Decision and Reasons for Decision

Administrative Review Tribunal

Applicant/s:	**Rex Patrick**
Respondent:	**Secretary, Department of Climate Change, Energy, the Environment and Water**
Tribunal Number:	**2024/1845**
Tribunal:	**Senior Member N Manetta**
Place:	**Adelaide**
Date:	**17 February 2025**
Decision:	The Tribunal sets aside the decision under review and in substitution decides that access shall be granted, or access may be withheld, as the case may be, in accordance with the list in paragraph [57] of the attached statement of reasons.

.....[sgnd].....

Senior Member N Manetta

Catchwords

FREEDOM OF INFORMATION – review of decision of Secretary, Department of Climate Change, Energy, the Environment and Water to redact noting brief – brief superseded in the event – brief containing legal advice and therefore exempt on basis of legal professional privilege – brief also containing deliberative material – section 47C of FOI Act – public interest considerations – respondent maintains grant of access would produce adverse effects on Department including inhibiting candour and frankness – contention rejected – discussion of duties arising under Public Service Act – access granted in respect of all material except material covered by legal professional privilege

Legislation

Freedom of Information Act 1982 (Cth)

Public Service Act 2019 (Cth)

Cases

Re Dreyfus and Secretary, Attorney-General's Department [2015] AATA 962

Frugtniet v ASIC [2019] HCA 16; (2019) 266 CLR 250; (2019) 79 AAR 9

Re Taggart and Civil Aviation Air Authority [2016] AATA 327; (2016) 155 ALD 161

Waterford v The Commonwealth (1987) 163 CLR 54

Workcover Authority (NSW), (General Manager) v Law Society of NSW [2006] NSWCA 84; (2006) 65 NSWLR 502

Secondary Materials

Office of the Australian Information Commissioner – *FOI Guidelines* (Version 1.4, May 2024) paras [6.222] – [6.259]

Statement of Reasons

1. This is an application by Mr Rex Patrick seeking a review of a decision by which the respondent declined to provide full access under the *Freedom of Information Act, 1982* (Cth) ('the FOI Act') to a certain ministerial noting brief (the 'Brief') addressed to the Minister for

Environment and Water. The Brief concerns salmon-farming operations in Macquarie Harbour and their possible impact on the Maugean skate, an endangered aquatic species. A copy of the Brief (but with redactions) was provided by the respondent to Mr Patrick after the latter requested access to it under the FOI Act. The redactions were said by the respondent to have been properly made for one or more of a number of reasons, to which I shall come in due course.

2. Mr Patrick challenges the respondent's decision to make the redactions. It would appear that the Brief was in fact withdrawn and a new brief was subsequently sent to the Minister.[1] Mr Patrick seeks access to the Brief in its entirety even though it was superseded.

TRIBUNAL'S TASK

3. The Tribunal's task in this matter is to evaluate each redaction against the terms of the FOI Act, and to decide whether the redaction is justified. In a case like this, the Tribunal hears the matter afresh on the evidence before it. It does not merely review the respondent's decision for error, but reaches the correct or preferable decision on the evidence adduced before it.[2] It follows that the Tribunal may set aside the decision under review notwithstanding the absence of any error in the respondent's decision if that is the correct or preferable decision on the evidence before it. Equally, the Tribunal may affirm the decision under review notwithstanding the presence of a clear error in the respondent's reasoning if that is the correct or preferable decision on the evidence before it.

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[1] See Statement of Ms Short, Ex R4, at 2 [11].

[2] See, for example, *Frugtniet v ASIC* [2019] HCA 16; (2019) 266 CLR 250; (2019) 79 AAR 9 at [51]. This case concerned the Tribunal's predecessor, the Administrative Appeals Tribunal, but its observations in this regard apply equally to the Tribunal.

BACKGROUND FACTS

4. I turn first to describe the background facts. The Brief is dated 9 November 2023. The documents in the Brief that have proved contentious consist of the noting brief proper, an Attachment 'A', and a flow-chart (appearing as Attachment 'B' (and called a 'road map')). There are a number of redactions in each document, and each redaction is marked with a reference to a section or sections in the FOI Act said to justify the redaction. I had an unredacted version of each of these three documents before me, but Mr Patrick did not.

5. The redacted version of the noting brief proper[3] records a single recommendation; namely, that the Minister should 'note' the anticipated handling of certain so-called 'reconsideration requests' arising under the *Environment Protection and Biodiversity Conservation Act, 1999* (Cth) ('the EPBC Act'). The 'reconsideration requests' which the Brief mentions involve a so-called 'referral decision' under the EPBC Act in 2012 concerning commercial salmon-farming operations in Macquarie Harbour. The redacted version of the Brief records that the 2012 referral decision decided that salmon-farming operations in the Harbour were not a 'controlled action' for the purposes of the EPBC Act 'if undertaken in a particular manner'.[4]

6. The redacted version of the Brief also records that a number of bodies have requested the responsible minister to reconsider this earlier decision, and they are listed.[5]

7. These reconsideration requests 'provide a range of scientific information', it is said, 'to support their assertions that Macquarie Harbour salmon farming is having a more significant impact on the Maugean Skate than anticipated at the time of the 2012 EPBC referral

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[3] Before the Tribunal as part of Annexure RMS-1 to the statement of Ms Rachel Short: Ex R4.

[4] Paragraph [1a] of the noting brief proper.

[5] Paragraph [1b] of the noting brief proper.

decision'. It is further recorded in the redacted version of the Brief that the Department considers it 'likely that the reconsideration requests meet the relevant requirements of the EPBC Act', and that the Department delegate 'expects formally to accept requests and commence the process to reconsider the 2012 referral decision'.[6]

8. It is further noted that the reconsideration process would commence with public consultation when the departmental delegate formally invites comments and publishes a public notice to this effect on the departmental website. This has occurred, and the consultation process has now closed. The responsible Minister is presently considering her decision as I understand matters.

REASONS

Legal Professional Privilege

9. One basis advanced by the respondent for some of the redactions is s 42(1) of the FOI Act. Section 42(1) provides that a 'document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the grounds of legal professional privilege'. If they are covered by the privilege, the redacted portions are exempt from disclosure: there is no further public-interest weighing to be undertaken. In respect of the redactions where legal professional privilege is asserted to apply, it is clear that the respondent has consulted an officer employed within the Department's internal legal division.

10. It is an essential precondition for a claim of legal professional privilege that there be a professional relationship between client and legal adviser that secures an independent

[6] Paragraphs [2] and [3] of the noting brief proper.

character to the legal advice given. It is accepted that the necessary degree of independence can arise out of an employer-employee relationship within Government, but it will always be a question of fact in each case whether the particular relationship allows sufficient independence to the legal adviser so that the privilege may properly be claimed.[7]

11. In this case, Mr Patrick conceded that the departmental legal division from which advice was sought was sufficiently independent of the Department. In the circumstances of this case, I am prepared to act on this concession.

12. It is not always the case, however, that the Tribunal acts on a concession of this type. No evidence was led to substantiate the independence of the departmental legal division; on the other hand, the respondent's assertion that the relationship between the Department and its internal legal division was independent is plausible, even if it is not supported by explicit evidence. Rather than call for more evidence from the respondent as part of my review, I have decided to act on Mr Patrick's concession.[8]

13. It remains necessary to consider whether the advice in question is protected by the privilege. I have decided that in respect of all redacted parts of the document where a claim for legal professional privilege has been made, the respondent is entitled to withhold access except in relation to the following parts:

- The final sentence appearing in [13b.iv] of the noting brief proper. This simply records the need for further legal analysis.

- The second sentence appearing in [20] of the noting brief proper. This adverts merely to the department's seeking of advice.[9]

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[7] *Waterford v Commonwealth* (1987) 163 CLR 54, 62 (Mason and Wilson JJ); and see the discussion, including of Federal Court authorities, in *Re Taggart and Civil Aviation Air Authority* [2016] AATA 327; (2016) 155 ALD 161 at [32]ff.

[8] See s 53 of the *Administrative Review Tribunal Act, 2024* (Cth).

[9] Legal professional privilege was not claimed in respect of the first sentence of paragraph [20].

- The header immediately under the heading 'Attachment A' in Attachment A does not represent legal advice to the Department or the Minister. It is merely a header that records the contents of the attachment.

- The header between [14] and [15] of Attachment A does not record legal advice to the Department or the Minister.

- The header between [16b] and [17] of Attachment A does not record legal advice to the Department or the Minister.

14. In deciding that the respondent's claim for legal professional privilege should be accepted, I have concluded that each part of the Brief where the claim has been successfully made either presents a summary of advice obtained from the internal legal division, or is a direct insertion of advice by the legal division into the Brief, or represents a modification by the internal legal division of draft text in the Brief and, therefore, represents implicitly its own advice. In all cases, the redaction in question represents, therefore, independent advice to the Minister and communicated to her through the Brief. I accept that the dominant purpose of preparing the advice was to respond to a request for legal input in respect of the Brief. There is nothing in the terms of the request for advice or the advice that suggests the advice concerns only operational, administrative or policy matters.[10]

Section 47C – Deliberative matter

15. Another basis for refusing access in respect of some of the redacted material concerns section 47C; namely, that the material concerns 'deliberative matter'. This is defined to be 'matter in the nature of, or relating to, opinion, advice, or recommendation obtained,

[10] Cf *Workcover Authority (NSW), (General Manager) v Law Society of NSW* [2006] NSWCA 84; (2006) 65 NSWLR 502 at [94].

prepared, or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency'.[11]

16. I have decided that all material where s 47C of the FOI Act is claimed to apply satisfies this definition. This material is made, therefore, 'conditionally exempt' under s 47C(1).

17. The FOI Act requires the disclosure of conditionally exempt material 'unless in the circumstances access to the material at that time would on balance be contrary to the public interest': s 11A(5). Section 11B sets out how I am to approach the question of whether disclosure of conditionally exempt documents would be contrary to the public interest. Section 11B(3) sets out certain factors favouring access to a conditionally exempt document in the public interest; and subsection (4) specifies factors that must be excluded from consideration as matters weighing against the public interest. Subsection (5) requires me to take account of any guidelines issued by the Information Commissioner. I have taken these into account.[12]

Public interest considerations and Ms Short's statement

18. In support of its submission that access to the conditionally exempt material would be contrary to the public interest, the respondent tendered a witness statement of Ms Short.[13] Ms Short is the branch head of the 'Environment Assessments (Victoria and Tasmania) and Post Approval Branch' within the 'Nature Positive Regulation Division' of the 'Commonwealth Department of Climate Change, Energy, the Environment and Water'. Ms Short gave oral evidence as well.

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[11] See section 47C(1)(a).
[12] And see paragraph [40] below.
[13] Ex R3 (unredacted) and Ex R4 (redacted).

19. Ms Short addresses various public-interest considerations in her statement. These are presented by her globally, so to speak, to justify the redaction of all material in the Brief where access has been refused under s 47C of the FOI Act.

20. It is convenient to address in general terms the contentions arising from her statement. A number of contentions are made, and some contentions overlap one another. I have tried to distil and summarise what I take to be the gravamen of each major contention. I make the obvious point that I am required to consider the strength of these contentions as they apply to the particular circumstances of the case before me.

21. Ms Short contends that there is 'limited public interest' to be served in the Department releasing its 'very preliminary analysis' as contained in the Brief.[14] That may well be true. It may well be the case that the Brief will not meaningfully inform debate on a matter of public importance (because the Brief was superseded in the event).[15] The point Ms Short makes in this regard does not mean disclosure would tend against the public interest, however: it means there is at most an absence of an additional factor favouring disclosure.

22. I am directed by s 11B(3)(a) to take into account that factors *favouring* access to the document in the public interest include whether access to the document would promote the matters set out in s 3. Section 3(1) of the FOI Act provides that the objects of the Act include giving access to information held by the Government by providing for a right of access *per se*. Section 3(2) says that by providing access, the Parliament intends to increase scrutiny, discussion, comment, and review of the Government's activities.

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[14] Ex R4, statement of Ms Short, at [53].
[15] Cf 11B(3)(b) of the FOI Act.

23. These matters clearly favour access to the Brief even though it has been superseded and even though it may not inform current debate.

24. Ms Short makes the following observation at paragraph [61] of her statement:

> I am aware that it is important that those preparing briefs containing opinion and advice based on an analysis of a preliminary nature, do so in the knowledge that the brief will remain confidential to the intended recipients who are well placed to discern that the brief necessarily contains preliminary analysis, opinion and advice based on the set of information available at the time.

25. Ms Short develops this view in her statement at various points. Ms Short cannot, of course, predict the effect upon all branches of the Australian Public Service ('APS') of a decision allowing access, and I do not understand her to have intended to do so. If I am to accept Ms Short's contention, I must find, as a matter of fact, that the release of one or more of the redacted portions will impede public servants in the respondent's department in their work.

26. Ms Short's contention does not address what I have assumed to be a clearly uncontroversial fact; namely, that, generally speaking, federal public servants must have become used to their documents being made available under the FOI Act. The FOI Act was passed in 1982, more than forty years ago. I do not accept the general premise of Ms Short's contention; namely, that public servants in the respondent's Department expect today to work in an environment of confidentiality in relation to their preliminary advice and reports to the Minister. I do accept that public servants understand that they are not generally at liberty to divulge or disseminate information arising in the course of their employment, and that they understand that even colleagues within their agency may enjoy only restricted access to their work if it is sensitive (or perhaps no access at all). But that does not mean that today's public servants believe that they work in an environment where FOI officers may not have to divulge departmental records to the public. That would be a very strange expectation, indeed. To the contrary, I believe I should proceed on the basis that public servants are aware, at least in a general way, that the FOI Act may require disclosure of

departmental work, whether of a preliminary nature or otherwise. I doubt strongly – in any event, I am not satisfied by Ms Short's statement – that public servants in her branch generally expect that the preliminary departmental work to which they contribute is not open to public access under the FOI Act regime or that they generally tailor their written work in accordance with this assumption. That may well have been different in the past; but the FOI Act has been in operation for many decades now, as I have said.

27. Ms Short further contends that in her belief it is reasonable to suppose that public servants might restrict the content of their noting briefs because of a fear of successful FOI Act requests.[16] Again, I would note that Ms Short cannot speak for the impact upon the entire Australian Public Service ('APS') of a release of documents in this case. So far as Ms Short's own branch within the APS is concerned, Mr Patrick made a number of persuasive points in respect of Ms Short's contention.

28. Mr Patrick submitted that the contention needs to be evaluated carefully against the background of the responsibilities that APS managers and employees have under the *Public Service Act 1999* (Cth) ('PS Act'). Section 10 of the PS Act specifies 'APS values'. Section 10(5) of the PS Act provides that the APS is 'apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence'. Section 13 of the PS Act then requires public servants to act honestly, with integrity, with care and diligence, and in a manner that supports APS values. These values include the value to which I have just made specific reference. An employee must also act in accordance with any direction given by a manager: see s 13(5) of the PS Act. An agency head is, furthermore, required to uphold and promote APS values: see s 12 of the PS Act. I think

[16] Ex R4, statement of MS Short, at [63].

this latter requirement includes a responsibility to promote a culture of upholding APS values within an agency.

29. Ms Short does not explicitly address in her statement the counterbalance that is provided by this statutory framework. All in all, I have found Ms Short's observations in her statement assert what she perceives to be a risk in giving access, but without according any weight to this statutory regime. As I have just noted, APS agency heads are obliged to promote adherence to APS values; and managers can direct their staff to ensure compliance with APS values. If Ms Short's analysis were correct, it would mean that public servants in her branch could well choose to operate in a way that is contrary to APS values (and, therefore, in breach of their obligations under the PS Act) merely because my decision might require disclosure of their preliminary work on this occasion. Ms Short does not refer in her statement to any past examples where she believes that a disclosure required under the FOI Act has led to inappropriately censored advice in noting briefs to Ministers. If there is a risk of the type identified by Ms Short, there appears to be a relatively straightforward way to address it; namely, by reinforcement of APS values within her agency (whether by formal direction or otherwise).

30. In saying this, I do not mean to imply that there are no cases where Ms Short's contention about a risk of inhibiting candour would apply. I refer below to a case in the Tribunal where it did prove relevant in a weighing of public interest factors.[17] Each individual case must be considered on its own merits, however. I have not found Ms Short's contentions persuasive in this case.

[17] See paragraph [37] below.

31. Ms Short also draws attention to the fact that briefing notes may become more complex as officers seek to ensure (unnecessarily) that their views are more amply elaborated, so as to avoid giving a misleading impression to any future successful FOI applicants. This contention is somewhat conjectural in my opinion. Moreover, I note again that it is the responsibility of managers in the APS to ensure the efficiency of staff; and if briefing notes were to become unnecessarily laboured, leading to appreciable inefficiency, managers and agency heads are authorised to direct staff not to unduly elaborate their submissions.

32. Ms Short suggests that if the Tribunal allowed access, the Department would be less likely to engage in preliminary analysis and provide advice to the Minister or may prefer to provide advice orally rather than in writing. One APS value is, as I have said, the provision of timely, honest, careful and diligent advice to the Minister. That advice will be provided in the manner expected by the Minister and in accordance with proper recordkeeping obligations within the Department. Those tasked with the management of the public service and liaising with the Minister's office can be expected, in my opinion, to ensure that the Minister remains properly informed, and informed in writing where it is appropriate to do so. This is a fundamental aspect of public administration. I do not accept the submission that acceding to the FOI request in this case could reasonably be expected to result in a dereliction in the performance of this core task in the ways mentioned by Ms Short.

33. Ms Short makes a further point that release of the redacted portions may interfere with the statutory consultation process under the EPBC Act, to which the Brief refers. That process involves inviting and receiving public submissions.

34. This contention should not be accepted in my opinion. When the Minister conducts a process under the EPBC Act inviting public submissions, that process is clearly advertised as one conducted under that Act, and it is conducted in the manner prescribed by that Act.

If a person seeks access to information under the FOI Act, it will be clear to that person that any information provided to him or her is provided in accordance with that request.

35. It may, or may not, prove to be the case that people who access information through a request under the FOI Act will seek to supplement their submission under the EPBC Act with information obtained under the FOI Act. I cannot say whether that will or will not occur in this case, but in and of itself, that is not an adverse event to be avoided. Any further submission that a person may choose to make under the EPBC Act process may, or may not, be accepted; and it may, or may not, prove persuasive or useful in the Minister's deliberations. But it cannot be said, in my opinion, that it is *per se* contrary to the public interest that a person requesting information under the FOI Act should receive that information simply because it *may* prompt that person or others to seek to participate further in a process under the EPBC Act.[18] I do not accept that there will be an associated burden on the department to ensure a response to an FOI Act request does not interfere with decision-making processes under the EPBC Act.

36. Ms Short's submission in this regard must also be assessed in light of the provision in s 11B(4). The following two considerations are explicitly excluded from the range of matters I may take into account as matters tending against disclosure in the public interest: first, the fact that access to the document could result in a person misinterpreting or misunderstanding the document;[19] and, secondly, the fact that access to the document could result in confusion or unnecessary debate.[20]

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[18] I note here that while Mr Patrick is nominally the applicant, he is acting on behalf of a number of people interested in the potential environmental consequences for the Maugean skate.

[19] See s 11B(4)(b) of the FOI Act.

[20] See s 11B(4)(d) of the FOI Act.

37. I was referred by the respondent to a decision of the Administrative Appeals Tribunal, *Dreyfus and Secretary, Attorney-General's Department*.[21] This case concerned an Incoming Government Brief, or 'IGB', to a new Attorney-General. This document was prepared to assist the new Attorney-General to come to terms with important issues within the portfolio.

38. The Tribunal in *Dreyfus* held as follows at [106] to [107]:

> [106] I accept that the factors favouring access, as set out in s 11B(3) of the Act, in the objects of the Act (set out in s 3 of the Act and in [1.14] of the Guidelines) and as relied upon by Mr Dreyfus do apply and do favour access generally. However, the IGB is unique in nature.
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> [107] In this case, the combination of factors against release in the public interest include the nature of an IGB to a new Minister in a newly elected incoming Government, the evidence of Mr Sheehan explaining the importance of the maintenance of confidentiality on not only the content of this IGB but also on the preparation of future IGBs, the need for continuity of frankness, candour and completeness in the advice and commentary contained in IGBs, the extent of deliberative matter contained in such a document and the impact on the preparation of future IGBs if access were granted. While none of these factors standing alone may be sufficient to outweigh the public interest in access, the factors against release are cumulative and it is that accumulation that tips the balance against access being granted. This is not a document of a nature that is prepared just once. Further, it is an IGB prepared for a new Minister in a new Government. The factors raised by Mr Sheehan and the Secretary, on balance, outweigh the public interest factors that favour access. As the Commissioner said, the IGB was prepared in a specific context, as summarised at [73] above. Such a context requires preparation of the document unhindered by apprehension that the IGB, prepared as a confidential brief to an incoming new Attorney-General, will be released. These factors were relevant when the IGB was being prepared and remain relevant today.

39. Each case must turn on an evaluation of its own facts, as I have noted, and this was the approach followed in *Dreyfus.* The Tribunal in *Dreyfus* acknowledged specifically that 'the IGB is unique in nature'. I do not think that any meaningful comparison can be drawn between an IGB and the Brief so as to make the Tribunal's reasons in *Dreyfus* a persuasive analogy in this case.

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[21] [2015] AATA 962.

40. I have already observed that under s 11B(5) of the FOI Act, I am required to have regard to the Guidelines issued by the Information Commissioner under s 93A. I have had regard to those Guidelines,[22] and there is nothing in them that I believe contradicts my decision in this case. In respect of what are called 'frankness and candour claims', I note the Guidelines provide as follows (at paragraph [6.252]):

> While frankness and candour claims may still be contemplated when considering deliberative material and weighing the public interest, they should be approached cautiously and in accordance with ss 3 and 11B [of the FOI Act]. Generally, the circumstances will be special and specific.

I respectfully agree with this observation.

41. In deciding whether it would be contrary to the public interest to allow access to a document, I must weigh the factors favouring disclosure against those that favour withholding access. As a general matter,[23] I have not been persuaded that there is any factor favouring the withholding of access in this case, and that there are some that favour disclosure.[24] Accordingly, I am not of the opinion, generally speaking, that access to the Brief would not be in the public interest.

Specific consideration of the redactions

42. What I have said above at paragraphs [18] to [41] reflects my assessment in respect of the respondent's global submissions as they affect claims made under s 47C. As I have indicated, I have found the contentions made by Ms Short generally unpersuasive in respect

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[22] Office of the Australian Information Commissioner – *FOI Guidelines* (Version 1.4, May 2024) paras [6.222] – [6.259].

[23] I consider individual redactions below at paragraphs [44]ff.

[24] Under s 11A(3)(a) and ss 3(1)(b) and 3(2)(b) of the FOI Act: see paragraphs [22]-[23] above.

of relevant public-interest considerations weighing against access, and I am not persuaded that disclosure of the material would be contrary to the public interest.

43. It remains my task, however, to assess each redacted portion to ensure that there is nothing special or unusual about that particular redacted material to cause me to alter my assessment as to where the public interest lies.

Application of the 'public interest' considerations where section 47C is said to apply

44. Paragraphs [5], [5a], [6], and [7] occur under the heading 'Key Points' in the noting brief proper of the Brief. Paragraph [5] refers to the departmental consultation process. Paragraph [5a] gives a worked example of a consultation across putative dates. I do not see anything here that contradicts or qualifies any of what I have earlier said in relation to the public interest. I am not satisfied that it would be contrary to the public interest to grant access to paragraphs [5] and [5a].

45. Paragraphs [6] and [7] concern consultation for salmon-farm operators and the reasons for allowing the consultation recommended there. I do not see anything in paragraphs [6] and [7] to contradict or qualify what I have earlier said in relation to where the public interest lies. I am not satisfied that it contrary to the public interest to release paragraphs [6] and [7].

46. Paragraphs [12], [13], [13a], [13b], [13b.i], [13b.ii], [13b.iii], [13b.iv], [14], the second sentence in paragraph [15], and paragraphs [15a] and [16b.i] of the noting brief proper of the Brief are all included in the section under the heading 'Sensitivities and Handling'. These paragraphs concern commencement of the consultation process, potential interest from stakeholders, the implications of a 'controlled action' decision, potential economic impacts and challenges for salmon-farm operators, interactions with the state Government or state regulatory bodies, and the impact of salmon farming on the Maugean skate. There

is nothing in any of these paragraphs to contradict or qualify what I have earlier said in relation to where the public interest lies. I am not satisfied that it is contrary to the public interest to release any of the redacted material in these paragraphs.

47. Paragraph [20] appears under the heading 'Legal Advice/Legislative Impacts'. This paragraph comprises two anodyne statements about potential legal recourse. There is nothing in paragraph [20] to contradict or qualify what I have earlier said in relation to where the public interest lies. I am not satisfied that it is contrary to the public interest to release any of the redacted material in this paragraph.

48. I turn now to Attachment 'A' to the Brief. There is nothing in paragraphs [1b], [1b.i], [6a] or the second sentence of paragraph [7] under the heading 'EPBC Act Reconsideration Process' to contradict or qualify what I have earlier said in relation to where the public interest lies. Paragraphs [1b] and [1b.i] concern legal advice, while paragraph [6a] records a view in connection with the Tasmanian Wilderness World Heritage Area and the second sentence of paragraph [7] records a departmental response to the allegations appearing in the first sentence (which has not been redacted). I am not satisfied that it is contrary to the public interest to release any of the redacted material in these paragraphs; but I note that access may be withheld under s 42(1) in respect of paragraphs [1b] and [1b.i].

49. There is nothing in paragraphs [8], [8a], [8b], [9], [10], [11c], [12], [13], or [14] (appearing under the heading 'Next steps') to contradict or qualify what I have earlier said in relation to where the public interest lies. Paragraphs [8], [8a], [8b], [9], and [10] concern a planned consultation process, and I am not satisfied that it is contrary to the public interest to release any of the redacted material in these paragraphs. The same applies to paragraphs [11c], and [12] – [14], which concern the effect of any controlled action decision that might be

made and interaction with salmon farmers following such a decision; but I note that access may be withheld under s 42(1) in respect of paragraph [14].

50. There is nothing in the heading that appears just before paragraph [15], or in the heading before paragraph [17], or in paragraphs [15], [16], [16a], [16b], [17], [18], or [19] to contradict or qualify what I have earlier said in relation to where the public interest lies. I am not satisfied that it is contrary to the public interest to release any of the redacted material in the heading or these paragraphs; but I note that access may be withheld under s 42(1) in respect of paragraphs [15], [16], [16a], [16b], [17], [18], and [19].

51. The flow-chart, or 'road map', marked 'EPBC – Macquarie Harbour Aquaculture' is simply a schematic representation of a decision-making process. There is nothing in the flow-chart to contradict or qualify what I have earlier said in relation to where the public interest lies. I am not satisfied that it is contrary to the public interest to release any of the redacted material in the chart.

Section 47B – Commonwealth-State relations

52. Ms Short makes further reference to some of the material reflecting discussions between Commonwealth agencies and state agencies. Section 47B(a) and (b) provide, respectively, that a document is conditionally exempt if it would or could reasonably be expected to cause damage to relations between the Commonwealth and a State, or it would divulge information or matter communicated in confidence by on behalf of the Government of a State to the Commonwealth. By way of general observation here, I would note whether these preconditions are satisfied depends on the precise facts of the matter in question. A document falling under s 47B is, as I have said, a conditionally exempt document.

53. The respondent has submitted that access should be denied to the last sentence in [14] and the entirety of [15] of the briefing note proper because it falls within s 47B of the FOI Act. The last sentence in [14] does not on its face disclose any in-confidence communication between a State and the Commonwealth nor would its disclosure on its face damage relations between the Commonwealth and the State. It is simply a statement representing the Department's view as to a state Government's expected position. I do not believe this sentence is conditionally exempt under s 47B.

54. The first sentence of paragraph [15] is simply a statement of fact, one that is presumably ascertainable on request to the appropriate regulatory authority, if it is not already in the public domain. It does not attract s 47B. The second sentence of paragraph [15] is simply a conclusion predicated upon consultation being commenced by a particular date. It does not attract s 47B in my opinion.

55. It follows that in my view s 47B of the FOI Act does not apply to exempt conditionally these paragraphs.

Application of the 'public interest' test where section 47B is said to apply

56. If s 47B had applied, there would clearly be matters against disclosure that I would need to weigh; but I do not think that I should attempt the artificial task of seeking to weigh the public interest considerations on an assumption that s 47B does apply.

RESULTS

57. The results of my review of the redactions in this matter are as follows:

Noting Brief proper

Officers' mobile numbers	This information is properly redacted.[25]
[5]:	Access should be granted.
[5a]:	Access should be granted.
[6a]:	Access should be granted.
[7]:	Access should be granted.
[12]:	Access should be granted.
[13]:	Access should be granted.
[13a]:	Access should be granted.
[13b]:	Access should be granted.
[13b.i]:	Access should be granted.
[13b.ii]:	Access should be granted.
[13b.iii]:	Access should be granted.
[13b.iv]:	Access should be granted.
[14]:	Access should be granted.
[15]:	Access should be granted.
[15a]:	Access should be granted.
[16b.i]:	Access should be granted.

[25] The parties agreed that this information was appropriately redacted under s 22(1)(a) of the FOI Act.

[20]:	Access should be granted.

Attachment 'A' to Noting Brief

Header immediately under Attachment A:	Access should be granted.
[1b]	Access may[26] be withheld.
[1b.i]	Access may be withheld.
[6a]	Access should be granted.
[7]	Access should be granted.
[8]	Access should be granted.
[8a]	Access should be granted.
[8b]	Access should be granted.
[9]	Access should be granted.
[10]	Access should be granted.
[11c]	Access should be granted.
[12]	Access should be granted.
[13]	Access should be granted.
[14]	Access may be withheld.
Header between [14] and [15]	Access should be granted.
[15]	Access may be withheld.
[16]	Access may be withheld.
[16a]	Access may be withheld.

[26] The expression 'access **may** be withheld', when it occurs in this list, reflects the fact that legal professional privilege may be waived.

[16b]	Access may be withheld.
Header before [17]	Access should be granted.
[17]	Access may be withheld.
[18]	Access may be withheld.
[19]	Access may be withheld.

Flow chart or 'road map'

All parts	Access should be granted.

FORMAL DECISION

58. I shall set aside the decision under review and make a decision in substitution requiring access, or permitting the respondent to withhold access, as the case may be, in accordance with the list in paragraph [57] above.

I certify that the preceding fifty-eight (58) paragraphs are a true copy of the reasons for the decision herein of Senior Member N Manetta.

……[sgnd]……..
Associate

Dated: 17 February 2025

Dates of hearing: 4, 12 September 2024

Applicant's Representative	Self-Represented
Respondent's Representative	David Blencowe Clayton Utz