

Participants:

**Rita Saffioti MLA**  
Complainant

- and -

**Minister for Transport; Housing**  
Respondent

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – contentious briefing notes and emails – clause 12(c) – what are the privileges of Parliament – what are ‘proceedings in Parliament’ – meaning of ‘infringe’ – whether public disclosure of the disputed matter would infringe the privileges of Parliament.

*Freedom of Information Act 1992*: section 10(1); Schedule 1, clauses 1(1), 3(1) and 12(c)

*Interpretation Act 1984*: section 5

*Constitution Act 1889*: section 36

*Parliamentary Privileges Act 1891*: section 1

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

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

*Bill of Rights 1688* (UK): article 9

*Freedom of Information Act 1982* (Cth): section 46

*Right to Information Act 2009* (Qld): Schedule 3, clause 6

*Freedom of Information Act 2000* (UK): section 34

*Freedom of Information Act 1992* (Qld): section 50(c)(i)

*Re Ravlich and Department of the Premier and Cabinet* [2011] WAICmr 3  
**United Kingdom Information Commissioner, Decision Notice Reference:**  
**FS50116013** (6 August 2007)

*Re Sharples and Queensland Police Service* [2001] QICmr 23

*Re Stanford and Crime and Misconduct Commission* [2009] QICmr 34

*Re Stiller and Department of Transport* [2009] QICmr 8

## DECISION

The respondent's decision is confirmed. I find that Documents 1, 2, 10-15, 17-19, 27, 28, 37 and the disputed information in Document 41 are exempt under clause 12(c) of Schedule 1 to the FOI Act.

Sven Bluemmel  
INFORMATION COMMISSIONER

11 April 2012

## REASONS FOR DECISION

1. I refer to previous correspondence in relation to this matter which arises from a decision of the Minister for Transport; Housing ('the Minister') under the *Freedom of Information Act 1992* ('the FOI Act') to, among other things, refuse Ms Rita Saffioti MLA ('the complainant') access to documents.

### BACKGROUND

2. By letter dated 8 September 2010, the complainant applied to the Minister under the FOI Act for access to "*all documentation regarding the Ellenbrook rail line*" for the period 1 April 2009 to 30 August 2010.
3. Following negotiations with the Minister's office, the timeframe of the application was later reduced to cover the period 1 January 2010 to 30 August 2010. The complainant also consented to extend the time allowed for the Minister to deal with her application.
4. On 28 June 2011, the Minister provided the complainant with his decision on 42 documents identified as coming within the scope of her access application. The Minister refused the complainant access to 26 documents under clauses 1(1) and 12(c) of Schedule 1 to the FOI Act and gave her access in an edited form to 16 documents, deleting only personal information pursuant to clause 3(1).
5. The complainant sought external review of that decision on 6 July 2011 but only in relation to the documents claimed to be exempt under clause 12(c).

### REVIEW BY THE INFORMATION COMMISSIONER

6. The Minister's office provided me with the originals of the disputed documents and its FOI file maintained in relation to the complainant's access application.
7. On 5 December 2011, I advised the parties, in writing, of my preliminary view of this matter, which was that with one exception (Document 1) all of the disputed matter was exempt under clause 12(c).
8. I invited the complainant to withdraw her complaint in respect of the matter that, in my preliminary view, was exempt or to provide me with submissions relevant to the matters for my determination. I also invited the Minister to give the complainant access to the document that, in my preliminary view, was not exempt or to provide me with further information to support his claim that it was exempt under clause 12(c).
9. In response, on 22 December 2011, the agency provided me with additional submissions and material. The complainant sought an extension of time in which to obtain legal advice so that she might provide me with her submissions. I agreed to suspend further dealings on this complaint until the complainant had obtained the advice she was seeking.

10. On 28 March 2012, the complainant's office advised me that the complainant reiterated the points made in her initial submission but would make no further submissions. At the same time, the complainant advised that she did not withdraw her complaint.
11. In light of that, I have reviewed the complainant's previous submissions and considered the additional information concerning Document 1 that the agency forwarded to me on 22 December 2011.

### **THE DISPUTED MATTER**

12. There are 14 documents in dispute in this matter – Documents 1, 2, 10-15, 17-19, 27, 28 and 37 – together with certain information in Document 41 (the whole of paragraph 3 of the covering email sent on 13 August 2010).
13. Documents 1 and 2 are contentious briefing notes and the remaining documents are emails sent internally between the Minister's staff and emails from those staff to staff at the Premier's and other Ministers' offices.

### **CLAUSE 12**

14. The Minister claims that all of the disputed matter is exempt under clause 12(c) of Schedule 1 to the FOI Act. Clause 12 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) be in contempt of court;*
- (b) contravene any order or direction of a person or body having power to receive evidence on oath; or*
- (c) infringe the privileges of Parliament.”*

15. The word 'Parliament' is not defined in the FOI Act but section 5 of the *Interpretation Act 1984* defines it to mean “*the Parliament of the State*” and defines ‘the State’ to mean “*the State of Western Australia*”.

### **The complainant's submissions**

16. In the complainant's letter to me of 6 July 2011 seeking external review, she disputes the Minister's claim for exemption under clause 12(c) on the basis that:

*“... the information, be it a briefing note and/or email information, is not actually used or said in Parliament, and therefore does not infringe on the privileges of Parliament. Importantly, the authors of these documents are not Members of Parliament, they are officers serving the Executive.*

...

*From my experience in Government I have never seen Parliamentary privilege attached to documents developed by staff in Ministerial offices. If this was to become a new standard, it could mean all briefing notes, emails and other documents prepared for possible use in Parliament would now be excluded. This is not consistent with FOI standards.”*

## Consideration

17. Under s.10(1) of the FOI Act, a person has a legally enforceable right to be given access to documents of an agency (which includes documents of a Minister) subject to the provisions of the Act, including the exemptions. In the present case, the Minister claims that the disputed matter is exempt from disclosure under clause 12(c), which requires me to consider whether the public disclosure of the disputed matter would infringe the privileges of Parliament.

## Public disclosure

18. Clause 12(c) is an absolute exemption designed to protect parliamentary privilege. It is not subject to a public interest test. Information will be exempt under that provision if its public disclosure would infringe the privileges of Parliament. In that regard, the exemption is unlike the other exemptions in the FOI Act, which do not refer to ‘public’ disclosure but merely to disclosure.
19. Similar provisions are found in the FOI legislation of other Australian and overseas jurisdictions, for example, s.46 of the *Freedom of Information Act 1982* (Cth), clause 6 of Schedule 3 to the *Right to Information Act 2009* (Qld) (formerly s.50(c)(i) of the *Freedom of Information Act 1992* (Qld) (‘the Qld FOI Act’)) and section 34 of the *Freedom of Information Act 2000* (UK). Since those provisions are analogous to clause 12(c) of Schedule 1 to the FOI Act, I consider that decisions made under those statutes on infringing the privileges of Parliament are a useful guide.
20. In *Re Sharples and Queensland Police Service* [2001] QICmr 23 at [20], the Queensland Information Commissioner commented on the meaning of ‘public disclosure’ in s.50(c)(i) of the Qld FOI Act and said that “*only an intentional general waiver of parliamentary privilege (most commonly, through tabling, or other authorised publication, of a document) may be taken into account in the application of s.50 of the FOI Act*”. I accept that is correct and that the reference to ‘public’ disclosure means that only intentional and general waiver of parliamentary privilege may be taken into account when applying clause 12(c) of the FOI Act.

## What are the privileges of Parliament?

21. The term ‘privileges of Parliament’ is not defined in the FOI Act. The most commonly cited definition of parliamentary privilege is found in *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (Sir William McKay (ed), 23<sup>rd</sup> edition, LexisNexis Butterworths, London 2004) at p.75, as follows:

*“Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law. Certain rights and immunities such as freedom from arrest or freedom of speech belong primarily to individual Members of each House and exist because the House cannot perform its functions without unimpeded use of the services of its Members. Other such rights and immunities such as the power to punish for contempt and the power to regulate its own constitution belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity. Fundamentally, however, it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by Members.”*

22. In brief, parliamentary privilege comprises certain powers, rights and immunities conferred on Houses of Parliament, their committees, members and officers. The justification for parliamentary privilege is that, to work effectively, Parliament must have freedom of speech and the freedom to control its own proceedings so that it can operate independently and protect the integrity of its processes without interference from external sources.
23. Section 36 of the *Constitution Act 1889* provides that Parliament may lawfully define by any Act *“the privileges, immunities, and powers to be held, enjoyed and exercised by the Legislative Council and Legislative Assembly, and by the members thereof respectively”*. In 1891, following the passage of that statute, Parliament enacted the *Parliamentary Privileges Act 1891* (‘the PP Act’), which linked to the Parliament of Western Australia those privileges held by the House of Commons of the Parliament of the United Kingdom (as at 1 January 1989, following an amendment in 2004 to the PP Act).
24. The privileges of the Parliament of Western Australia are based on both statute and common law, as set out in s.1 of the PP Act, which provides:

***“1. Privileges, immunities and powers of Council and Assembly***

*The Legislative Council and Legislative Assembly of Western Australia, and their members and committees, have and may exercise -*

- (a) the privileges, immunities and powers set out in this Act; and*
- (b) to the extent that they are not inconsistent with this Act, the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament and its members and committees as at 1 January 1989.”*

25. The PP Act goes on to set out primarily the powers enjoyed by the Legislative Council and Legislative Assembly.
26. The most important parliamentary immunity inherited from the United Kingdom is contained in the UK *Bill of Rights* of 1688 ('the Bill'). Article 9 of the Bill states that:

*“The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.”*

27. In *Re Ravlich and Department of the Premier and Cabinet* [2011] WAICmr 3 at [21], I noted that the various privileges, immunities and powers of Parliament, include, amongst others:

- freedom of speech and proceedings in Parliament;
- the freedom of each House to control its own affairs;
- the control of publication of Parliamentary proceedings; and
- the power to punish for breach of privilege and contempt.

28. Although the term 'proceedings in Parliament' is not defined in the PP Act or other statutes in this State, I consider that s.16(2) of the *Parliamentary Privileges Act 1987* (Cth) and s.9 of the *Parliament of Queensland Act 2001* (Qld) provide a useful guide to its meaning: see *Re Ravlich*.

29. Section 16(2) of the *Parliamentary Privileges Act 1987* (Cth) defines 'proceedings in Parliament' as follows:

*“(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, proceedings in Parliament means 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, and, without limiting the generality of the foregoing, includes:*

- (a) the giving of evidence before a House or a committee, and evidence so given;*
- (b) the presentation or submission of a document to a House or a committee;*
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and*
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.”*

30. Similarly, s.9 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 including preparing a document for the purposes of, or incidental to transacting such business.
31. The complainant submits that the disputed matter is not information that was actually used or read out in Parliament and that the authors of the relevant documents are not Members of Parliament but officers serving the Executive. I accept that is correct but I also accept that where information is directly referable to ‘proceedings in Parliament’, because documents have been prepared for the purpose of or incidental to the transacting of parliamentary business, then parliamentary privilege does attach to those documents and they may be brought within the exemption in clause 12(c) of Schedule 1 to the FOI Act. In my opinion, the fact that the authors of the disputed documents are not Members of Parliament is not relevant to that issue.
32. The UK Information Commissioner took a similar view in his Decision Notice Reference: FS50116013 (6 August 2007), which dealt with an application for access to certain documents held by the House of Commons Treasury Committee. The Treasury Committee claimed that those documents were exempt because disclosure would infringe parliamentary privilege. In the course of considering that matter, the UK Information Commissioner listed the following types of information that would normally fall within this exemption:
- committee reports and drafts;
  - memoranda submitted to committees;
  - internal papers prepared by the Officers of either House directly related to the proceedings of the House or committees;
  - papers prepared by the libraries of either House, or by other House agencies;
  - correspondence between Members, Officers, Ministers and Government Officials directly related to House proceedings;
  - papers relating to investigations by the Parliamentary Commissioner for Standards;
  - papers relating to the Register of Members’ interests; and
  - bills, amendments and motions, including those in draft, where they originate from Parliament or a Member rather than from parliamentary counsel or another government department.
33. I have examined the disputed matter. Documents 1 and 2 are contentious briefing notes prepared for, respectively, the Premier and the former Minister. Although I was at the date of my preliminary view letter, on the information then before me, not satisfied that Document 1 was prepared for the purposes of, or incidental to, the transacting of parliamentary business, the Minister has now provided me with sufficient evidence to satisfy me on that point.
34. Documents 10-15, 17-19 and 27 consist of email correspondence between Parliamentary Liaison Officers and Ministers’ officers; Document 28 is an email with attachment sent between officers of the former Minister for Transport (‘the



former Minister’); Document 37 consists of two emails with an attachment, being a contentious issues briefing note for the Premier; and the disputed information in Document 41 is part of an email sent between an officer of the former Minister and certain officers of government agencies. In my opinion, all of the disputed matter is directly related to proceedings in Parliament, being correspondence prepared for the purposes of or incidental to the transacting of parliamentary business.

### *Infringe the privileges of Parliament*

35. The next question is whether the public disclosure of the disputed matter would infringe the privileges of Parliament. Although the heading to clause 12 refers to “*Contempt of Parliament or court*”, when dealing with clause 12(c), I am only required to determine whether the public disclosure of the subject documents would infringe the privileges of Parliament, not whether such disclosure would be in contempt of Parliament.
36. The plain meaning of ‘infringe’ is “*act contrary to; violate (a law, an oath, etc) ... act in defiance of (another’s rights etc.) ... encroach, trespass*” (*The Australian Concise Oxford Dictionary*, 4<sup>th</sup> edition, 2004). In my view, clause 12(c) requires me to determine whether the public disclosure of the disputed matter would encroach or trespass upon the privileges of Parliament.
37. In *Re Stanford and Crime and Misconduct Commission* [2009] QICmr 34 at [46], the Queensland Information Commissioner said, in respect of s.50(c)(i) of the Qld FOI Act, which was essentially the same as clause 12(c):

*“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 s50(c)(i) of the FOI Act, unless its public disclosure has been authorised by Parliament ...”*
38. In *Re Stiller and Department of Transport* [2009] QICmr 8, the relevant agency claimed that a ministerial briefing note was exempt under s.50(c)(i) 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.
39. In the present case, there is nothing before me to establish that there has been any intentional general waiver of Documents 1, 2, 10-15, 17-19, 27, 28, 37 and the disputed information in Document 41. In my view, the public disclosure of the disputed matter would infringe the privileges of Parliament because Parliament has not authorised its public disclosure. 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. Accordingly, I consider that the Minister has satisfied the requirements of clause 12(c) in respect of the disputed matter.

## CONCLUSION

40. I find that Documents 1, 2, 10-15, 17-19, 27, 28, 37 and the disputed information in Document 41 are exempt under clause 12(c) of Schedule 1 to the FOI Act, as the Minister claims.

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