

Decision and reasons for decision D0082018 – Published in note form

Re Nahan and Department of Treasury [2018] WAICmr 8

Date of Decision: 6 July 2018

Freedom of Information Act 1992 (WA): Schedule 1, clause 12(c)

Background

On 21 September 2017, Mike Nahan MLA (**the complainant**) applied to the Department of Treasury (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to all draft versions of the 2017-2018 Budget Papers.

On 1 December 2017, the agency decided to refuse the complainant access to the disputed documents on the ground they were exempt under clause 12(c) of Schedule 1 to the FOI Act (**clause 12(c)**). On internal review, the agency confirmed its decision.

The disputed documents are draft versions of the Treasurer's Parliamentary Budget Speech and draft versions of the Treasurer's Budget Papers (**the disputed documents**). Clause 12(c) provides that '*matter is exempt matter if its public disclosure would ... infringe the privileges of Parliament.*'

On 12 January 2018, the complainant applied to my office for external review of the agency's decision to refuse access to the disputed documents. The complainant stated that 'a similar request we received in Government required the budget paper documents to be released'.

Following receipt of the complaint, the agency provided my office with a copy of the disputed documents together with its FOI file maintained in respect of the complainant's access application. On 15 May 2018, my Acting Principal Legal Officer (**PLO**) wrote to the complainant informing him of her initial view that the disputed documents were exempt under clause 12(c) and setting out the reasons for that view. In response, on 21 May 2018, the complainant provided submissions in relation to his complaint.

By email on 18 June 2018, my PLO informed the complainant that I had considered his submissions and for the reasons set out in that email, my preliminary view was that the disputed documents were exempt under clause 12(c) (**preliminary view**). The complainant was invited to accept the preliminary view or to provide me with further submissions.

The complainant did not accept the preliminary view and provided further submissions on 18 June 2018 and 20 June 2018. The complainant maintained his view that the disputed documents were not exempt based on the release of, what he considered to be, similar documents by the former government following legal advice and the Auditor General's Report 18: August 2016 (**Report**).

Consideration

Clause 12(c) is an absolute exemption designed to protect parliamentary privilege and it is not subject to a public interest test. Information will be exempt under clause 12(c) if its *public* disclosure would infringe, that is, breach or contravene the privileges of Parliament.

The agency's submissions are set out in its initial decision and its decision on internal review. The agency submits that parliamentary privilege attaches to the disputed documents as they were prepared predominantly for the purpose of, or incidental to, transacting the business of a house of Parliament. In particular, the disputed documents were drafted primarily for the

purpose of assisting the Treasurer to appear before the Legislative Assembly to introduce the budget Bills and to assist Parliament in the process of debating and decision-making in relation to the State Budget. The agency also submits that public disclosure of the disputed documents that has not been authorised by Parliament would infringe the privileges of Parliament, as described in *Re Saffioti and Minister for Transport* [2012] WAICmr 10 (*Saffioti*).

The complainant submits that he received legal advice in 2013 that the draft documents for the 2012-2013 Government Mid-Year Financial Projections Statement were not exempt under the FOI Act and he submits that the disputed documents are very similar. The complainant also submits that I take a broader legal interpretation of parliamentary privilege than both the previous legal advice he received and the Auditor General (based on the Report).

In my view, the disputed documents are directly referable to proceedings in Parliament because they were prepared for the purpose of conducting the business of a house of Parliament. As a result, parliamentary privilege attaches to those documents. I also consider that public disclosure of the disputed documents would infringe upon the power of Parliament to control the publication of documents and information incidental to transacting the business of the Legislative Assembly, as described in *Re Ravlich and the Department of Premier and Cabinet* [2011] WAICmr 3 and *Saffioti*. It is the public disclosure of the disputed documents that infringes the privileges of Parliament because Parliament has not authorised their public disclosure.

In *Saffioti* at [38], it was observed in relation to the Queensland equivalent of clause 12(c) that:

In Re Stiller, the relevant agency claimed that a ministerial briefing note was exempt ... because it was prepared to assist the Minister to answer questions that might be asked of the Minister in the Assembly. The Queensland Information Commissioner found that the briefing note was exempt as the agency claimed because its preparation was an act done for the purpose of, or incidental to, transacting business in the Assembly.

Consequently, disclosure would encroach or trespass or infringe upon Parliament's power to control the publication of documents and information incidental to transacting the business of the Legislative Assembly.

I have considered all of the material before me, including the complainant's submissions, however, I am not dissuaded from the preliminary view. In summary, I do not consider that the complainant's submissions relating either to the previous legal advice or to the contents of the Report, which refers to Cabinet confidentiality, rather than the privileges of Parliament, are relevant to my determination about the application of clause 12(c) to the disputed documents.

I find that the material facts underlying my reasons are as set out in the preliminary view and above. For the reasons given in both the preliminary view and above I am satisfied that the disputed documents are exempt under clause 12(c).

Decision

The agency's decision is confirmed. I find that the disputed information is exempt under clause 12(c) of Schedule 1 to the FOI Act.

Lisa Ward
ACTING INFORMATION COMMISSIONER