, information concerning the rules and practices followed by government in its dealings with members of the public) is readily available to members of the public and to Members of Parliament; and
>
> (b) conferring on each member of the public and on Members of Parliament 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 (including maintenance of the effective conduct of public affairs through the free and frank expression of opinions) and the preservation of personal privacy; ...

14. Section 3A(1) states that the parliament has intended:

> (a) that this Act should be interpreted and applied so as to further the objects of this Act; and
>
> (b) that a person or body exercising an administrative discretion conferred by this Act exercise the discretion, as far as possible, in a way that favours the disclosure of information of a kind that can be disclosed without infringing the right to privacy of individuals.

15. The FOI Act provides that upon receipt of an application for access to documents, an agency is entitled to make a determination to refuse access where the documents are 'exempt'. The term 'exempt document' is defined as 'a document which is an exempt document by virtue of Schedule 1.'[3] Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access.

16. Under section 48 of the FOI Act, the onus is on the agency to justify its determination 'in any proceedings'. In my opinion, this includes the external review process.

17. To justify its determination, the agency must give reasons for its determination and show the findings on any material questions of fact underlying these reasons, together with a reference to the sources of information on which those findings are based. This is a requirement of an agency in the determination process under the FOI Act; and in my opinion, it is equally applicable in an external review.

18. Section 39(11) of the FOI Act provides that I may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

The documents

19. The agency has identified 12 documents within the scope of the application. A copy of the agency's schedule of documents is **Attachment 1** to this determination.

The agency's submissions

20. In a letter to me dated 29 January 2013 the agency's Director of State Services detailed the agency's position with respect to each of the 12 documents. The substance of, and quotes from, this letter are set out below.

Document 1

21. The agency submitted that:

[3] See sections 4 and 20(1)(a), FOI Act.

> Document 1 is a minute from the (then Acting) Executive Director of the Aboriginal Affairs and Reconciliation Division (AARD), DPC, to the Minister for Aboriginal Affairs and Reconciliation. The minute provides a briefing on two matters. DPC considers that there is no information contained under the heading 'Status regarding the General Manager position', (page one) that falls within the scope of the application and suggests that this information is redacted before release.

22. In the event that I disagreed with this submission, the agency claimed that parts of page 1 are exempt under clause 10(1) of Schedule 1 to the FOI Act.

23. The agency did not object to the remainder of the document being released, namely the text that appears above the heading 'Status ...' on page 1, along with pages 2 and 3 in their entirety.

Documents 2 and 3

24. The agency did not object to documents 2 and 3 being released to the applicant.

Documents 4 to 7

25. The agency submitted:

> Document 6 has been specifically prepared for submission to Cabinet. Therefore, DPC submits that this document is exempt from disclosure under clause 1(1)(a) of Schedule 1 to the FOI Act. Documents 4 and 5 are both minutes which summarise document 6, and therefore DPC considers that both documents are exempt from disclosure pursuant to clause 1(1)(e) of Schedule 1 to the FOI Act, as the disclosure of the documents would reveal information related to the deliberations or decisions of Cabinet. Document 7 is a costing comment prepared in relation to the Cabinet submission to which it was attached (document 6). Costing comments are created for the sole purpose of accompanying a Cabinet submission to assure ministers the costings contained in the submission are accurate, and also repeat details of the submission itself. DPC therefore submits that document 7 is exempt from disclosure under clauses 1(1)(a) and 1(1)(e) of Schedule 1 to the FOI Act.

Documents 8 and 9

26. The agency did not object to documents 8 and 9 being released to the applicant.

Documents 10 and 11

27. The agency claimed that documents 10 and 11 were prepared by Parliamentary Counsel and were therefore exempt pursuant to clause 10(1) of Schedule 1 to the FOI Act.

Document 12

28. The agency submitted:

> that only paragraph four, which refers to the date of appointment of [the] successful applicant to the position of the General Manager of Oak Valley, falls within the scope of the original FOI request, and that the remainder of the letter is not relevant and should therefore be redacted before this document is released.

29. By email dated 8 April 2013, an officer of the agency's AARD described the searches for documents as follows:

> I have undertaken an additional search within the Objective records management system and the DPC-AARD shared network drive for any correspondence between the

> Commonwealth agency - Office of Indigenous Policy Coordination and DPC-AARD between 2005 and 2006.
> This search has resulted in no documents being found.
>
> Previously DPC-AARD undertook a thorough search within the Objective records management system and the AARD shared drive where all staff are required to save any documentation for documents listed in the original request.
>
> The search criteria used was:
> Any record (files & physical documents) with Maralinga
> Any record (files & physical documents) with Maralinga Tjarutja
> Any record (files & physical documents) with Oak Valley
> Any record (files & physical documents) with Sec 400 handing back of MT
> Any record (files & physical documents) with MT
>
> The only information resulting from these searches is what was previously provided.
>
> As discussed with you... in the past we have not been as diligent in registering every document and linking it to a file as we should have been. In some cases documentation has been retained, however not necessarily in an Objective file so it is not always easily located and retrieved. In some case[s] the documentation has been filed in an Objective file, however the title doesn't reflect the topic of the documentation.
>
> This does present difficulty in locating documents that people believe we should have copies of, and we endeavour to do our best in locating the relevant documents to comply with the FOI requests however our only method of searching is the Objective records management system and the shared network drive.
>
> The DPC-AARD files within Objective date back to 2006.

30. By letter dated 12 April 2013 the agency advised that it could not locate the instructions to Parliamentary Counsel. The agency, however, submitted:

> That the production of the drafting instructions is not necessary to show the draft bill prepared by Parliamentary Counsel is exempt pursuant to clause 10... Parliamentary Counsel does not produce draft bills without first being instructed to by government, and ... [referred to a document indicating] that such instructions existed. I do not believe that it is necessary to know the exact content of these instructions to be able to conclude that the draft bill was prepared in the context of advice being the agency and its legal advisors.

31. The above letter refers expressly to document 10. During a discussion between an agency officer and one of my legal officers on 30 April 2013, the agency confirmed that it also relies on these submissions to claim that the regulations that form part of document 11 are exempt pursuant to clause 10(1) of Schedule 1 to the FOI Act.

32. During a discussion between an agency officer and one of my legal officers on 2 April 2013, the agency conceded, however, that the Report to the Legislative Review Committee (**the Report**) that forms the other part of document 11 is not subject to legal professional in its entirety or to parliamentary privilege.

The applicant's submissions

33. In an email to my office dated 4 March 2013, the applicant expressed his hope 'after all this that the information will be useful for my thesis'.

34. In a response to my provisional determination dated 24 March 2013, the applicant questioned the sufficiency of the agency's searches for documents. His response included the following submissions:

> ... On the 23rd August 2005 the Office of Indigenous policy coordination on behalf of the Federal Government and the South Australian Government intervened in the operation of Maralinga Tjarutja and Oak Valley Community Inc. In early 2006 the two arms of Government, Federal and State, signed the Overarching Agreement on Indigenous Affairs formalising a whole of Government approach to Indigenous affairs throughout South Australia... Verity Edwards writes
>
> '*Before the land is handed over, which the community hopes will be in September, the SA Government must pass legislation transferring management. With the federal Government pushing the deal and preparing to wash its hands of 50 years of nuclear history, the Rann Government is unlikely to stall the passage of the legislation through parliament*'.[4]
>
> ...
>
> If the 2006 Weekend Australian article is to be believed, and there has been no repudiation of the text, then the six month consultation between the State Government and Maralinga Tjarutja was a *fait accompli*, must have been a part of the terms and conditions of the hand-back of Sec 400 set in 2006...
>
> ... [I]t beggars belief that there was no correspondence between the two strands of government particularly as there existed in 2006 a new initiated policy of joint responsibility...

35. Following a discussion with the applicant on 2 April 2013, one of my legal officers sent an email to the applicant to confirm the extent to which he believed additional documents may exist and be held by the agency as follows:

> As I understand it, you believe there must be correspondence between the State and Federal governments about the legislation between August 2005 and May 2006. In addition, you believe that any such documents may be within the scope of item 6 of your application.

The interested parties' submissions

Commonwealth Department of Resources, Energy and Tourism ***(the department)***

36. I consulted the department about documents 8 and 9.

37. In an email dated 15 April 2013, the department's FOI Co-ordinator advised that the department did not object to these documents being released. The FOI Co-ordinator noted that the department had released them to the applicant 'on 17 January 2013 outside the *Freedom of Information Act 1982 (Cth)* ... as clause 16 of the Deed [document 8] allows for the provision of the Deed upon request.'

Maralinga Tjarutja Community Inc; Maralinga Tjarutja; Oak Valley (Maralinga) Inc; and the Maralinga Piling Trust

38. By letter dated 19 March 2013 I consulted the General Manager of Maralinga Tjarutja Community Inc about parts of documents 1 and 3.

39. From discussions between members of my staff and an officer of the agency on 10 April and 16 April 2013, I understand that the General Manager of Maralinga Tjarutja Community Inc is not available at present and the Acting General Manager did not wish to respond to my letter due to a potential conflict of interest. The Acting General Manager and General Manager are both employees of the agency.

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[4] Verity Edwards, 'Maralinga fallout', *The Weekend Australian* (Australia), 20-21 May 2006, 22.

40. As a result, on 12 April 2013, Mr Andrew Collett was asked to respond to my letter dated 19 March 2013.[5]

41. By letter dated 17 April 2013 Mr Collett responded on behalf of his clients, Maralinga Tjarutja; Oak Valley (Maralinga) Inc; and the Maralinga Piling Trust. I have summarised his submissions below to the extent that I consider practicable without disclosing claimed exempt matter.

42. Mr Collett advised that his clients object to the following information being released:

From document 1

(a) the first sentence of the penultimate paragraph on page 2

(b) the last sentence of the penultimate paragraph on page 3

From document 3

(c) the first sentence under the heading 'Background' on page 1

(d) the last sentence of the first paragraph below the item 1 heading for 'Discussion' on page 2.

43. Mr Collett submitted that the parts of the documents referred to above represent his clients' business, professional or financial affairs.

44. Mr Collett submitted that release of such information may affect his clients' capacity to continue attracting grant funding, which is their sole source of income. Mr Collett further submitted that it may result in the traditional owners losing confidence and the benefits available to them being reduced.

45. Mr Collett claimed that disclosure of each part referred to above would be contrary to the public interest. He has addressed each part separately.

46. Briefly stated, Mr Collett noted that documents 1 and 3 were prepared in August 2008 and May 2009, respectively. He submitted that the information in each case is 'important and sensitive', but is not in the public domain. Mr Collett further submitted that disclosure of the parts 'would not contribute to debate on a matter in the public interest or enhance scrutiny of government decision making.'

Document 1

Mr Collett submitted that the option proposed on page 2 has not come to pass. Regarding page 3, he submitted that no further such statements have been made, AARD has not raised the issue with his client, and the 'government has no role to play' in relation to this client. He claimed that the information on page 2 is 'generalised and hearsay' and could affect future grants, and the information on page 3 is 'anecdotal' and obligations of confidence mean that his client could not easily respond to it.

Document 3

Mr Collett submitted that the information on both pages is generalised and hearsay, the information on page 1 is vague and could affect future grants, and the information on page 2 is wrong and could affect confidence in his client. In addition, Mr Collett submitted that the information on both pages had not been raised by AARD elsewhere.

[5] This approach also addresses concerns raised by the applicant in his response to my provisional determination.

The relevant exemption provisions in Schedule 1

47. In Attachment 2, I have set out the clauses in Schedule 1 to the FOI Act which the agency relies on to refuse access to documents 4 to 7, 10 and 11, namely clauses 1(1)(a), 1(1)(e) and 10(1) of Schedule 1 to the FOI Act. In addition, I have included clauses 6(1) and 7(1)(c) of Schedule 1 to the FOI Act, which I consider relevant.[6] I have set out my views about the operation of these clauses, and what needs to be shown to justify claiming them as a basis for refusing access to documents. I have applied those views in my consideration of the agency's determination below.

Consideration of the submissions and the agency's determination

Document 1

48. Document 1 is a minute to the Minister for Aboriginal Affairs and Reconciliation (**the Minister**) dated 26 August 2008. It refers to past events and circumstances that existed at the time that the document was created.

49. Having regard to the terms of the application for access, my view is that the information that appears under the heading 'Status ...' on page 1 is outside its scope.

50. Given this, I do not intend to consider the agency's alternative claim that the part of page 1 under the heading 'Status ...' is exempt under clause 10(1) of Schedule 1 to the FOI Act.

51. I consider that this document contains information concerning the business affairs of Mr Collett's clients, namely:

    (a) the first sentence of the penultimate paragraph on page 2

    (b) the last sentence of the penultimate paragraph on page 3.

    Given the time that has elapsed since the document was created, I am not satisfied that disclosure of such information could reasonably be expected to have an adverse effect on their affairs by limiting future grants, or prejudice the future supply of such information to the Government or an agency. I am prepared to accept that disclosure of some of the information may reduce the confidence that traditional owners have in one of Mr Collett's clients, but consider this risk to be remote given the time that has elapsed since the document was created. In any event, I am not satisfied that disclosure of either part would, on balance, be contrary to the public interest having regard to the age of the document; the objects of the FOI Act; and the importance of government decision-making processes and the factors informing such processes being transparent. In addition, information of this sort is in the public domain.[7]

52. In my view, the matter that is within scope, namely the text that appears above the heading 'Status ...' on page 1, along with pages 2 and 3 in their entirety, is not exempt under the FOI Act.

Documents 2 and 3

53. The agency does not object to documents 2 and 3 being released to the applicant.

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[6] I have a discretion to consider exemptions not relied upon by the agency: *Department of the Premier & Cabinet v Redford* (2005) 240 LSJS 171, [29].

[7] I will not include the reference here, but will advise the agency and Mr Collett of it.

54. I consider that document 3 contains information concerning the business affairs of Mr Collett's clients, namely:

    (c) the first sentence under the heading 'Background' on page 1

    (d) the last sentence of the first paragraph below the item 1 heading for 'Discussion' on page 2.

    My discussion of document 1 above applies equally to document 3.

55. My view is that these documents are not exempt under the FOI Act.

Documents 4 and 5

56. Document 4 is a minute to the Chief Executive of the agency dated 10 November 2009 and document 5 is a minute to the Minister. The subject of both documents is clearly the Cabinet submission, which is referred to as being attached. In addition, both documents refer to a number of matters for which Cabinet approval was sought.

57. I am satisfied that releasing documents 4 and 5 would disclose Cabinet deliberations.

58. In my view, none of the exceptions in clauses 1(2) and 1(2a) of Schedule 1 to the FOI Act apply. Specifically, the documents do not *merely* consist of factual or statistical information for the purposes of clause 1(2)(a)(i).

59. I am satisfied that documents 4 and 5 are exempt under clause 1(1)(e) of Schedule 1 to the FOI Act.

60. Having regard to the contents of the documents, my view is that it would not be practicable to provide partial access, as envisaged by section 20(4) of the FOI Act.

Document 6

61. Document 6 comprises a 'Cabinet Cover Sheet' and a minute that is addressed to 'the Premier for Cabinet'. Both parts of document 6 are unsigned but refer to 2009 below the signature blocks. Having regard to the contents of each part of the document, I am satisfied that it was specifically prepared for submission to Cabinet.

62. In my view, none of the exceptions in clauses 1(2) and 1(2a) of Schedule 1 to the FOI Act apply. Specifically, the documents do not *merely* consist of factual or statistical information for the purposes of clause 1(2)(a)(i).

63. I am satisfied that document 6 is exempt under clause 1(1)(a) of Schedule 1 to the FOI Act.

64. In my view, section 20(4) of the FOI Act has no application in this instance, because of the way that clause 1(1)(a) of Schedule 1 to the FOI Act is worded.[8]

Document 7

65. Document 7 is a costing comment. It is an attachment to document 6 and it specifically refers to the Cabinet submission. The agency has submitted that '[c]osting comments are created for the sole purpose of accompanying a Cabinet submission'. I accept that document 7 was specifically prepared for submission to Cabinet.

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[8] Clause 1(1)(a) provides that '[a] document is an exempt document – *if it is a document* that has been specifically prepared for submission to Cabinet' [my emphasis]. This is in contrast to a number of other exemption clauses that provide that '[a] document is an exempt document *if it contains matter* –...' [my emphasis].

66. In my view, none of the exceptions in clauses 1(2) and 1(2a) of Schedule 1 to the FOI Act apply.

67. I am satisfied that document 7 is exempt under clause 1(1)(a) of Schedule 1 to the FOI Act.

68. In my view, section 20(4) of the FOI Act has no application in this instance, for the same reasons I have outlined above with respect to document 6.

Documents 8 and 9

69. The agency and the department do not object to documents 8 and 9 being released to the applicant.

70. My view is that these documents are not exempt under the FOI Act.

Documents 10 and 11

71. Document 10 is comprised of a draft amendment bill and an 8-page draft report about the bill. Document 11 is comprised of regulations and the Report.

72. The agency claims that document 10 and the regulations that form part of document 11 were prepared by Parliamentary Counsel and are therefore exempt pursuant to clause 10(1) of Schedule 1 to the FOI Act.

73. I accept that the relationship between the government and Parliamentary Counsel may be one of client and lawyer.[9] Advice given by Parliamentary Counsel 'in relation to the drafting and preparation of bills' may therefore be subject to legal professional privilege.[10] According to a decision of the Federal Court:

> [16] The question then arises as to the scope of the retainer between the State and Parliamentary Counsel in circumstances where Parliamentary Counsel is asked to prepare draft legislation. The scope of a retainer may not be confined to the client's express instructions. Matters which would reasonably arise in the course of carrying out express instructions should be regarded as coming within the scope of the retainer...
>
> [21] Similarly with preparing draft legislation... Parliamentary Counsel do not merely type or format the legislation. Parliamentary Counsel apply legal skill and knowledge to give written expression to the policy underlying the proposed legislation. Parliamentary Counsel would be expected, and perhaps under a duty, to advise upon the legality or effectiveness of the legislation being sought by the instructors. In the case of subordinate legislation, if regarded as beyond power, Parliamentary Counsel would presumably advise of this view. Similarly, if an Act of Parliament was considered unconstitutional, or inconsistent with another Act of Parliament, this is a matter Parliamentary Counsel would be expected to advise upon, even if the only express instruction was to draft the legislation.
>
> [22] Where no problem of this kind arises, Parliamentary Counsel, in drafting the legislation and presenting the draft to the government agency, is in effect advising that the draft legislation is in accordance with the instructions given and gives legal effect to those instructions. The draft itself is not the legal advice, but the communication in providing the

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[9] *State of New South Wales v Betfair Pty Ltd* (2009) 180 FCR 543, [15]; cited in *Fitzpatrick v NSW Office of Liquor and Gaming* [2010] NSWADT 72, [76].

[10] *General Manager, WorkCover Authority of NSW v Law Society of NSW* (2006) 65 NSWLR 502, [74]; See also: *State of New South Wales v Betfair Pty Ltd* (2009) 180 FCR 543, [15] – [24]; *Fitzpatrick v NSW Office of Liquor and Gaming* [2010] NSWADT 72, [72] and [76]; *Three Rivers District Council v Governor and Company of the Bank of England* (No 6) [2004] UKHL 48, [41].

> draft legislation contains implicitly the advice of Parliamentary Counsel endorsing the draft legislation as being effective and valid.
>
> [23] It is impossible to disentangle the creation of the draft legislation and the giving of advice in these circumstances. It is not a matter of there being multiple concurrent purposes. Undoubtedly if there were purposes of equal weight, then neither would be dominant, and a claim for privilege would fail. However, there is only one purpose here - to obtain the advice of Parliamentary Counsel, and the communicating of that advice is given in the form of draft legislation.
>
> [24] Therefore, the purpose of the government agency providing instructions to Parliamentary Counsel is to obtain effective and valid draft legislation that is in accord with the instructions. The provision of draft legislation without more necessarily involves Parliamentary Counsel implicitly advising that the draft legislation provided is effective and valid.[11]

74. According to the footer of the draft amendment bill (part of document 10) and the regulations (part of document 11) they were prepared by Parliamentary Counsel. Both parts of document 10 refer to the same date and reference number, and judging by their contents they are connected. I accept that document 10 and the regulations (part of document 11) were prepared by Parliamentary Counsel.

75. Although the agency has not provided me with the details of the instructions given to Parliamentary Counsel, having regard to the agency's submissions in response to my provisional determination, I accept that document 10 and the regulations (part of document 11) were prepared by Parliamentary Counsel for the dominant purpose of giving legal advice to the government.

76. It is not apparent from the face of the Report (the other part of document 11) that it was prepared by Parliamentary Counsel. The multiple contact officers listed on the final page, along with the reference to an attached document at paragraph 6.2 (which has not been provided to me) suggest that Parliamentary Counsel may not have prepared it.

77. The agency no longer claims that the Report is exempt in its entirety.

78. Paragraphs 3.12 (on page 3) and 3.26 (on page 5) of the Report refer to advice from the Solicitor General and the Crown Solicitor's Office, respectively. In my view, such information would be privileged from production in legal proceedings on the ground of legal professional privilege.

79. Paragraph 6.4 on page 7 of the Report includes information about the health of an individual. In my view, such information constitutes that person's personal affairs for the purposes of clause 6(1) of Schedule 1 to the FOI Act. Having regard to the nature of the information, I consider it likely that the person concerned would not want the information disclosed without their consent. In addition, my view is that the relevance of this paragraph is minimal given that the land was handed back to its traditional owners in 2009.

80. My view is therefore that document 10 is exempt pursuant to clause 10(1) and document 11 is exempt pursuant to clauses 6(1) and 10(1) of Schedule 1 to the FOI Act. Nevertheless, I consider that it would be practicable to release document 11 after deleting the regulations, and paragraphs 3.12, 3.26 and 6.4 from the Report, in accordance with section 20(4) of the FOI Act.

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[11] *State of New South Wales v Betfair Pty Ltd* (2009) 180 FCR 543, [16].

Document 12

81. The agency submitted that only paragraph four is within the scope of the application for access. The agency consented to this paragraph being released, after redacting the other paragraphs.

82. Having regard to part 2 of the application for access,[12] my view is that the following information is also within scope:

    (a) part of the third paragraph (the last word of the second line; the first seven words of the third line; the fourth line, excluding the year at the beginning; the fifth to the seventh lines)

    (b) the fifth paragraph

    (c) the first sentence of the sixth paragraph

    (d) the first two sentence of the seventh paragraph.

83. My view is that paragraph 4 and the additional information described at paragraph 82 is not exempt under the FOI Act.

Sufficiency of the agency's searches

84. The FOI Act does not prescribe the manner in which an agency must search for documents within the scope of an application. It is my role in an external review to determine, on the evidence provided to me, whether the agency has conducted a reasonable search for documents in the circumstances.

85. The applicant believes that the agency holds additional documents, namely 'correspondence between the State and Federal governments about the legislation between August 2005 and May 2006', and that any such documents would be within the scope of item 6 of his application. Item 6 requests '[d]etails of terms and conditions *agreed to* ...' (my emphasis).

86. The agency's searches to date have not identified any such documents. Although the agency concedes that its records management practices have not always been perfect, I note that AARD's records within the Objective records management system only date back to 2006. In addition, item 6 of the application is contingent on terms and conditions having been agreed to.

87. I am not persuaded that the agency holds additional documents within the scope of the application.

88. Further, even if the agency does hold additional documents within the scope of the application, I am satisfied that the agency's searches for documents to date have been reasonable in the circumstances.

Determination

89. In light of the above, I vary the agency's determination pursuant to section 39(11) of the FOI Act, to enable documents 2, 3, 8, and 9 to be released to the applicant in their entirety, and documents 1, 11 and 12 to be released to the applicant in part as follows:

[12] Part 2 of the application requested 'Details of outcomes of six month consultation with Maralinga Tjarutja and Oak Valley Councils.' It is not clear from the information provided by the agency to date when the 'six months consultation' occurred.[12] During a conversation on 2 April 2013 the applicant submitted that it was in 2009. I will proceed on this basis.

(a) the text that appears above the heading 'Status ...' on page 1, along with pages 2 and 3 of document 1 in their entirety

(b) all but the regulations, and paragraphs 3.12, 3.26 and 6.4 of the Report from document 11

(c) paragraph 4 and the additional information described at paragraph 82 above of document 12.

Richard Bingham
SA OMBUDSMAN

1 May 2013

Attachments:
1. Schedule of documents
2. Relevant exemption clauses under Schedule 1 to the FOI Act

SCHEDULE OF DOCUMENTS—DPC12/2677

Freedom of Information application from Mr Jeffrey Morrall, seeking access to:

1. *Briefing paper supplied to Minister Weatherill pertaining to Maralinga Tjarutja Land Rights (Miscellaneous) Amendment Bill presented to Parliament 17th November 2009.*
2. *Details of outcomes of six month consultation with Maralinga Tjarutja and Oak Valley Councils.*
3. *Names of Council members constituting both Maralinga Tjarutja and Oak Valley Councils respectively who endorsed the revised organisation structure in June 2009.*
4. *Date of appointment of successful applicant to the position of General Manager Oak Valley.*
5. *Names of any independent negotiators involved in the constitutional process.*
6. *Details of terms and conditions agreed to by the State and Federal Governments pertaining to the hand back of Sec 400 and associated compensation.*

No	Author	Addressee	Date	Description of document	Determination	Reason
1.	Nerida Saunders, Executive Director, Aboriginal Affairs and Reconciliation Division, Department of the Premier and Cabinet (AARD-DPC)	Minister for Aboriginal Affairs and Reconciliation	26 August 2008	*Minute: Maralinga Tjarutja – Meeting with Lynn Breuer MP* *Physical Id DPC08D06638* *File DPC08/0308*	Release in part	Sections not relevant (If sections deemed to be relevant, then part exempt clause 10(1) – Legal professional privilege
2.				MT & OVM Structural Framework Arrangement Attachment to Document 1	Release in full	No exempt material
3.	Principal Project Manager, Rob Foster, DPC	Kim Petersen, Director Remote Communities, AARD-DPC	18 May 2009	Minute - Re: Assistance to Oak Valley Maralinga Community Physical Id DPC09D04471 File No DPC09/0209	Release in full	No exempt material
4.	Nerida Saunders, Executive Director, AARD-DPC	Chief Executive, DPC	10 November 2009	Minute - Re: Cabinet Submission – Transfer of Section 400, out of Hundreds (Maurice) ("Section 400") to Maralinga Tjarutja Physical Id DPC09D09711 File No DPC09/0128	Refuse in full	Exempt clause 1(1)(e) – Information which would disclose deliberation or decision of Cabinet
5.				Minute to Minister for Aboriginal Affairs and Reconciliation Physical Id DPC09D09711 Attachment to Document 4	Refuse in full	Exempt clause 1(1)(e) – Information which would disclose deliberation or decision of Cabinet
6.				Cabinet submission re transfer of Section 400 to Maralinga Tjarutja Attachment to Document 5	Refuse in full	Exempt clause 1(1)(a) – Cabinet document
7.				Costing Comment Attachment 1 to Document 6	Refuse in full	Exempt clause 1(1)(e) - Information which would disclose deliberation or decision of Cabinet

Attachment 1 - 2013/00183

SCHEDULE OF DOCUMENTS—DPC12/2677

No	Author	Addressee	Date	Description of document	Determination	Reason
8.				Maralinga Nuclear Test Site Hand back Deed Attachment 2 to Document 6	Consult Commonwealth (DPC has no objections to release)	Inter-governmental relations
9.				Maralinga Land and Environment Management Plan (Annexure to Document 8) Attachment 3 to Document 5	Consult Commonwealth (DPC has no objections to release)	Inter-governmental relations
10.	Parliamentary Counsel			Draft Maralinga Tjarutja Land Right (Miscellaneous) Amendment Bill 2009 Attachment 4 to Document 5	Refuse in full	Exempt clause 10(1) – Legal professional privilege
11.	Parliamentary Counsel			Environment Protection Variation Regulations 2009 Attachment 5 to Document 4	Refuse in full	Exempt clause 10(1) – Legal professional privilege
12.	Nerida Saunders, Executive Director, AARD-DPC	Ms Leonie Scott, Ms Kelly Sleep, Ms Linda Bennie		Letter - re: Letter dated 9 August 2011 sent to the Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP.	Release in part	Sections not relevant

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Attachment 2 - 2013/00183
Relevant exemption clauses under Schedule 1 to the FOI Act

1. The *Freedom of Information Act 1991* (the FOI Act) provides that an agency is entitled to refuse access to an 'exempt document'. The term 'exempt document' is defined as 'a document which is an exempt document by virtue of Schedule 1.[1] Schedule 1 to the FOI Act contains a list of clauses which may be claimed by an agency as a basis for refusing access to a document. In addition, I may have regard to exemption clauses not relied on by the agency.[2]

Clauses 1(1)(a) and 1(1)(e)

2. The relevant parts of clause 1 of Schedule 1 to the FOI Act provide as follows:

> **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...
>
> (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.
>
> (2a) A document is not an exempt document by virtue of this clause if–
>
> (a) the document has been submitted to Cabinet by a Minister; and
>
> (b) a Minister has certified that Cabinet have approved the document as a document to which access may be given under this Act.
>
> (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.

3. I consider that in the context of clause 1(1)(a) the word 'specifically' means 'specially' prepared for submission to Cabinet. It will be sufficient if submission to Cabinet was 'the dominant purpose or one of a number of significantly contributing purposes' for the document's creation.[3] Whether a document has been prepared for submission to Cabinet is to be ascertained by reference to the events at the time the document was created.[4]

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[1] The FOI Act, sections 4 and 20(1)(a).
[2] *Department of the Premier & Cabinet v Redford* (2005) 240 LSJS 171, [29].
[3] *Secretary to the Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11, [13] per Buchanan JA.
[4] *Re Fisse and Department of Treasury* (2008) 101 ALD 424, 434.

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4. The words 'information concerning' in clause 1(1)(e) mean that it has a broad scope. Whether releasing a document would 'disclose information concerning any deliberation or decision of Cabinet' is a question of fact. When interpreting this clause, I have had regard to the South Australian District Court judgment of *Rann v SA Water & Baker (No 2)*[5] and a decision of the New South Wales Administrative Decisions Tribunal, *McGuirk v Director-General, The Cabinet Office*.[6] *McGuirk* concerned clause 1(1)(e) of the *Freedom of Information Act 1989* (NSW), which mirrored clause 1(1)(e) of the FOI Act (SA). In *McGuirk*, Judicial Member Montgomery commented that:

> ... Clause 1(1)(e) is not merely concerned with 'disclosing Cabinet deliberations'. It also concerns 'information concerning any deliberation or decision of Cabinet'...
>
> In my view it is possible that a document that pre-dates a Cabinet meeting could still contain information that is 'relevant to' or 'about' the deliberative or decision-making process... For example, a Cabinet Minute that contains a series of recommendations upon which Cabinet deliberates logically contains subject matter that is 'relevant' to or 'about' these deliberations. At the very least, such a document 'concerns' these deliberations because it helped to shape the course of these deliberations. To the extent that any document is so central to a Cabinet meeting that it shapes the course of, or outcome of, any deliberations of Cabinet, the disclosure of its contents could reveal information concerning the process of deliberation or decision-making.

I agree with the Judicial Member's interpretation, and consider it applicable to clause 1(1)(e) of Schedule 1 to the FOI Act (SA).

Clause 6(1)

5. Clause 6(1) of Schedule 1 to the FOI Act provides:

> 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).

6. In order for a document to be exempt under clause 6(1), I must be satisfied that:

   (a) The document contains the personal affairs of someone other than merely the applicant's (personal affairs is defined inclusively in section 4(1) of the FOI Act); and

   (b) It would be unreasonable to release it.

   The following factors are relevant to interpreting whether a disclosure would be unreasonable under clause 6(1):

> ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance.[7]

   In addition, unreasonableness has 'at its core, public interest considerations',[8] such as the protection of personal privacy (the FOI Act generally does not restrict the use of information once it is released); the objects of the legislation being satisfied; and ensuring transparency and accountability within representative government.

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[5] (Unreported, District Court of South Australia, Chief Judge, 9 August 1996).
[6] [2007] NSWADT 9 at 35-37.
[7] *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALD N257 at 259.
[8] *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429 per Lockhart J at 438.