

Participants:

Ljiljana Maria Ravlich
Complainant

- and -

**Department of the Premier and
Cabinet**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – correspondence – clause 1(1)(b) – whether policy options or recommendations – clause 12(c) – infringe the privileges of Parliament – whether committee a Parliamentary Committee – Parliamentary privileges – whether ‘proceedings in Parliament’ – whether disclosure would infringe the privileges of Parliament.

Freedom of Information Act 1992: Schedule 1: clauses 1(1) and 12(c);

Freedom of Information Act 1982 (Cth): section 46

Parliamentary Privileges Act 1891: section 1

Right to Information Act (Qld): Schedule 3, clause 6

Parliamentary Privileges Act 1987 (Cth): section 16(2)

Parliament of Queensland Act 2001 (Qld): section 9(1)

Re Environmental Defender’s Office (Inc) and Ministry for Planning [1999]

WAICmr 35

DECISION

The agency's decision to refuse access to the documents is varied. I find that:

- paragraph 3 of the email sent at 19:30:37 in Document 2, and paragraph 3 of the email sent at 19:30:37 in Document 3, are exempt under clause 1(1)(b).
- Documents 4(a) and 4(b) are exempt under clause 12(c) of Schedule 1 to the FOI Act.

Sven Bluemmel
INFORMATION COMMISSIONER

16 February 2011

REASONS FOR DECISION

1. This complaint arises from a decision made under the *Freedom of Information Act 1992* ('the FOI Act') by the Department of the Premier and Cabinet ('the agency') to refuse Hon Ljiljanna Ravlich MLC ('the complainant') access to documents.

BACKGROUND

2. On 30 January 2009, the complainant applied to the Premier; Minister for State Development for access to:

“all correspondence between your Chief of Staff and any other Minister’s Chief of Staff since 23 September 2008 relating to:

- *Election commitments in your portfolios;*
- *The Royalties for Regions Program and Royalties for Regions Fund; and*
- *The government’s three percent efficiency dividend.”*

3. The application was dealt with by the agency on the basis that the Office of the Premier is declared under column 2 of Schedule 2 to the FOI Regulations, not to be regarded as a separate agency, but it is to be regarded as part of the agency for the purposes of the FOI Act. Following the agency’s request to narrow the scope, the complainant agreed to exclude all personal information and clarified the information sought in the three bullet points, above.
4. On 9 April 2009, the complainant granted an extension of time to the agency until 24 April 2009. A further extension of time was sought on 23 April 2009. On 29 April 2009, the agency informed the complainant of its decision in respect of the six documents identified as within the scope of her application. The agency gave the complainant access to Documents 1 and 4 in edited form, deleting personal information, but refused access to Documents 2, 3, 4(a) and 4(b). The agency also noted that certain information in Documents 2, 3 and 4(b) was outside the scope of the complainant’s access application.
5. On 28 May 2009, the agency confirmed its original decision and, by letter dated 17 June 2009, the complainant applied to this office for external review, as follows:

“I hereby request an external review on documents 2 and 3 which are claimed as exempt under Clause 1(1) of [Schedule] 1 of the Act and documents 4(a) and 4(b) which are claimed as exempt under Clause 12(c) of [Schedule] 1 of the Act.”

REVIEW BY INFORMATION COMMISSIONER

6. Following the receipt of the complainant's application for external review, the agency produced the originals of the documents in dispute in this matter and its FOI file to this office.
7. On 31 January 2011, I provided the parties with a letter setting out my preliminary view of this matter. My preliminary view was that certain information in Documents 2 and 3 was exempt under clause 1(1)(b) and that Documents 4(a) and 4(b) were exempt under clause 12(c) of Schedule 1 to the FOI Act.
8. The agency accepted my preliminary view and gave the complainant access to Documents 2 and 3 edited to delete the information that I considered to be exempt under clause 1(1)(b). The complainant did not accept my preliminary view but made no further submissions.

THE DISPUTED DOCUMENTS AND INFORMATION

9. The disputed documents are described on the agency's schedule of documents, which was given to the complainant, as follows:

Document 2: Email between Chiefs of Staff dated 11/11/2008

Document 3: Email between departmental [Ministerial] staff dated 11/11/2008

Document 4(a): Correspondence dated 18/12/2008

Document 4(b): Correspondence dated 18/12/2008

10. Since the agency has now released Documents 2 and 3 in edited form to the complainant, the information deleted from those documents is the only information in Documents 2 and 3 that remains in dispute. That information is paragraph 3 of the email sent at 19:30:37 in Document 2 and paragraph 3 of the email sent at 19:30:37 in Document 3 ('the disputed information').

CLAUSE 1(1)(b)

11. The agency now claims that the disputed information is exempt under clause 1(1)(b). Clause 1, insofar as it is relevant, provides:

“Cabinet and Executive Council

(1) *Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without limiting that general description, matter is exempt matter if it –*

(a) ...

(b) *contains policy options or recommendations prepared for possible submission to an Executive body.*

...

- (5) *Matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into existence for the purpose of submission for consideration by an Executive body.*
- (6) *In this clause “Executive body” means –*
- (a) Cabinet;*
 - (b) a committee of Cabinet;*
 - (c) a subcommittee of a committee of Cabinet; or*
 - (d) Executive Council.”*

The agency’s submissions

12. In its notices of decision, the agency referred me to *Re Environmental Defender’s Office (Inc) and Ministry for Planning* [1999] WAICmr 35 at [9], which noted that the purpose of the exemption in clause 1 is to protect the confidentiality of Cabinet discussions and consultations between Ministers in order to maintain Cabinet solidarity and collective responsibility. The agency states that confidentiality of Cabinet information is essential for the maintenance of Cabinet responsibility and frankness between Ministers and senior officials.
13. The agency makes the following submissions:
- Both Documents 2 and 3 are marked as ‘Cabinet in confidence’.
 - The disclosure of Documents 2 and 3 would reveal information that is subject to the deliberative process undertaken by the Economic and Expenditure Reform Committee (‘the EERC’), which is a subcommittee of Cabinet and, thus, an ‘Executive body’.
 - If disclosed, Documents 2 and 3 would reveal consultations within Government in relation to election commitments that are subject to the deliberation of the EERC. Those consultations reveal recommendations and considerations that are meant for the deliberation of the EERC.

Consideration

14. I acknowledge that all of the emails in Documents 2 and 3 are marked as being ‘Cabinet in confidence’, although that alone is not sufficient to establish the requirements of clause 1(1).
15. Having examined Documents 2 and 3, I am satisfied from the face of those documents that the disputed information relates to a policy option or recommendation prepared for possible submission to the EERC, which is an Executive body. In light of that, I consider that the requirements of clause 1(1)(b) are satisfied. In my opinion, none of the limits on the exemption in

clauses 1(3) - 1(5) apply. Consequently, I find that the disputed information is exempt under clause 1(1)(b).

CLAUSE 12

16. The agency claims that Documents 4(a) and 4(b) are exempt under clause 12(c) of Schedule 1 to the FOI Act, which provides:

“12. Contempt of Parliament or court

Matter is exempt matter if its public disclosure would, apart from this Act and any immunity of the Crown -

- (a) ...
- (b) ...
- (c) *infringe the privileges of Parliament.*”

The agency’s submissions

17. In its notices of decision, the agency made the following submissions:
- The release of Documents 4(a) and 4(b) would reveal information of a Standing Committee of Parliament that is privileged from production under the FOI Act and would infringe the privileges of Parliament.
 - The information in Documents 4(a) and 4(b) can only be disclosed with the consent of the Standing Committee on Estimates and Financial Operations (‘the Committee’) and the Committee has objected to the release of those documents. Any attempt to release them would, therefore, infringe the privileges of Parliament.

Consideration

18. Documents 4(a) and 4(b) are attachments to Document 4, which is an email sent between the Premier’s former Chief of Staff and the Chief of Staff of the Minister for Agriculture and Food; Forestry and Minister Assisting the Minister for Education (‘the Minister’). The agency gave the complainant access to an edited copy of Document 4 and that particular document is not in dispute.
19. From the copy of Document 4 that was disclosed to the complainant, it can be seen that the attachments to the email included: “*L Council inq on 3 per cent.pdf*” as well as two documents that are not within the scope of the complainant’s access application. The reference to the Legislative Council inquiry is a reference to Documents 4(a) and 4(b) which are letters from the Committee to the Chief Executive Officers of two government agencies. Apart from the addressees, Documents 4(a) and 4(b) are identical.
20. I accept that the Committee is a Parliamentary committee that is a delegate of Parliament. I also acknowledge that the proceedings of such committees are

recognised as ‘proceedings in Parliament’ and have the same privileges and immunities as Parliament itself.

21. In brief, parliamentary privilege comprises certain rights and immunities conferred on Parliament, its committees, members and officers. Those privileges are based on both statute and common law, as provided in s.1 of the *Parliamentary Privileges Act 1891* (‘the PP Act’), and include:
 - freedom of speech and proceedings in Parliament
 - the freedom of each House to control its own affairs
 - the control of publication of Parliamentary proceedings
 - freedom from arrest
 - the power to punish for breach of privilege and contempt
22. I can find no decisions by my predecessors on clause 12(c) but similar provisions are found in the FOI legislation of other Australian jurisdictions, for example, s.46 of the *Freedom of Information Act 1982* (Cth) and clause 6 of Schedule 3 to the *Right to Information Act* (Qld).
23. Although the term ‘proceedings in Parliament’ is not defined in the PP Act or other statutes in this State, s.16(2) of the *Parliamentary Privileges Act 1987* (Cth) defines that term to mean “*all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee*”.
24. Similarly, s.9(1) of the *Parliament of Queensland Act 2001* (Qld) defines ‘proceedings in the Assembly’ to include “*all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee.*”
25. In my view, communications from a Parliamentary committee, such as those in Documents 4(a) and 4(b), are proceedings in Parliament - because they relate specifically to the proceedings of a formally constituted committee of Parliament - and are covered by parliamentary privilege. In my opinion, Documents 4(a) and 4(b) are protected by parliamentary privilege and their disclosure (which under the FOI Act is disclosure to the world at large because no conditions can be placed upon its publication) would infringe the privileges of Parliament.
26. Consequently, I consider that Documents 4(a) and 4(b) are exempt under clause 12(c) of Schedule 1 to the FOI Act.

CONCLUSION

27. For the reasons given, I find that:
 - paragraph 3 of the email sent at 19:30:37 in Document 2, and paragraph 3 of the email sent at 19:30:37 in Document 3, are exempt under clause 1(1)(b); and

- Documents 4(a) and 4(b) are exempt under clause 12(c) of Schedule 1 to the FOI Act.
