

Participants:

Ljiljana Maria Ravlich
Complainant

- and -

**Minister for Regional Development;
Lands**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to the Royalties for Regions program and Fund – section 30(f) – the requirements of a notice of decision if the decision is to refuse access – meaning of clauses 1(1) and 1(1)(a) – whether the disputed matter is an agenda, minute or other record of the deliberations or decisions of an Executive body – clause 1(2) – meaning of ‘merely factual’ – meaning of ‘officially published’ – clause 1(1)(b) – whether the disputed matter contains policy options or recommendations prepared for possible submission to an Executive body.

Freedom of Information Act 1992: sections 3(3), 30(f) and 102(1); Schedule 1, clauses 1(1), 1(1)(a), 1(1)(b), 1(2) and 1(6)

Interpretation Act 1984: sections 18 and 19(1)

Freedom of Information Act 1982 (Cth): section 34(1)

Re Highway Construction Pty Ltd and State Supply Commission [2000] WAICmr 25

Re Environmental Defender’s Office WA (Inc) and Ministry for Planning [1999] WAICmr 35

Re Edwards and Minister for Transport [2000] WAICmr 39

Re Porter and Department of Community Services and Health (1988) 14 ALD 403

Re Toomer and Department of Agriculture, Fisheries and Forestry (2003) 78 ALD 645

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321.

Anderson and Department of Special Minister of State No.2 (1986) 11 ALN N239

DECISION

The respondent's decision is varied. I find that:

- Document 7 and the disputed information in Documents 5 and 13 are not exempt under clauses 1(1) or 1(1)(a); and
- Documents 15, 16 and 17 are exempt under clause 1(1)(b).

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER

2 April 2009

REASONS FOR DECISION

1. This complaint arises from a decision made by the Minister for Regional Development; Lands ('the respondent') to refuse Hon Ljiljana Ravlich MLC ('the complainant') access to certain documents under clause 1 of Schedule 1 to the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 20 October 2008, the complainant applied to the respondent for access to: "*all documentation since the 23rd September 2008 relating to the Royalties for Regions Program and the Royalties for Regions Fund.*"
3. On 3 November 2008, the respondent advised the complainant that her application covered a large number of documents and asked her to identify the specific kind of documents sought. In response, the complainant agreed to limit the scope of the application to correspondence and documents sent between State Government agencies and the respondent "*and perhaps to other Ministers and Members of Parliament.*" On 21 November 2008, the complainant further reduced the scope of the complaint by agreeing to accept emails edited to delete the names of third parties.
4. The respondent identified 17 documents within the revised scope of the application and, on 5 December 2008, notified the complainant of its decision to give access to one document; access in edited form to six documents; and to refuse access to ten documents, claiming exemptions under clauses 1 and 3 of Schedule 1 to the FOI Act. I understand that the respondent's claims for exemption under clause 3 relate to personal information other than the names of third parties, since the complainant was no longer seeking access to that matter.
5. On 10 December 2008, the complainant applied to the Information Commissioner for external review of the respondent's decision in relation to 13 documents which the respondent claimed were exempt, either in full or in part, under clause 1. Those documents are listed on the respondent's schedule of documents as Documents 1, 2, 3, 4, 5, 6, 7, 10, 13, 14, 15, 16 and 17 and more particularly described in that schedule. The complainant did not seek access to information deleted by the respondent pursuant to clause 3.

REVIEW BY A/INFORMATION COMMISSIONER

6. Following the receipt of this complaint, I required the respondent to produce to me the originals of the documents in dispute, together with the original of the respondent's FOI file maintained in respect of the access application for examination. On 6 January 2009, I provided the parties with a letter setting out my preliminary view of this complaint. My preliminary view, on the information before me at that time, was that Documents 1, 3, 4, 6, 10 and 14 were exempt in full; the information deleted from Document 2 and certain information deleted from Document 7 was exempt under various provisions of clause 1; but that the remaining documents and information were not exempt under clause 1 as claimed by the respondent.

7. At that time, the information before me comprised the disputed documents; the respondent's notice of decision; and the material contained in the respondent's FOI file.
8. In light of my preliminary view, the complainant withdrew her complaint in relation to Documents 1, 3, 4, 6, 10 and 14; the information deleted from Document 2 and the whole of the first email in Document 7. Consequently, those documents and that information are no longer in dispute between the parties.
9. The respondent did not accept my preliminary view that the remainder of the disputed matter was not exempt and, on 16 January 2009, 9 February 2009 and 23 March 2009, gave me further submissions, information and material in support of its position.

The form of notices of decision that refuse access to documents

10. If an agency decides to refuse access to a document, section 30(f) of the FOI Act provides that the agency must include the following details in its notice of decision given to the access applicant:
 - the reasons for the refusal;
 - the findings on any material questions of fact underlying those reasons; and
 - reference or references to the material on which those findings were based.
11. Although the respondent gave the complainant reasons for its refusal to give access, those reasons were only briefly stated. Clause 1(1) of the FOI Act contains six separate paragraphs, which set out the specific kinds of matter that is exempt under clause 1. There are four limitations on exemption contained in clause 1(2)-(5). Nowhere in the respondent's notice of decision did the respondent expressly link the relevant provision of clause 1 to the particular document or information that it claimed was exempt, although in some cases it was possible, using the schedule of documents provided to the complainant to infer which specific exemption claim was relied upon or relevant to the particular document.
12. For example, in its notice of decision the respondent said:

“Upon examination of the discovered documents, my observation in relation to Documents 1, 3, 4, 6, 7, 10, 14, 15, 16, and 17 is that they would reveal either a decision of an Executive Body (Cabinet); communication between Ministers on a matter where a decision is made by an Executive body (Economic and Expenditure Reform Committee) or was prepared for possible submission to an Executive body.”

A portion of Documents 2, 5 and 13 also contain matter which would reveal matters pertaining to an Executive body and so that portion has been deleted.”

13. Elsewhere, the decision notice stated: “*In considering this matter, I have taken into account Clause 1(1)(a), (b), (c) and (d) ...*”.
14. In the examples cited, the respondent has either expressly or impliedly referred to a particular paragraph of clause 1 - although in the case of paragraph (d), not the relevant subparagraph - but has not identified the particular document or documents claimed to be exempt under one or more of those provisions. In my view, it is not possible, for example, to identify from that information whether Document 6 is claimed to be exempt under subclause 1(1) or under paragraph (a), (b), (c) or (d) of subclause 1(1).
15. Some further information relating to the exemptions claimed was set out in the respondent’s schedule of documents. By way of example, the schedule refers to Document 4 as follows: “*Clause 1 – Would reveal a briefing to the Minister on matters prepared for possible submission to an Executive body*”. From that wording, it can be inferred that the relevant exemption claim made for Document 4 was clause 1(1)(d)(i), although nowhere in the respondent’s notice of decision is that explicitly stated.
16. Moreover, the respondent’s notice of decision did not give the complainant details of the findings on material questions of fact or refer to the material on which those findings were based, as required by section 30(f). In other words, an agency should explain to applicants why the requirements of a particular exemption provision are satisfied (for example, in a claim made under clause 1(1)(a), an agency might identify the document as being an agenda for a Cabinet meeting) and refer to the material on which the agency based its findings (for example, a reference to the date of that particular meeting of Cabinet). I acknowledge that the respondent is restrained from identifying exempt information, and that this may limit how much detail it is able to include in its findings of fact.
17. If an agency gives an applicant a notice of decision that does not contain sufficient findings of fact and a clear statement of the basis on which an exemption is claimed, it is unlikely that the applicant will have a clear understanding of the reasons why access is refused and why the requirements of any exemption clause or clauses claimed are satisfied. Only if applicants understand all of the elements involved in applying a particular exemption and why access is refused are they in a position to decide whether to accept the decision or to test it by way of external review on complaint to the Information Commissioner.
18. The obligation to provide applicants with notices of decision that contain all of the information prescribed by s.30 is intended to ensure that the true basis of a decision is clearly explained. In my view, an applicant who receives a decision that complies fully with s.30(f) of the FOI Act is less likely to seek external review of that decision.

19. Section 102(1) of the FOI Act provides that the onus is on the agency to establish that its decision is justified or that a decision adverse to another party should be made. Applicants are not required to establish that they are entitled to access the requested documents; it is up to the agency to establish a case for exempting a document from disclosure and to demonstrate that it has established the requirements of any exemption claimed in its notices of decision.

THE DISPUTED MATTER

20. The respondent's description of the documents in question, as listed in the schedule of documents given to the complainant, is set out below in italics, together with my own comments in relation to those documents:

Document 5 – *“Email from [a government officer] dated 9/10/08 Re: Royalties for Regions Fund”*.

More accurately, Document 5 is a series of six emails sent between officers of government agencies on 9 October 2008. A copy of Document 5 has been disclosed to the complainant with personal information deleted pursuant to clause 3(1) of Schedule 1 to the FOI Act. The disputed information in Document 5 is paragraphs 1 and 2 of the first email in the series sent at 9:18am on 9 October 2008. That information was also deleted from the copy of Document 5 given to the complainant.

Document 7 – *“Email from [a government officer] dated 16/10/08 Re: Regional Development Commissions - royalties for regions”*.

Document 7 consists of a series of six emails sent between government officers on 13-16 October 2008. The complainant has withdrawn her complaint in relation to the first email in Document 7 (sent at 11:50am on 13 October 2008) so that only the remaining five emails in Document 7 are the subject of this decision.

Document 13 – *“Email from [a government officer] dated 21/10/08 Re Royalties for Regions ...”*.

Document 13 is a series of four emails sent between government officers on 15 and 21 October 2008. As with Document 5, the respondent has given the complainant an edited copy of Document 13 from which information has been deleted pursuant to clause 3(1). The disputed information in Document 13 is paragraph 2 of the first email in the series dated 15 October 2008.

Document 15 – *“Royalties for Regions ... – Minutes of meeting held on 22/10/08”*.

Document 16 – *“Email from [a government officer] dated 23/10/08 FW: Costings”*.

Document 16 consists of two emails dated 23 October 2008, attaching a table, sent between government officers.

Document 17 – “*Email from [a government officer] dated 23/10/08 FW: amended figures for R4R*”.

Document 17 consists of two emails dated 23 October 2008, attaching a table, sent between government officers.

CLAUSE 1 – CABINET AND EXECUTIVE COUNCIL

21. As I understand it, based on the respondent’s notice of decision and subsequent submissions, the respondent claims that certain information in Documents 5 and 13 is exempt under clauses 1(1)(a) and 1(1)(b); Documents 7 and 15 are exempt under clauses 1(1)(a) and 1(1)(b); and that Documents 16 and 17 are exempt under clause 1(1)(b) of Schedule 1 to the FOI Act. Clause 1, insofar as it is relevant, provides:

“Cabinet and Executive Council

Exemptions

- (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) *is an agenda, minute or other record of the deliberations or decisions of an Executive body;*
 - (b) *contains policy options or recommendations prepared for possible submission to an Executive body;*
 - (c) *is a communication between Ministers on matters relating to the making of a Government decision or the formulation of a Government policy where the decision is of a kind generally made by an Executive body or the policy is of a kind generally endorsed by an Executive body;*
 - (d) *was prepared to brief a Minister in relation to matters –*
 - (i) *prepared for possible submission to an Executive body; or*
 - (ii) *the subject of consultation among Ministers relating to the making of a Government decision of a kind generally made by an Executive body or the formulation of a government policy of a kind generally endorsed by an Executive body;*
 - (e) *is a draft of a proposed enactment; or*

- (f) *is an extract from or a copy of, or part of, matter referred to in any of paragraphs (a) to (e).*

Limits on exemptions

- (2) *Matter that is merely factual, statistical, scientific or technical is not exempt matter under subclause (1) unless –*
- (a) *its disclosure would reveal any deliberation or decision of an Executive body; and*
- (b) *the fact of that deliberation or decision has not been officially published.*
- (3) ...
- (4) ...
- (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 the Executive body.*

Definition

- (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.”*

22. Subclause (1) of clause 1 contains a general description of the matter that is exempt under that provision. Without limiting that general description, specific kinds of document that are exempt under clause 1 are set out in paragraphs (a)-(f) of clause 1(1). Subclauses 1(2)-1(5) contain limits on the exemptions in clause 1(1). In *Re Highway Construction Pty Ltd and State Supply Commission* [2000] WAICmr 25, the former Information Commissioner (‘the former Commissioner’) said at [23]:

“Reading clause 1 as a whole, it is clear from considering each of the subclauses that specific kinds of documents – those central to the Cabinet process – are protected ...”

23. In *Re Environmental Defender’s Office WA (Inc) and Ministry for Planning* [1999] WAICmr 35, the former Commissioner said at [9]:

“I consider that the purpose of the exemption in clause 1 is to protect the confidentiality of Cabinet discussions and of consultations between Ministers. Among other things, the maintenance of Cabinet solidarity and

collective responsibility is generally accepted to be an essential part of the Westminster system of Government and the FOI Act recognises this in clause 1 and in the range of documents that are protected from potential disclosure by this exemption.”

I agree with those statements.

The respondent’s submissions

24. The respondent provided me with written submissions on 16 January 2009 and 9 February 2009. In brief, the respondent submits that the disclosure of Documents 7 and 15 and the disputed information in Documents 5 and 13 “*would ultimately reveal a decision of Cabinet*” and that those documents and that information is exempt under clauses 1(1)(a) and 1(1)(b).
25. In support of its claims, the respondent provided me with a copy of a Cabinet Decision Sheet dated 13 October 2008 (‘the CD Sheet’). The CD Sheet sets out a Cabinet decision made on 13 October 2008 (‘the Decision’), which consists of six separate points (‘Items 1-6’). Attached to the CD Sheet are a Cabinet Summary Sheet and a Cabinet Minute (‘the Minute’) dated 29 September 2008, which was submitted by the respondent to the Premier (in Cabinet). In particular, the respondent referred me to Item 4 on the CD Sheet; paragraphs 2 and 3 on page 4 of the Minute; and recommendation 4 on page 5 of the Minute.
26. Pursuant to s.74 of the FOI Act, I am constrained from disclosing matter that is claimed to be exempt so that I am unable to set out the respondent’s submissions in full. Consequently, I have indicated in square brackets below the kind of information that I have had to omit from the respondent’s submissions of 9 February 2009, made in relation to Document 5, in order to comply with my obligations under s.74:

“As with Documents 7, 13 and 15 ... the series of emails and those particular paragraphs explain the process for the preparation of the Cabinet Submission [and other matter that is referred to in recommendation (iv) of the Minute]... detailing those reasons would ultimately reveal a decision of Cabinet [i.e. the Decision] and exposure of the process would reveal [information contained in Item 4 of the Decision].”
27. Having considered the respondent’s submissions; the Decision; the Cabinet Summary Sheet and the Minute, it seems to me that the respondent is, in effect, submitting that the disclosure of Documents 7 and 15 and the disputed information in Documents 5 and 13 would reveal not only a decision of Cabinet but also information that is contained in a Cabinet Minute (i.e. the Minute).
28. On 16 January 2009, in response to my preliminary view letter, the respondent advised me that Documents 16 and 17 are in its submission exempt under clause 1(1)(b) because they had been prepared for submission to the Economic and Expenditure Reform Committee (‘the EERC’) – which is a committee of Cabinet – and/or to Cabinet. In support of that submission, the respondent

provided me with copies of a Cabinet Submission dated 6 November 2008 and a Cabinet Decision Sheet dated 10 November 2008. On 23 March 2009, the respondent also provided me with a copy of a Cabinet decision dated 8 December 2008.

Meaning of Clauses 1(1) and 1(1)(a)

29. The respondent claims that Documents 5 and 13 are exempt in part and Documents 7 and 15 are exempt in full under clause 1(1)(a). Since, for the reasons set out in relation to the respondent's claims for exemption under clause 1(1)(b), I find that Document 15 is exempt under that provision, it is not necessary for me to consider whether Document 15 is also exempt under clause 1(1)(a).
30. Consequently, in order to decide the claimed exemption, I have considered the question of whether Document 7 and the disputed information in Documents 5 and 13 are exempt under clause 1(1) because that matter would disclose "*the deliberations or decisions of an Executive body*" or whether that matter is exempt under clause 1(1)(a) because it would disclose a "*an agenda, minute or any other record of the deliberations or decisions of an Executive body*" and what the differences are between those two provisions.

Clause 1(1)

31. Clause 1(1) sets out a general description of matter that is exempt under clause 1 and states that matter is exempt matter if its disclosure would reveal "*the deliberations or decisions of an Executive body*". Paragraphs (a)-(f) of clause 1(1) set out specific kinds of matter which are exempt under clause 1. These specific kinds do not limit the general description of exempt matter contained earlier in clause 1(1).
32. The terms 'deliberations' and 'decisions' are not defined in the FOI Act. In *Re Environmental Defender's Office* and in *Re Edwards and Minister for Transport* [2000] WAICmr 39, the former Commissioner took the view that the general description "*deliberations or decisions*" in clause 1(1) meant, respectively, 'active discussion or debate' and 'formal decisions made in Cabinet'. That view conforms with the purpose of clause 1, as set out in paragraph 23 above.
33. In *Re Edwards*, the former Commissioner said at [25]-[26]:

"I accept that Documents 2 and 3 were attached to a submission taken to Cabinet. However, as to the general exemption in clause 1(1), in my view, none of the documents records any deliberation or decision of an Executive body and their disclosure would not reveal any such deliberations or decisions. I agree with Deputy President Todd in Re Porter and Department of Community Services and Health (1988) 14 ALD 403, when he said at 407:

"'Deliberation' of Cabinet seems to me to connote what was actively discussed in Cabinet. It is not the agenda for a meeting of

Cabinet, nor is it what Cabinet formally decided. What the words “*deliberation or decision*” of Cabinet cover is debate in Cabinet (deliberation), and formal decisions made in Cabinet. It is not to be concluded that there was deliberation in respect of matter contained in a document merely because a document was before Cabinet at a meeting thereof.”

The fact that the disputed documents were taken to a Cabinet meeting as part of a Cabinet submission, or used in a submission to Cabinet as claimed by the Minister, is not sufficient to establish that the disputed documents are exempt under clause 1(1). The documents must contain matter of the kind described in clause 1(1).”

34. Similarly, in *West Australian Newspapers Ltd and Attorney General* [2008] WAICmr 20, I considered a claim made by an agency under clause 1(1) and formed the view - at [31] - that the disclosure of the disputed document in that case would reveal the deliberations of an Executive body because the document disclosed debate or argument considered by that body.
35. The wording of clause 1 in Schedule 1 to the FOI Act differs from that of equivalent provisions concerning documents of Cabinet or other Executive bodies in the FOI legislation of other Australian jurisdictions in that it specifically identifies a range of documents or matter that is covered by the exemption in paragraphs (a)-(f) of clause 1(1).
36. The meaning of ‘*deliberation or decision*’ in s.34(1) of the *Freedom of Information Act 1982* (Cth) (‘the Commonwealth FOI Act’) – which is an equivalent provision to clause 1 – was considered by the Administrative Appeals Tribunal of Australia (‘the Tribunal’) in *Re Toomer and Department of Agriculture, Fisheries and Forestry* (2003) 78 ALD 645. In that case, Deputy President Forgie reviewed the legislative framework and the authorities and accepted that the correct approach to determining the meaning of words such as ‘decision’ and ‘deliberation’ is to have regard to the ordinary meanings of those words; their context; and the policy considerations underlying the provision, citing the decision of the High Court in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.
37. In taking that approach, the Tribunal concluded that the Commonwealth FOI Act expressed competing policy considerations in relation to access to information but that the balance to be achieved between those competing interests is that the right of access to documents is specifically limited by the exemptions and exceptions contained in the Act. The Tribunal said at [88]:

“The protection of Cabinet documents of the type specified has been seen as the protection of an essential public interest and so all its deliberations and decisions are protected as provided by s.34(1)(d). Taking its deliberations first, this means that information that is in documentary form and that discloses that Cabinet has considered or discussed a matter, exchanged information or discussed strategies [sic]. In short, its deliberations are its thinking processes be they directed to gathering

information, analysing information or discussing strategies. They remain its deliberations whether or not a decision is reached. Its decisions are its conclusions as to the courses of action that it adopts be they conclusions as to its final strategy on a matter or its conclusions as to the manner in which a matter is to proceed. If a document discloses such deliberations or decisions then, as Deputy President Hall said in Anderson and Department of Special Minister of State No.2 (1986) 11 ALN N239:

‘It is not necessary that the decision or deliberation should be quoted verbatim. To construe s.34(1)(d) otherwise would be to place a premium upon verbal accuracy and to require a precision of expression in government documents that could only frustrate rather than promote the proper and efficient conduct of government. Whether, in a particular case, disclosure of a document would involve the disclosure of a decision or deliberation of Cabinet is a question of fact to be decided in the light of all the circumstances.’ (paragraph 27).”

38. I agree with the views expressed by the Tribunal in *Re Toomer* with regard to the approach to be taken to the interpretation of clause 1 and also with the comments of Deputy President Hall in *Anderson and Department of Special Minister of State No.2* (1986) 11 ALN N239. Adopting the approach to interpretation set out in *Re Toomer*, I have considered both the ordinary meanings of the words in clause 1(1) and the policy reasons underlying clause 1.
39. Information on the underlying policy can be found in certain extrinsic material. Section 18 of the *Interpretation Act 1984* (‘the Interpretation Act’) provides:

“Purpose or object of written law, use of in interpretation

In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.”

40. Section 19 of the Interpretation Act provides:

“(1) Subject to subsection (3), in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material –

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law ; or

(b) ...

- (2) *Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law includes -*
- (a) ...
- ...
- (h) *any relevant material in any official record of proceedings in either House of Parliament.*
- (3) *In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to –*
- (a) *the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law ...”*

41. In my view, extracts from the debates following the Second Reading of the Freedom of Information Bill 1992 ('the Bill') come within s.19(2)(h) of the Interpretation Act and can be used to assist in ascertaining the meaning of clause 1.
42. At p. 7017 of *Hansard* vol.302 (1992), the former Minister for Justice in charge of the Bill said:
- “...the basic intent of the Cabinet and Executive Council exemption is that a matter is exempt “if its disclosure would reveal the deliberations or decisions of an Executive body...
...
All that is intended by paragraphs (a) to (f) is to make obvious some of what is covered by the exemption.”*
43. *Hansard*, at pp.7018-7019, also records that the former Minister for Justice commented on the application of clauses 1(1)(a)-(f). With regard to clauses 1(1)(a) and (b), the former Minister for Justice said:

“Paragraph (a) refers to “an agenda, minute or other record of the deliberations or decisions of an Executive body”. I do not think the member for Floreat would argue that that is not the sort of material that is intended to be covered by the preliminary words.

Paragraph (b) states –

contains policy options or recommendations prepared for submission (whether submitted or not) to an Executive body;

That covers what often happens when one gets one’s agenda or minutes and lodged with that minute will be a range of reports or policy options

for consideration by Cabinet in conjunction with the minute. I do not think we could exclude any of those matters under the amendment moved by the member for Floreat ... Therefore, the existing clause would mean that, if documents had been prepared to accompany a minute and for some reason did not actually accompany the minute, they would also be exempt... One of the things we must ensure is that when people are preparing documents which may or may not accompany Cabinet minutes they should feel unconstrained in what they say in those drafts. My view is that, if they have been prepared for the purposes of submission and they are strong in their language and are not submitted, not to exempt them would defeat the primary objective which is to prevent the disclosure of deliberations or decisions because, if the document is not submitted, it would still reveal the fact there was a Cabinet minute and basically what the Cabinet minute was about and some discussion about what it contained.

When Cabinet minutes are first submitted, a copy of them is sent to other Ministers who may, if they wish, refer them to the agencies under their control for the preparation of comment sheets for the Ministers. In some cases, when those comment sheets come back from the agencies, the Ministers differ from the opinions of their agencies and may then decide not to pass on those minutes to Cabinet. If he did not specifically exclude them, then other people would have access to them. That would reveal that a Cabinet minute existed, what it was about and what the comments of a particular respondent were about that minute. That would clearly breach the provision.

...

Cabinet correspondence sheets or other documentation between Ministers may be constrained simply because there is a feeling that people may not know whether they will be exempt under this provision. In the interests of good Government not only should advisers be able to be as frank and open as they desire in ensuring their views are heard, but also so should Ministers one to another. For that reason, those sorts of exchanges should be exempt.

...

We must ensure that discussions at Cabinet and minutes, or comment sheets which go to Cabinet, should be as strong as they can possibly be and that we do not encourage a situation where Ministers or agencies feel constrained in commenting about another Minister's minute because they might be available under FOI. That is not the objective. Discussions at Cabinet level should be as robust as we all want them to be and as well informed as we want them to be. That is the reason for the exemption and why the greater public interest in having those robust discussions and the documentation required to enable Cabinet to reach the best decision. That is of bigger public interest than giving people the opportunity to know what goes on in Cabinet."

44. The extracts from the Debate on the Bill cited here indicate that Parliament intended the meaning of 'deliberations' to include not only its ordinary meaning of consideration, discussion or debate by a particular Executive body – the

Australian Concise Oxford Dictionary, 4th edition, 2004 defines ‘deliberation’ as: “**1** careful consideration. **2 a** the discussion of reasons for and against. **b** a debate or discussion...” – but also information that discloses that certain matter was put to the Executive body at that meeting for its information or consideration as well as particular categories of matter. The intention that emerges from the Debate is that Ministers and their advisers should be able to engage in unconstrained exchanges of opinion which, if disclosed, could reveal the deliberations or decisions of an Executive body.

45. Although I agree with the view of the former Commissioner in *Re Edwards* that the word ‘deliberations’ in clause 1(1) includes active discussion and debate by an Executive body, I do not consider that it is limited to that concept. Having reviewed the authorities; the ordinary meaning of ‘deliberations’; the policy reasons underlying clause 1; and the context of the whole of clause 1, I consider that the word ‘deliberations’ extends to matter that discloses that an Executive body has considered, gathered information on, analysed or looked at strategies in relation to a particular issue.
46. With regard to the meaning of ‘decisions’ in clause 1(1), the ordinary dictionary meaning of the term ‘decision’ is: “**1** the act or process of deciding. **2 a** conclusion or resolution reached, esp. as to future action after consideration” (*Australian Concise Oxford Dictionary*). In light of that, and taking into account its context and the underlying policy considerations, I consider that the term ‘decisions’ in clause 1(1) means the formal decisions of an Executive body.

Clause 1(1)(a)

47. Clause 1(1)(a) provides that matter is exempt matter if it is “*an agenda, minute or other record of the deliberations or decisions of an Executive body.*” In my opinion, the words ‘*of an Executive body*’ at the end of paragraph (a) are, in context, intended to qualify both ‘agenda’ and ‘minute’, as well as ‘other record of the deliberations or decisions’, so that protection is afforded not to *any* agenda or minute but only to the agendas or minutes of Executive bodies.
48. By applying the *ejusdem generis* rule of statutory interpretation - which provides that words derive their meaning from the context in which they appear - I understand that the reference to “*other record of the deliberations and decisions of an Executive body*” indicates that the preceding items in the list of documents in paragraph (a) – an agenda and a minute – also come within the same category of documents described; that is, they are both records of the deliberations or decisions of an Executive body contained in documents that directly derive from the meeting of the Executive body.
49. As a result, although the term ‘an ... other record’ - appears to be of broad import - the word ‘record’ is defined in clause 1 of the Glossary to the FOI Act to mean (unless the contrary intention appears) “*any record of information however recorded ...*” – it should be read *ejusdem generis*. In that way, ‘other record’ is limited to the same kinds of document that precede it in paragraph (a) so that the term is not to be interpreted broadly but is limited to records of a like

kind, being documents that directly relate to a meeting of an Executive body and which record its deliberations or decisions.

Consideration

50. As previously noted, I am conscious of the need to describe the content of that material and the claims made for it by the respondent without breaching my obligations under s.74 of the FOI Act. However, in brief, the respondent says that, if disclosed, Document 7 and the disputed information in Documents 5 and 13 would reveal both the Decision and information contained on pages 4 and 5 of the Minute.
51. In my view, the matter claimed to be exempt relates to two separate but related subjects. Item 4 of the Decision and page 4 of the Minute refers to one of those subjects ('Subject 1') and page 5 (recommendation iv) of the Minute refers to the other ('Subject 2'). In my view, the disclosure of the information relating to Subject 1 would reveal both a decision of Cabinet (the Decision) and the deliberations of Cabinet (page 4 of the Minute), whilst the disclosure of the information relating to Subject 2 would reveal the deliberations of Cabinet (page 5 of the Minute), in the sense described in paragraphs 44 and 45.
52. I have examined Documents 5, 7 and 13. On their face, the emails in all three documents are, in my opinion, simply communications between officers of government agencies concerning routine administrative matters. The emails in Document 5 were sent four days before the Cabinet meeting of 13 October 2008 which resulted in the Decision; those in Documents 7 and 13 were sent, respectively, on 13 – 16 October 2008 and 15 October 2008: in other words, they were all sent on or after the date of the Decision. I accept that each of those documents contains information on Subjects 1 and 2, although none of that information is a complete record of the information contained in Item 4 of the Decision or pages 4 and 5 of the Minute, but rather, it is a paraphrase or summary of part of that information.
53. I am satisfied that Documents 5, 7 and 13 are not agendas or minutes of Cabinet. I am also satisfied that none is "*an ...other record of the deliberations or decisions of an Executive body*" because they are not documents that were provided to or formed part of a meeting of an Executive body, which are a record of the deliberations or decisions of that body. In that category, I would include, for example, Cabinet submissions, but not, as here, a series of emails between government officers on routine administrative matters which, on the information before me, were not part of and were never intended to form part of the deliberations or decisions of any Executive body. Consequently, I am not satisfied that Document 7 and the disputed information in Documents 5 and 13 are exempt under clause 1(1)(a).
54. Nonetheless, I consider that Document 7 and the disputed information in Documents 5 and 13 would, if disclosed, 'reveal' the deliberations or decisions of Cabinet under the general exemption in clause 1(1) because it is information that was provided to Cabinet at its meeting on 13 October 2008 and is part of the decision made by Cabinet on that date.

55. Accordingly, I consider that Document 7 and the disputed information in Documents 5 and 13 is *prima facie* exempt under clause 1(1) of Schedule 1 to the FOI Act.

Clause 1(2) – limit on exemptions

56. Although the decisions of Cabinet and other Executive bodies are protected from disclosure under clause 1, the content or substance or effect of those decisions is often published after they are made. In such cases, the limit on exemption in clause 1(2) may apply. Clause 1(2) provides that matter that is ‘merely factual’, among other things, is not exempt under clause 1(1) unless its disclosure would reveal any deliberation or decision of an Executive body and the fact of that deliberation or decision has not been officially published.
57. I have considered, firstly, whether the limit on exemption in clause 1(2) applies to the information contained in Item 4 of the Decision and on page 4 of the Minute (Subject 1).
58. The questions for my determination in relation to clause 1(2) are whether the information relating to Subject 1 contained in Document 7 and the disputed information in Documents 5 and 13 is ‘merely factual’ and whether the facts of the relevant decision and deliberations have been ‘officially published’.
59. The ordinary dictionary meaning of ‘mere’ or ‘merely’ is “*solely*” or “*no more than what is specified*” and the ordinary meaning of ‘factual’ is “*based on or concerned with fact or facts*” and “*actual, true*” (*Australian Concise Oxford Dictionary*). Having examined the Subject 1 information in Documents 5, 7 and 13, I am satisfied that it consists of merely factual information because it contains no more than statements of fact.
60. The meaning of the term “*officially published*” in the context of s.34(1)(d) of the Commonwealth FOI Act, was considered by the Tribunal in *Re Toomer*. Section 34(1)(d) provides that a document is an exempt document if it is “*a document the disclosure of which would involve the disclosure of any deliberation or decision of Cabinet, other than a document by which a decision of Cabinet was officially published.*”
61. In that case, Deputy President Forgie said, at [101]:

“The words should be given their meanings as they are ordinarily understood. When that is done, it means that the exclusion relates to a document that has two qualities. The first is that it is a document that makes the decision generally known. It is not an announcement that is made confidentially but may be an announcement made to a limited audience if the understanding is that it is not conveyed on a confidential basis or for a limited purpose. The second quality must be that the document by which the decision is published must be written or issued as one of the functions of the person or body responsible for publishing it. That is to say, it must publish the decision officially. Given the evidence as to the manner in which Cabinet

considers matters taken to it by Ministers of government, it is conceivable that a decision might be officially published in a document approved by Cabinet or in a document approved by the Minister responsible for the matter. Whether a document officially publishes a decision depends upon the evidence.”

62. I agree with that statement and consider those principles to be a useful guide to the interpretation of clause 1(2).
63. The ordinary meaning of ‘official’ relevantly includes “*of or relating to an office or its tenure or duties*” and “*emanating from or attributable to a person in office; properly authorised*” and the ordinary meaning of ‘publish’ relevantly includes “*make generally known*” and “*announce formally*” (*Australian Concise Oxford Dictionary*).
64. In the present case, the complainant sought access to documents relating to the Royalties for Regions Program and Fund, which was the subject of highly publicised discussions before the State election held in 2008. On the same day that Cabinet made the Decision - 13 October 2008 - the respondent released a Ministerial Media Statement headed “*Cabinet approves Royalties for Regions Policy*” (‘the Media Statement’), which can be downloaded from the respondent’s website. The Media Statement refers directly to the substance or effect of Items 1, 3, 4 and 6 of the Decision. Consequently, all of that information has been made generally known and is in the public domain.
65. Applying the principles in *Re Toomer*, I am satisfied that the publication of the Media Statement establishes that the information disclosed in that way is not confidential information. In addition, the Media Statement was published by the Minister responsible for the Royalties for Regions Program. In light of that, I am satisfied that the fact of the information in Item 4 of the Decision and on p.4 of the Minute has been officially published. In my view, it is not necessary, for example, that the relevant information should be published in the *Government Gazette*.
66. Accordingly, I find that the Subject 1 matter contained in Document 7 and the disputed information in Documents 5 and 13 is not exempt, pursuant to clause 1(2), because that information is merely factual and the fact of the relevant decision and deliberations has been officially published.
67. The position with regard to the Subject 2 material contained in the disputed matter is less straightforward. The Subject 2 information is contained on page 5 of the Minute. Some of the information in the disputed matter that relates to Subject 2 does not appear on page 5 of the Minute (for example, paragraph 2 of the disputed information in Document 5). Accordingly, in my view, the disclosure of that kind of information would not disclose those particular deliberations of Cabinet.
68. The respondent has also provided me with a copy of a Cabinet Decision dated

8 December 2008. However, I consider that the information contained in that document goes beyond the facts relating to Subject 2, set out in the Decision and the Minute so that I do not consider it to be directly relevant.

69. Having examined the Subject 2 matter in Document 7 and the disputed information in Documents 5 and 13, I consider that it is 'merely factual' in nature because it relates merely (in the sense of nothing more than) to statements of fact. The question that remains for my determination is whether the fact of the Subject 2 information on page 5 of the Minute has been 'officially published'.
70. I accept that there is no media release that mentions that particular information. However, on its face, Document 7 clearly establishes that Subject 2 was mentioned in correspondence with other government agencies (see emails 2 and 3 in Document 7) without any reference, expressed or by necessary implication, to that information being regarded as sensitive or confidential.
71. I also note that the respondent has already disclosed much, if not all, of the Subject 2 information contained in Document 7 and the disputed information in Documents 5 and 13 to the complainant – in part in its notice of decision given to the complainant and more fully in the edited copies of Documents 5 and 13 that the respondent has released to the complainant.
72. The documents disclosing the Subject 2 matter were released by the Minister responsible for the Royalties for Regions Program in the course of his official responsibilities under the FOI Act to the complainant, an opposition member of Parliament. Information disclosed under the FOI Act amounts to disclosure to the world at large, since no restrictions may be placed upon what happens to the information once it has been released.
73. On the facts, the Subject 2 information has been disclosed to a limited number of people, with no control over the dissemination of that information. In addition, the information has been released to the complainant by the responsible Minister as part of his functions under the FOI Act. In light of that, I am satisfied that the fact of the Subject 2 information on p.5 of the Minute has been officially published.
74. I find that the references to Subject 2 contained in Document 7 and the disputed information in Document 13 are not exempt, pursuant to clause 1(2), because that information is merely factual and the fact of the relevant deliberation has been officially published.

Consideration - clause 1(1)(b)

75. In light of my findings on Documents 5, 7 and 13 in relation to clauses 1(1) and 1(1)(a), it is not necessary for me to consider whether the disputed matter in those documents would also be exempt under clause 1(1)(b) because, in the event that they were found to be exempt under that provision, the limit on the exemption in clause 1(2) would apply. Accordingly, I have considered the

application of clause 1(1)(b) only insofar as it concerns Documents 15, 16 and 17.

76. Clause 1(1)(b) provides that matter is exempt if its disclosure would reveal the deliberations or decisions of an Executive body and if it “*contains policy options or recommendations prepared for possible submission to an Executive body*”.
77. Document 15 consists of the minutes of a meeting held on 22 October 2008 in relation to matters that arose from the making of the Decision. From my examination of the contents of that document, I accept that the purpose of the meeting was to develop a future submission to Cabinet and the minutes outline matters relevant to that submission. Having examined Document 15 and a copy of a Cabinet decision dated 8 December 2008, which the respondent provided to me, I am satisfied that Document 15 contains policy options prepared for possible submission to an Executive body. In my view, Document 15 is exempt under clause 1(1)(b).
78. Documents 16 and 17 each consists of emails attaching a table of figures sent between government officers on 23 October 2008. The respondent submits that Documents 16 and 17 contain policy options or recommendations prepared for possible submission to Cabinet and/or the EERC. In support of its claim for exemption, the respondent has given me copies of a Cabinet Summary Sheet dated 6 November 2008, attaching a Cabinet minute and a Cabinet decision sheet, dated 10 November 2008, which show that information in the attachments were submitted to the EERC and to Cabinet.
79. I accept that the EERC is a committee of Cabinet and thus, I find that it is an Executive body, pursuant to clause 1(6). Having examined Documents 16 and 17 and the documents and information provided to me by the respondent, and having considered the submissions made by the respondent, I am satisfied that Documents 16 and 17 contain recommendations prepared for possible submission to the EERC and to Cabinet. I am also satisfied, on the information before me, that the limit on exemption in clause 1(5) has no application in this case.
80. In my view, based on my examination of them, the covering emails also contain information that, if disclosed, would reveal the deliberations of an Executive body – in this case, both the EERC and Cabinet. Consequently, I consider that the covering emails are exempt under the general exemption in clause 1(1).

CONCLUSION

81. I find that:
 - Document 7 and the disputed information in Documents 5 and 13 are not exempt under clauses 1(1) or 1(1)(a); and
 - Documents 15, 16 and 17 are exempt under clause 1(1)(b).
