

Determination (redacted version)
External review - section 39 *Freedom of Information Act 1991*

Applicant	[The applicant]
Agency	Attorney-General's Department
Ombudsman reference	2018/03527
Agency references	18/0203 & 18/0304
Determination	The determination of the agency is varied.

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (**the FOI Act**) the applicant requested access from the Attorney-General's Department (**the agency; AGD**) to:

A copy of any document or thing in relation to or connection with:

1. Any and all Resolutions/Decisions made by the Legal Practitioners Conduct Board (as it was prior to 1 July 2014) to:
 - a) Lay the Charge and any and all amended charges against [the applicant] before the Legal Practitioners Disciplinary Tribunal i.e. described as:

[matter number and filing date]
 - b) Lay the charge and any and all amended Charges against [the applicant] before the Legal Practitioners Disciplinary Tribunal i.e. described as:

[matter number and filing date].

Background

2. Briefly stated, the Legal Practitioners Conduct Board (**the LPCB; the Board**) laid two charges against the applicant, alleging that he engaged in:
 - unprofessional conduct by [particulars and year of charge]
 - unsatisfactory conduct by [particulars and year of charge].¹
3. [A summary of the outcome of the charges].^{2,3,4}
4. For ease of reference, procedural steps relating to the application and the external review are set out in the appendix.

¹ [Citation].
² [Citation].
³ [Citation].
⁴ [Citation].

Jurisdiction

5. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

6. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 7 August 2018. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
7. The applicant, the agency, one interested party and a statutory office responded to my provisional determination. They did not express opposition to my provisional determination, however. Accordingly, the reasons for this (my final) determination are in the substantially similar terms to those set out in my provisional determination.

Relevant law

8. The Board was established under the *Legal Practitioners Act 1981 (the LP Act)*, and was an agency under the FOI Act. After 30 June 2014, however, the LPCB became defunct within the meaning of the FOI Act by reason of the *Legal Practitioners (Miscellaneous) Amendment Act 2013 (the Amending Act)*.⁵
9. Pursuant to the Amending Act, the LPCB was replaced by the Legal Practitioners Conduct Commissioner (**the LPCC**) with effect from 1 July 2014. The LPCC is an 'exempt agency' for the purpose of the FOI Act.⁶
10. Section 19(1) of the *State Records Act 1997* requires an agency to deliver all official records that are no longer required for current administrative purposes into the custody of State Records. Since the LPCB became a defunct agency, all of its records not required by the LPCC were delivered to State Records, and the LPCB's responsibilities under the FOI Act devolved to State Records.⁷
11. State Records is a business unit within the Attorney-General's Department (the agency for the purposes of the FOI Act and my external review).
12. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.⁸
13. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
14. The agency has refused access to the documents under review, claiming they are exempt in full as documents affecting personal affairs (clause 6(1)), internal working documents (clause 9(1)), documents subject to legal professional privilege (clause 10(1)), documents relating to judicial functions etc (clauses 11(b)⁹ and 11(c)),

⁵ *Freedom of Information Act 1991*, section 8.

⁶ *Freedom of Information Act 1991*, Schedule 2(1a).

⁷ *Freedom of Information Act 1991*, section 8(2)(b). This section is enlivened when an agency ceases to exist and no other agency takes over its functions. As an 'exempt agency', the LPCC is specifically excluded from the definition of an 'agency': *Freedom of Information Act 1991*, section 4(1). By email dated 5 June 2018 the agency confirmed having liaised with the LPCC and that '[n]one of the documents were part of a transferred complaint under section 13(1) of the *Legal Practitioners (Miscellaneous) Amendment Act 2013*.'

⁸ *Freedom of Information Act 1991*, section 12.

⁹ The agency first relied on clause 11(b) following internal review.

documents the subject of secrecy provisions (clause 12(1), in conjunction with section 73 of the *Legal Practitioners Act 1981* (**the LP Act**), and clause 17(2) of Schedule 2, Part 4 of the Amending Act (**the transitional provision**)), and documents containing confidential material (clauses 13(1)(a) and 13(1)(b)¹⁰).

15. The following provisions are relevant to my review:

Clauses 6(1) and 6(3)

- (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).
- (2) ...
- (3) A document is not an exempt document by virtue of subclause (1) or (2) merely because it contains information concerning the person by or on whose behalf an application for access to the document is made.

Clause 9(1)

- (1) A document is an exempt document if it contains matter—
 - (a) that relates to—
 - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and
 - (b) would, on balance, be contrary to the public interest.

Clause 10(1)

A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.

Clauses 11(b) and 11(c)

A document is an exempt document if it contains matter—

...

- (b) prepared for the purposes of proceedings (including any transcript of the proceedings) that are being heard or are to be heard before a court or tribunal;
- (c) prepared by or on behalf of a court or tribunal (including any order or judgment made or given by the court or tribunal) in relation to proceedings that are being heard or have been heard before the court or tribunal.

Clause 12(1)

- (1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act...

Section 73 of the LP Act¹¹

- (1) Subject to this section, a member of the Board or a person employed or engaged on work related to the affairs of the Board must not divulge information that comes to his or her knowledge by virtue of that office or position except—
 - (a) in the course of carrying out the duties of that office or position; or
 - (b) as may be authorised by or under this Act; or
 - (ba) as may be authorised by or under an agreement or arrangement that has been approved by the Attorney-General under section 73A; or
 - (c) in evidence before a court in which criminal proceedings arising from matters subject to a report of the Board have been brought.

Maximum penalty: \$10 000.

¹⁰ The agency first relied on clause 13(1)(b) following internal review. It also appears to have resiled from its clause 13(1)(a) claim at this time. For completeness, I have nevertheless still included clause 13(1)(a).

¹¹ As in force from 1 February 1999 to 30 June 2014.

- (2) A person referred to in subsection (1) may divulge information referred to in that subsection to—
- (a) the Council; and
 - (ab) the Attorney-General; and
 - (ac) a member of a law enforcement or prosecution authority of a State, or of the Commonwealth, relating to a matter referred to the authority by the Attorney-General or reported to the authority by the Board, to which the information is relevant; and
 - (ad) a regulatory authority of a participating State who has requested the information in connection with actual or possible disciplinary action against a legal practitioner; and
 - (b) a committee or person to whom the Council has delegated its power to appoint an inspector pursuant to Division 5 of Part 3; and
 - (c) an inspector appointed pursuant to that Division.
- (3) Nothing in this section prevents the disclosure of information relating to a complaint to the complainant or a person acting on behalf of the complainant.

Clause 17(2) of Schedule 2, Part 4 of the Amending Act

Section 73 of the Principal Act as in force immediately before the commencement of section 44 of this Act¹² continues to apply to a person who was, before that commencement, a member of the Board or employed or engaged on work related to the affairs of the Board.

Clauses 13(1)(a) and 13(1)(b)

- (1) A document is an exempt document—
- (a) if it contains matter the disclosure of which would found an action for breach of confidence ; or
 - (b) if it contains matter obtained in confidence the disclosure of which—
 - (i) might reasonably be expected to prejudice the future supply of such information to the Government or to an agency; and
 - (ii) would, on balance, be contrary to the public interest.
16. Section 20(4) of the FOI Act provides that if it is practicable to give access to a copy of a document from which the exempt matter has been deleted, and it appears that the applicant would wish to be given access to such a copy, the agency must give the applicant access to a copy of the document to this limited extent.
17. Section 39(12) provides that if I am satisfied that a document is an exempt document, I do ‘not have power to make a determination to the effect that access is to be given to the document’.
18. Section 39(15) provides that I must avoid disclosing in my reasons ‘any matter that the agency claims is exempt matter’.
19. Under section 48, the onus is on the agency to justify its determination ‘in any proceedings’. This includes the external review process.
20. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency’s determination in an external review, based on the circumstances existing at the time of review.

¹² Section 44 of the Amending Act provided for, among other things, the establishment of the LPCC.

Documents in issue

21. The agency identified two documents and their attachments¹³ within the scope of the application.
22. The agency originally determined to grant full access to documents 1aa, 1ab, 1ac, 1aca, 2d, 2g, 2j, 2ja and 2k, and access to document 2bb after redacting information considered to be outside the scope of the access application. It released these documents to the applicant with its original notice of determination. I note, however, that following internal review the agency purported to reverse this aspect of the original determination, claiming that these documents were also exempt in full. Given that the applicant 'might be expected to already have been in possession of these documents', the agency did not seek their return. During the course of my external review, the applicant consented to these documents being excluded from further consideration. Accordingly, documents 1aa, 1ab, 1ac, 1aca, 2bb, 2d, 2g, 2j, 2ja and 2k (**the excluded documents**) are not in issue in my external review.
23. The agency claims that documents 1, 1a, 1acb, 1ad, 2, 2a, 2b, 2ba, 2c, 2e, 2ea, 2f, 2h, 2i, 2ka, 2kb, 2l, 2m, 2n and 2o (**the documents in issue**) are exempt in full. These are the documents in issue in my review.

Issues in this review

24. It is for me to decide whether or not the agency has justified its determination to refuse access to the documents in issue.

Summary of evidence and submissions

The applicant

25. In his internal review application, the applicant made the following comments:
 1. The information relates to me not a third party.
 2. The Legal Practitioners Conduct Board was not an exempt agency at the relevant time.
 3. I have a right to know what evidence/ material was considered by the Board to lay the charges & that protocol was followed to make the determine [sic] the laying of charges.
26. When applying for external review, the applicant advised my Office that he was aggrieved because he had not been given any documents that he 'did not already have'.
27. The applicant acknowledged receipt of my provisional determination and advised that he looked forward to receiving my final determination.

The agency

28. In its original determination, the agency proffered the following reasons for refusing access to the documents:¹⁴

... I determine to refuse access in full to documents 2b, 2c, 2f, 2h and 2i pursuant to Schedule 1, Clause 6(1) ...

¹³ The documents and their attachments are marked 1, 1a, 1aa, 1ab, 1ac, 1aca, 1acb, 1ad, 2, 2a, 2b, 2ba, 2bb, 2c, 2d, 2e, 2ea, 2f, 2g, 2h2i, 2j, 2ja, 2k, 2ka, 2kb, 2l, 2m, 2n, 2o.

¹⁴ I have omitted the agency's quotations of legislation in its determination, having included these above in the section headed 'Relevant Law'.

These documents were authored by individuals external to the agency expressing their personal views on this subject matter and it would be unreasonable to release their details and the content of their correspondence to you for this application.

... I determine to refuse you access in full to documents 1, 2, and 2e pursuant to Schedule 1, Clause 9(1)(a)(i)(b) ...

These documents were prepared by the Legal Practitioners Conduct Board and contain opinion, advice or recommendations which were considered for the purpose of decision making relating to the functions of government. On balance, it is not in the public interest to disclose the content of these documents as it is important for the agency to receive frank and comprehensive advice and opinions, including the expression of views which may be contentious. The prospect that unknown third parties may obtain access to those documents by way of an FOI application may inhibit the provision of full and open opinions and recommendations on such matters in the future.

... I determine to refuse access in full to documents 1a, 1ad, 2a, 2ea, 2l, 2m, 2n and 2o pursuant to Schedule 1, Clause 10(1) ...

These documents comprise or include confidential communications between members of the Legal Practitioners Conduct Board and external lawyers engaged by the Board. The documents were created for the purpose of obtaining or giving legal advice in relation to charges that were filed/heard before the Legal Practitioners Disciplinary Tribunal.

... I determine to refuse access in full to documents 1acb, 2ba, 2c, 2ka and 2kb pursuant to Schedule 1, Clause 11(c) ...

These documents were prepared by judicial representatives in relation to proceedings which have been heard before [...] Courts ...

... I determine to refuse access in full to documents 1, 1a, 1ad, 2, 2a, 2b, 2c, 2e, 2ea, 2f, 2h, 2i, 2l, 2m, 2n and 2o pursuant to Clause 12(1) ...

Release of the documents which do not relate to you would contravene section 73(1) of the *Legal Practitioners Act 1981* (version 4.9.2006 - 31.5.2007) ...

The exempt documents relate to an investigation conducted by The Legal Practitioners Conduct Board. Section 73 prevents the release of information except in particular circumstances. Where the exception to section 73(3) is met, you have been provided with access to documents.

Clause 17(2) of Schedule 2, Part 4 of the *Legal Practitioners (Miscellaneous) Amendment Act 2013* (the Amending Act) provides that section 73 of the *Legal Practitioners Act 1981* will remain in force as per the principal act pursuant to section 44 of the Amending Act which outlines the confidentiality will continue to apply to a person who was, before the commencement of the amending act, a member of the Board or employed or engaged on work related to the affairs of the Board. Therefore, it is my view that the statutory protection provided by section 73 does not dissolve because the documents are the subject of a freedom of information application.

... I determine to refuse access in full to documents 1, 1a, 1ad, 2, 2a, 2b, 2c, 2e, 2ea, 2f, 2h, 2i, 2l, 2m, 2n and 2o pursuant to Schedule 1, Clause 13(1)(a)(c) [sic¹⁵] ...

These documents comprise or include confidential material which was created by or submitted to a regulatory board. The integrity of a regulatory body is maintained when external members have confidence that their information will remain confidential.

Given that the release of a document under the [FOI] Act is to 'all of the world'; if it became known that details of correspondence relating to allegations or complaints to

¹⁵ The agency went on to cite the terms of clause 13(1)(a). There is no subclause (c) within clause 13.

the Legal Practitioners Conduct Board were disclosed publicly, this would discourage third parties from working with regulatory bodies and government agencies.

The Legal Practitioners Conduct Board has been replaced by the Legal Professional Conduct Commissioner and due to the ongoing confidential work of this body it is now classified as an exempt agency under the [FOI] Act...

29. Following internal review, the agency's reasons for refusing access to the documents included the following:¹⁶

... I acknowledge that the documents in issue predominantly contain information relating to you, and relating to the consideration undertaken by the Legal Practitioners Conduct Board ('the Board') in determining to lay certain charges against you. These matters do not, however, take priority over applicable statutory confidentiality provisions in respect of the Board's information, nor the proper maintenance of legal professional privilege, nor the appropriate protection of the personal information of others.

... I confirm that the Board was not an exempt agency at the relevant time. I do not rely upon such an exemption as a reason for not releasing any of the documents found to be in scope.

A number of the determinations I have made result in the document being wholly exempt, including documents subject to legal professional privilege (clause 10), secrecy provisions (clause 12) and those which relate to judicial functions (clause 11).

I consider it would be impracticable to give access to a copy of any of the documents found to be in scope from which the exempt matter has been deleted. I have come to this conclusion because the exempt material is embedded in the document, in some instances by its mere existence, and it would be impracticable to give access in the circumstances...

Documents subject to secrecy provisions

... I note at the outset that although you are the applicant for the purposes of the FOI Act, you are not a complainant, or a person acting on their behalf, for the purposes of section 73(3) [of the *Legal Practitioners Act 1981*] ...

Section 17 of the *Legal Practitioners (Miscellaneous) Amendment Act 2013* provided that section 73 of the principal Act as in force immediately before the commencement of section 44 of the *Legal Practitioners Act* continues to apply to a person who was, before that commencement, a member of the Board or employed on work related to the affairs of the board. I take the view that section 73 continues to apply to Board documents access to which is sought pursuant to the FOI Act.

I take the view that documents 1, 1a, ... 1acb, 1ad, 2, 2a, 2b, 2ba, ... 2c, ... 2e, 2ea, 2f, ... 2h, 2i, ... 2ka, 2kb, 2l, 2m, 2n and 2o contain information obtained through the Board's investigation and collated for the purpose of determining whether to lay a charge against the applicant before the Tribunal. Information contained within these documents came to the knowledge of the Board members or persons employed or engaged on work related to the affairs of the Board by virtue of that office or position.

Similarly, documents 2b, 2c, 2f, 2h and 2i are confidential correspondence to and from the Board which contains information that has come to the knowledge of a Board member or person employed or engaged on work related to the affairs of the

¹⁶ I have omitted references to the excluded documents from the extract of the agency's reasons in my reasons. I have also omitted the agency's quotations and paraphrasing of legislation in its determination, having included these above or below in the sections headed 'Relevant Law' and 'Consideration'.

Board by virtue of that office or position. Documents 1 and 2 also contain information within the extract of minutes known by Board members in the course of their duties which would not otherwise have come to their knowledge except by virtue of their position.

In light of the above, the disclosure of the above mentioned documents would constitute an offence against section 73 of the *Legal Practitioners Act*, as the exemptions in 73(2) and 73(3) do not apply.

Therefore, the above mentioned documents are exempt documents by reason of clause 12(1) of Schedule 1 to the FOI Act.

Legal professional privilege

It is my view that documents 1a, 1ad, 2a, 2ea, 2l, 2m, 2n and 2o are confidential communications between a lawyer and a client created for the dominant purpose of seeking legal advice or for use in relation to pending or anticipated legal proceedings. Therefore, I determine that each of these documents are wholly exempt on the grounds of legal professional privilege (Schedule 1, clause 10(1)).

Documents relating to judicial functions

... The relevant time for the inquiry of whether a document was created for the purpose of court or tribunal proceedings being heard or have been heard is at the time the document was created, rather than at the time the application is made to access it (See *Department of the Premier and Cabinet v Colin Thomas* [2011] SADC 56 per Boylan J).

Documents 1acb and 2kb are exempt documents by reason of clause 11(b) as they contain matter prepared for the purposes of court proceedings that were either to be heard or continuing proceedings.

I determine that documents ... 2ba, 2c and 2ka are exempt by reason of clause 11(c) as they are documents prepared by or on behalf of a court in relation to proceedings that either were being heard or had been heard before the court or tribunal. The proceedings in each case were either heard or underway at the relevant time.

Documents affecting personal affairs

... In respect of documents 2b, 2c, 2f and 2h I consider that they each contain personal information concerning a number of persons including personal relationships, circumstances and personal opinions. The information contained within these documents is not in the public domain and would be unreasonable to disclose.

Internal working documents

... I am satisfied that documents 1, 2, and 2e contain recommendations which relate to opinion, advice, and deliberations that have taken place for the purpose of the decision making functions of an [sic] the Board.

Additionally, documents 1a, 1ad, 2a, 2ea, 2l, 2m, 2n and 2o each contain confidential legal opinion and advice obtained for the purpose of exercising the Board's decision making functions.

On balance, the disclosure of these documents would be contrary to the public interest in that it may result in a criminal offence and/or the loss of privilege in the documents. Therefore, documents 1, 1a, 1ad, 2, 2a, 2e, 2ea, 2l, 2m, 2n and 2o are exempt pursuant to clause 9(1).

Documents containing confidential material

... I consider that documents 2b, 2c, 2f, 2h and 2i each contain confidential information

received by the Board and its disclosure might reasonably be expected to prejudice the future supply of information to Government.

I acknowledge the Board is no longer in existence, its role having been transferred to the Legal Profession Conduct Commissioner (an exempt agency). Therefore, there is perhaps a limited risk in future complainants to the Commissioner being discouraged from lodging complaints on the basis of the disclosure of a complaint to the now defunct Board. However, there is the need, in the context of encouraging full and frank disclosure of potential misconduct to appropriate oversight bodies, to ensure there is a high level of trust by the public that such complaints will be kept confidential. On balance, I consider it is not in the public interest to disclose these documents.

Therefore, I consider that documents 2b, 2c, 2f, 2h and 2i are exempt pursuant to clause 13(1)(b).

30. The agency also provided confidential submissions to my Office. These took the form of a two-page attachment to its letter dated 17 April 2018, marked 'Submissions of the agency', a nine-page internal minute dated 26 March 2018 referred to in the two-page attachment, and a five-page external memo dated 20 February 2018. I have considered these submissions when reaching my provisional determination, but am restrained from referring to them here.¹⁷
31. The agency advised that it would not make any submissions in response to my provisional determination.

Statutory office

32. A statutory office advised that it had no objection to the release of documents in the form proposed by my provisional determination. It acknowledged that the applicant had been given access outside of the FOI Act to one of the documents proposed for release in my provisional determination.

Interested party

33. An interested party consulted about part of one document under review confirmed the accuracy of the information concerning their personal affairs and advised that they did not object to its release.

Consideration

Clause 12(1)

34. The agency claims that each of the documents in issue is exempt under clause 12(1) as '[d]ocuments the subject of secrecy provisions'.
35. The agency's submission, as I understand it, is that the position of an FOI officer or other agency that comes into possession of LPCB documents is analogous to that of a Board member or other person employed or engaged on work related to the affairs of the Board. Accordingly, the 'FOI officer or other agency' is prohibited from divulging the documents in issue pursuant to section 73 of the LP Act, and the documents are exempt under clause 12(1) of Schedule 1 to the FOI Act.
36. I am not persuaded that the agency has justified its clause 12(1) claim.

¹⁷ Section 39(15) of the *Freedom of Information Act 1991* provides, however, that I should avoid disclosing claimed exempt matter in my reasons (whether or not I agree with the claim).

37. I have considered whether the agency's preferred construction is reasonably open. In my view, for the reasons set out below, it is not. Accordingly, considerations flowing from section 22 of the *Acts Interpretation Act 1915* do not arise.¹⁸
38. In my view, the transitional provision exists to ensure that the obligation of secrecy imposed by section 73 of the LP Act on members and employees of the LPCB, and anyone else engaged in work related to its affairs (for example, an independent expert or investigator), survived despite the abolition of the LPCB.
39. I am not satisfied that the transitional provision is sufficiently broad to impose an obligation of secrecy on State Records or an FOI officer or other agency that comes into possession of LPCB documents after the commencement of section 44 of the Amending Act, however. In saying this, I note that the transitional provision expressly applies to a member of the Board or a person employed or engaged on work related to the Board's affairs 'before' the commencement of section 44 of the Amending Act.
40. By way of further comment I note that the LPCB was, and the Attorney-General's Department is, an agency for the purpose of the FOI Act. In this sense, the obligations on, and exemption clauses available to, the agency under the FOI Act are consistent with the obligations on, and exemption clauses available to, the LPCB when it existed.¹⁹

Conclusion

41. Accordingly, I am not satisfied that the documents are exempt under clause 12(1), in conjunction with section 73 of the LP Act and the transitional provision.
42. I will therefore proceed to consider the agency's remaining claims of exemption.

Clause 10(1)

43. The agency claims that documents 1a, 1ad, 2a, 2ea, 2l, 2m, 2n and 2o are exempt under clause 10(1).
44. Clause 10(1) allows an agency to refuse an applicant access to a document where the document would be able to be withheld from disclosure in any hypothetical legal proceedings on the grounds of legal professional privilege.
45. In *Esso Australia Resources Limited v The Commissioner of Taxation*, the High Court decided that a document is privileged from production in legal proceedings if it is a confidential communication between a client and their solicitor that was created for the dominant purpose of obtaining or giving legal advice; or if it is a confidential communication made for the dominant purpose of use, or obtaining material for use in, pending or anticipated legal proceedings.²⁰
46. Dominant has been held to mean a 'ruling, prevailing or most influential' purpose.²¹
47. In *R v Bunting*, the Supreme Court remarked that '[t]he privilege attaches to confidential communications within such a [legal practitioner/client] relationship notwithstanding that the practitioner is a salaried employee.'²² Whether such a relationship gives rise to the

¹⁸ Section 22 of the *Acts Interpretation Act 1915* is only enlivened where 'a provision of an Act is reasonably open to more than one construction'.

¹⁹ The most recent amendment to Schedule 1 to the FOI Act (the insertion of clause 4(3a)) commenced on 4 September 2008.

²⁰ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

²¹ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49, 64-65.

²² *R v Bunting and Others* [2002] 84 SASR 378, [8] (Martin J), citing *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 and *Waterford v Commonwealth* (1987) 163 CLR 54. In *R v Bunting* the Supreme Court considered communications involving the Director of Public Prosecutions and DPP practitioners.

privilege is a question of fact, but '[i]t must be a professional relationship which secures to the advice an independent character notwithstanding the employment.'²³

48. Document 2o appears to comprise three separate documents:
- part 1 - marked with the word 'draft' on page 1 and containing the number '[reference number 1]' in the footer of each page (6 pages)
 - part 2 - including 'January/coversheets [reference number 2]' in the footer (2 pages)
 - part 3 - a memorandum (1 page) containing the number '[reference number 2]' in the footer, and attachment with the word 'draft' on page 1 and containing the number '[reference number 1]' in the footer of each page (9 pages).
49. Documents 1a, 1ad, 2a, 2ea, 2l, 2m and 2n and parts 2 and 3 of document 2o are addressed to the LPCB or its members. Part 1 of document 2o does not itself include an addressee. Nevertheless, having regard to document 2a, part 3 of document 2o and the author of part 1 of document 2o, I am satisfied it was created for the LPCB.
50. I note that the authors of documents 1ad, 2ea and 2m were first admitted to the Supreme Court of South Australia well before the documents were created (based on the dates that appear on the documents), and each hold a current practising certificate.²⁴
51. One of my legal officers also spoke to an employee of the Law Society of South Australia who confirmed that the authors of documents 1a, 2a, 2l and 2n and parts 1 and 3 of document 2o held practising certificates when the relevant documents were created.
52. Having regard to the contents of documents 1a, 1ad, 2a, 2ea, 2l, 2m and 2n and parts 1 and 3 of document 2o, along with the author and recipient of each, I am satisfied that they:
- represent confidential communications in the course of a lawyer-client relationship
 - were created for the dominant purposes of giving legal advice.
53. Part 2 of document 2o appears to have been created for the purpose of providing routine information to LPCB members of an administrative nature. I am not satisfied that part 2 of document 2o is exempt under clause 10(1) having regard to its contents and the purpose for which it appears to have been created. In saying this, I note that it does not disclose the substance of parts 1 and 3 of document 2o.

Conclusion

54. Accordingly, I am satisfied that documents 1a, 1ad, 2a, 2ea, 2l, 2m and 2n and parts 1 and 3 of document 2o would be privileged from production in legal proceedings and are therefore exempt under clause 10(1). Given this, I do not intend to consider the agency's remaining claim of exemption with respect to these documents.
55. I am not satisfied that part 2 of document 2o is exempt under clause 10(1). I will consider whether it is otherwise exempt below.

²³ *R v Bunting and Others* [2002] 84 SASR 378, [9] (Martin J), citing *Waterford v Commonwealth* (1987) 163 CLR 54, 62 (Mason and Wilson JJ).

²⁴ Search conducted via https://www.lawsociety.sa.asn.au/LSSA/Community/Practitioner_Listing.aspx on 15 May 2018.

Clauses 11(b) and 11(c)

56. Following internal review, the agency claimed that documents 1acb and 2kb are exempt under clause 11(b) and documents 2ba, 2c and 2ka exempt under clause 11(c).
57. Document 2c consists of a one-page letter (part 1) with the following attachments:
- a three-page summary (part 2)
 - a one-page [...] Court application (part 3)
 - two-page reasons for a [...] Court decision (part 4).
58. Clause 11(b) provides that a document is exempt if it contains matter 'prepared for the purposes of proceedings (including any transcript of the proceedings) that *are* being heard or are to be heard before a court or tribunal' (my emphasis).
59. Clause 11(c) provides that a document is exempt if it contains matter 'prepared by or on behalf of a court or tribunal (including any order or judgment made or given by the court or tribunal) in relation to proceedings that are being heard or have been heard before the court or tribunal'.
60. The terms 'court' and 'tribunal' are both defined in section 4(1) of the FOI Act:

court includes a justice;...
tribunal means any body (other than a court) invested by the law of the State with judicial or quasi-judicial powers...

61. On 15 May 2018, a representative of the agency advised my Office that, at present, there are no ongoing or anticipated court or tribunal proceedings relevant to the documents under review.

Clause 11(b)

62. I understand that the agency's clause 11(b) claim with respect to documents 1acb and 2kb is premised on proceedings that were current or anticipated at the time the documents were created.
63. Although not relied on by the agency, I also intend to consider whether or not document 2ba and part 3 of document 2c are exempt under clause 11(b).²⁵
64. I accept that the documents were prepared for the purpose of [...] Court proceedings. It is apparent from pages 11 and 14 of document 1acb that the proceedings and related proceedings were ongoing when it was created. Documents 2ba and 2kb and part 3 of document 2c were clearly prepared in anticipation of future court proceedings.
65. When considering clause 11(b), the South Australian District Court has held:

that the relevant time for undertaking the enquiry required by clause 11(b) is the time of creation of the document rather than the time at which application for access is made under the FOI Act. Such a construction - or interpretation - creates a single point in time for agencies to undertake the relevant assessment and is productive of certainty.²⁶

²⁵ I have a discretion to consider exemptions not relied upon by the agency: *Department of the Premier & Cabinet v Redford* (2005) 240 LSJS 171 [29].

²⁶ *Department of the Premier and Cabinet v Thomas* [2014] SADC 56 (unreported, Judge Boylan, 11 April 2014), [23].

Conclusion

66. Accordingly, I am satisfied that documents 1acb, 2ba, and 2kb and part 3 of document 2c are exempt under clause 11(b).

Clause 11(c)

67. I will now consider whether or not parts 1, 2 and 4²⁷ of document 2c and document 2ka are exempt under clause 11(c).
68. Having regard to part 4 of document 2c, I am satisfied that it was prepared by the [...] Court in relation to proceedings heard before it. Parts 1 to 3 of document 2c appear to have been prepared by individuals, rather than a court or tribunal, and not on behalf of a court of a tribunal.
69. Document 2ka is a stamped order. The agency has indicated in its schedule of documents that it was created by the [...] Court. I have no reason to doubt this. The order clearly relates to proceedings that were heard before it.

Conclusion

70. I am satisfied that part 4 of document 2c and document 2ka are exempt under clause 11(c). Given this, I do not intend to consider the agency's remaining claims of exemption with respect to them.
71. I am not satisfied that parts 1 and 2 of document 2c are exempt under clause 11(c). Accordingly, I will consider whether they are otherwise exempt below.

Clause 6(1)

72. The agency originally claimed that documents 2b, 2c,²⁸ 2f, 2h and 2i were exempt under clause 6(1). Following internal review it reiterated this claim with respect to all but document 2i. For the sake of completeness I will nevertheless consider whether document 2i is exempt under clause 6(1).
73. The agency claims variously that the documents include information concerning a 'number of persons including personal relationships, circumstances and personal opinions', which 'is not in the public domain and would be unreasonable to disclose'.

'Personal affairs'

74. The term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act. It specifically refers to 'financial affairs', 'marital or other personal relationships', and 'personal qualities or attributes'. The term has also been held to involve 'matters of private concern to an individual'²⁹ and the 'composite collection of activities personal to the individual concerned'.³⁰
75. In my view, the documents 2b, 2f, 2h and 2i and parts 1 to 3 of document 2c contain information concerning the personal affairs of people other than the applicant within the meaning of clause 6(1).³¹

²⁷ Having concluded above that document 2ba and part 3 of document 2c are exempt under clause 11(b).

²⁸ I have already concluded that part 4 of document 2c is exempt under clause 11(c), so will only consider whether parts 1 to 3 of document 2c are exempt under clause 6(1).

²⁹ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625, citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1986) 13 FCR 85 at 88-89.

³⁰ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

³¹ The documents do not merely contain information concerning the applicant: see clause 6(3).

Unreasonableness test

76. I will therefore consider whether disclosure of the documents would be unreasonable.

77. In *Treglown v SA Police* the South Australian District Court said that when interpreting 'unreasonable' in clause 6, a decision maker needs:

... to consider not merely the content of the information which is sought to be disclosed, although in some circumstances that may be sufficient, but, as well, its relationship with other material known to the applicant, its level of sensitivity, the attitude of the person affected by the disclosure, the circumstances in which the information was originally obtained, whether it was already known to the applicant, the nature of the applicant's interest in it and any disclosed intentions with respect to its use.³²

78. In addition, unreasonableness has 'as its core, public interest considerations'.³³

79. Public interest considerations relevant to this matter are:

In favour of disclosure:

- fulfilling the objects of the FOI Act, particularly the public interest in promoting openness of the Board's and the agencies' decision-making processes, and the accountability of their staff³⁴
- the ongoing relevance of the information to the applicant
- individuals receiving fair treatment in accordance with the law, and having access to what is recorded about them
- information in the documents that is publicly available³⁵
- the views expressed by an interested party as set out in document 2h
- the views expressed by a statutory office in response to my provisional determination
- with respect to part of document 2b, the views expressed by an interested party in response to my provisional determination

Contrary to disclosure:

- the agency's objections to disclosure
- the preservation of personal privacy, particularly of interested parties other than the author of document 2h (the FOI Act generally does not restrict the use of information once it is released³⁶)
- the sensitive nature of information about one person referred to in document part 1 of document 2c and the likelihood that person would object to its release.

80. In my view, it would be unreasonable to disclose the fourth and fifth words on the third line of the paragraph commencing with 'O...' from document part 1 of document 2c. In reaching this conclusion I consider that the public interest in protecting personal privacy of these words is of paramount importance, having regard to the nature of the information and my understanding that it is not in the public domain. I consider it unlikely that the person concerned would want the information about them to be released.

³² *Treglown v SA Police* (2011) 278 LSJS 231, [133], considering *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALD N257, 259 and *Victoria Police v Marke* (2008) 23 VR 223, [18] and [106]-[103].

³³ *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429, 438.

³⁴ I accept that the public interest in promoting the accountability of the now defunct Board's staff is significantly reduced, however.

³⁵ This is suggested by the documents themselves and supported by [information] available via the Internet. My Office conducted searches of names referred to in the documents themselves, available via www.austlii.edu.au. By emails dated 7 August 2018, my Office provided copies of publicly accessible documents to the agency.

³⁶ *Priebe v SA Police* [2007] SADC 119 (unreported, Judge Boylan, 20 November 2007), [4].

81. I am not satisfied that it would be unreasonable to release documents 2b, 2f, 2h and 2i, the residual parts of part 1 of document 2c (that is, excluding the fourth and fifth words on the third line of the paragraph commencing with 'O...'), or parts 2 and 3 of document 2c. The applicant having access to what is recorded about him, information that is in the public domain, and the views expressed by an interested party as set out in document 2h (without any apparent caveat) are persuasive considerations in reaching this conclusion.

Conclusion

82. I am satisfied that part 1 of document 2c is exempt under clause 6(1).
83. I am not satisfied that documents 2b, 2f, 2h, 2i, or parts 2 and 3 of document 2c are exempt under clause 6(1).
84. I will consider whether or not documents 2b, 2f, 2h, 2i, the residual parts of part 1 of document 2c (that is, excluding the fourth and fifth words on the third line of the paragraph commencing with 'O...'), and parts 2 and 3 of document 2c are otherwise exempt below.

Clause 9(1)

85. The agency originally claimed documents 1, 2 and 2e exempt under clause 9(1). Following internal review, the agency claimed that documents 1a, 1ad, 2a, 2ea, 2l, 2m, 2n and 2o were also exempt under clause 9(1). With the exception of document part 2 of document 2o I consider that these additional documents are exempt under clause 10(1). Accordingly, I will confine my consideration of clause 9(1) to documents 1, 2, 2e and part 2 of document 2o.
86. Documents 1,³⁷ 2³⁸ and 2e³⁹ are extracts from minutes of the Board. Part 2 of document 2o appears to have been created for the purpose of providing routine, administrative information to LPCB members.
87. The scope of clause 9(1)(a) is wide, particularly given the words 'that relates to'.
88. The 'opinion, advice or recommendation' must nevertheless have been obtained, prepared or recorded, or the 'consultation or deliberation' must have taken place, 'in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency'.
89. Having considered the contents of documents 1, 2, 2e and part 2 of document 2o, I am satisfied that they contain matter that relates to:
- opinions, advice and recommendations obtained; and/or
 - deliberations that took place,
- in the course of, or for the purposes of, the Board's and/or the Government's and/or a Minister's decision-making functions.
90. I note that at the time the documents were created the Board was an agency for the purpose of the FOI Act. Accordingly, my view is that AGD has satisfied clause 9(1)(a).

³⁷ I note that document 1 bears the date [the first date]. The agency's schedule of documents refers to it as dated [the second date], however. Having regard to information received from a statutory office, I am satisfied that [the first date] is the correct date.

³⁸ Document 2 is dated [...].

³⁹ Document 2e is dated [...].

The public interest test

91. I have therefore considered whether or not the public interest test set out in clause 9(1)(b) has been met.
92. The agency claims that it would be contrary to the public interest to disclose the documents because it may 'inhibit the provision of full and open opinions and recommendations on such matters in the future', in circumstances where '[i]t is important for the agency to receive frank and comprehensive advice and opinions'.⁴⁰ The agency would, in my view, need to establish that there is a risk that the provision of future advice would be inhibited. Whilst I accept such a risk exists, I consider it to be minimal in light of the fact that the LPCB is now defunct and the obligations imposed on public sector employees.⁴¹
93. In considering the public interest, I have had regard to the factors and submissions referred to above in relation to clause 6(1), along with the very slight possibility that disclosure of the documents would inhibit frankness and candour in the future.
94. I am not satisfied that it would be contrary to the public interest to release documents 1, 2, 2e and part 2 of document 2o. The applicant having access to what is recorded about him, promoting openness of decision-making processes, information that is in the public domain, and the views expressed by an interested party as set out in document 2h are persuasive considerations in reaching this conclusion.

Conclusion

95. Documents 1, 2, 2e and part 2 of document 2o are not, in my view, exempt under clause 9(1).

Clause 13(1)(a)

96. The agency originally claimed that documents 1, 1a, 1ad, 2, 2a, 2b, 2c, 2e, 2ea, 2f, 2h, 2i, 2l, 2m, 2n and 2o were exempt under clause 13(1)(a). Although the agency appears to have resiled from this claim following internal review, I will consider it with respect to documents 1, 2, 2b, 2e, 2f, 2h, 2i, part 1 of document 2c (excluding the fourth and fifth words on the third line of the paragraph commencing with 'O...'), part 2 of document 2c and part 2 of document 2o (having concluded above that the remaining documents and parts of documents are exempt).
97. To succeed in claiming clause 13(1)(a) as the basis for refusing access to a document it is necessary to demonstrate that the relevant document contains matter 'the disclosure of which would found an action for breach of confidence'. The term 'would' should be read as 'could'.⁴²

⁴⁰ The agency also claimed that disclosure of the documents may result in commission of a criminal offence and/or the loss of privilege. As indicated above, my view is that the agency has not justified its reliance on clauses 10(1) or 12(1), and therefore that such public interest factors are irrelevant, with respect to documents 1, 2, 2e and part 2 of 2o.

⁴¹ Public sector employees:

- have a general duty to act honestly in the performance of their duties at all times: *Public Sector (Honesty and Accountability) Act 1995*, section 26(1)
- are required to observe the public sector code of conduct: *Public Sector Act 2009*, section 6
- should act 'with the utmost professional integrity': *Code of Ethics for the South Australian Public Sector* (2015), 3 (issued under the *Public Sector Act 2009*)
- 'must rely on evidence to provide objective advice to Government': *Code of Ethics for the South Australian Public Sector* (2015), 7
- should act 'truthfully, consistently, and fairly': *Code of Ethics for the South Australian Public Sector* (2015), 9
- 'must exhibit the highest standards of professional conduct': *Code of Ethics for the South Australian Public Sector* (2015), 10
- are to 'be diligent in the discharge of their role and duties and not act in a way that is negligent': *Code of Ethics for the South Australian Public Sector* (2015), 11.

⁴² *Bray and Smith v WorkCover* (1994) 62 SASR 218, 226 to 227.

98. The Administrative Appeals Tribunal (AAT) has had cause to consider section 45 of the *Freedom of Information Act 1982* (Cth),⁴³ which is in substantially the same terms as clause 13(1)(a) of the FOI Act (SA). After consideration of the authorities, Deputy President Forgie of the AAT determined that an action for breach of confidence can only mean an action for equitable breach of confidence.⁴⁴ In my view, the AAT decision has persuasive value.
99. An equitable obligation of confidence is a duty not to disclose information because the information was given and received in circumstances which would make it unconscionable for the confidant to disclose the information in a way the confider has not authorised. A number of criteria must be satisfied:⁴⁵
- the information must be capable of being identified with specificity
 - the information must have the necessary quality of confidence
 - the information must have been received in circumstances which import an obligation of confidence
 - there must be actual or threatened misuse of the information.
100. I will therefore consider whether the criteria for founding an equitable breach of confidence can be established.
101. It is the information in documents 1, 2, 2b, 2e, 2f, 2h, 2i, part 1 of document 2c (excluding the fourth and fifth words on the third line of the paragraph commencing with 'O...'), part 2 of document 2c and part 2 of document 2o that is in issue. Based on the submissions and documentation provided by the agency to date and information that is in the public domain, I am not satisfied that the information either:
- has the necessary quality of confidence
 - was received in circumstances which imported an obligation of confidence.
102. I also consider the views expressed by an interested party as set out in document 2h relevant to the information about, or provided by, that interested party.
103. I accept that if the other criteria for founding an action for breach of confidence were satisfied, release of the documents under the FOI Act would constitute their misuse.
104. For clause 13(1)(a) to apply, it may also be necessary for the confider to show '(at least for confidences reposed within government), that unauthorised use would be to the detriment of the' confider.⁴⁶
105. If detriment is an essential element, my view is that it is easily established. It would be sufficient, for example, to show that disclosure would cause the confider difficulty. I note also that Deputy President Forgie of the AAT commented that detriment:

... may be that disclosure of information relating to his affairs will expose his actions to public discussion and criticism ... [or] the disclosure itself in circumstances in which the disclosure is neither consented to nor otherwise justified.⁴⁷

⁴³ *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244.

⁴⁴ *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244, [163].

⁴⁵ *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150 (Unreported, Judge Brebner, 9 December 2010), [38], affirming the test from *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 443. The test was also endorsed in *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244, [165].

⁴⁶ *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443. See, however, *Trevorrow v State of South Australia* (2005) 94 SASR 44; *N P Generations Pty Ltd v Feneley* [2001] SASC 185, [21]; and *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73.

⁴⁷ *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244, [174].

Conclusion

106. I am not satisfied that documents 1, 2, 2b, 2e, 2f, 2h, 2i, part 1 of document 2c (excluding the fourth and fifth words on the third line of the paragraph commencing with 'O...'), part 2 of document 2c and part 2 of document 2o are exempt under clause 13(1)(a).

Clause 13(1)(b)

107. The agency claims that documents 2b, 2c, 2f, 2h and 2i are exempt under clause 13(1)(b). I will consider whether or not the agency has satisfied its claim with respect to documents 2b, 2f, 2h and 2i, part 1 of document 2c (excluding the fourth and fifth words on the third line of the paragraph commencing with 'O...'), and part 2 of document 2c, having already concluded above that document 2c (parts 3 and 4) is exempt.
108. To succeed in claiming clause 13(1)(b) as a basis for refusing access to a document, each of the following criteria must be satisfied:
- that matter in the document was 'received under an express or inferred understanding that [it] would be kept confidential'⁴⁸
 - that disclosure of the matter might reasonably be expected to prejudice the future supply of such information to the Government or an agency
 - that disclosure of the matter would, on balance, be contrary to the public interest.
109. The evidence and submissions provided by the agency to date, and the contents of the documents themselves, have not satisfied me that the documents were received under an express or inferred understanding that they would be kept confidential. For the sake of completeness, I will nevertheless consider the remaining elements of clause 13(1)(b).
110. The agency claims that disclosure of these documents might reasonably be expected to prejudice the future supply of information to the Government, although it concedes that the risk of future complainants being discouraged from lodging complaints with the LPCC on the basis of the disclosure of a complaint to the now defunct Board is limited. The agency has nevertheless submitted that:

in the context of encouraging full and frank disclosure of potential misconduct to appropriate oversight bodies, to ensure there is a high level of trust by the public that such complaints will be kept confidential.

111. I am not persuaded that disclosure of documents 2b, 2f, 2h and 2i, part 1 of document 2c (excluding the fourth and fifth words on the third line of the paragraph commencing with 'O...'), and part 2 of document 2c might reasonably be expected to prejudice the future supply of such information (that is, information of the sort contained in documents 2b, 2f, 2h and 2i, part 1 of document 2c (excluding the fourth and fifth words on the third line of the paragraph commencing with 'O...'), and part 2 of document 2c) to the Government or an agency given the views expressed by an interested party as set out in document 2h and the fact that the LPCC is an exempt agency. That said, I accept that disclosure of these documents may discourage future complainants from complaining to other agency or Government oversight bodies. I consider this possibility to be remote given the views expressed by an interested party as set out in document 2h, however. It is also reasonable to expect that a body investigating a complaint would have to put the allegations to the subject of the complaint in some form.

⁴⁸ See *Re Maher and Attorney General's Department* (1985) 7 ALD 731 at 737.

The public interest test

112. In considering the public interest, I have had regard to the factors and submissions referred to above in relation to clauses 6(1) and 9(1), along with the remote possibility that disclosure of these documents might prejudice the future supply of complaints to the Government or an agency.
113. I am not satisfied that it would be contrary to the public interest to release documents 2b, 2f, 2h and 2i, part 1 of document 2c (excluding the fourth and fifth words on the third line of the paragraph commencing with 'O...'), or part 2 of document 2c. The applicant having access to what is recorded about him, promoting openness of decision-making processes, information that is in the public domain, and the views expressed by an interested party as set out in document 2h are persuasive considerations in reaching this conclusion.

Determination

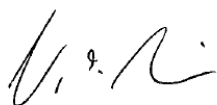
114. I am satisfied that documents 1a, 1acb, 1ad, 2a, 2ba, 2c, 2ea, 2ka, 2kb, 2l, 2m, 2n and 2o are exempt.
115. I am not satisfied that documents 1, 2, 2b, 2e, 2f, 2h or 2i are exempt.
116. In addition, I consider that it would be practicable to release parts of documents 2c and 2o after redacting exempt matter, in accordance with section 20(4).
117. In light of my views above, I vary the agency's determination to enable documents 1, 2, 2b, 2e, 2f, 2h and 2i to be released in full and documents 2c and 2o to be released after redacting:
- the fourth and fifth words on the third line of the paragraph commencing with 'O...' from part 1, along with parts 3 and 4 from document 2c
 - parts 1 and 3 from document 2o.

Comment - interested parties

118. The documents and parts of documents proposed for release contain information concerning the personal affairs of nine interested parties.
119. Section 39(10) of the FOI Act provides that I:
- ... must not make a determination to the effect that access is to be given to a document to which Division 2 of Part 3^[49] applies unless ... [I have] taken steps as are reasonably practicable to obtain the views of any interested person as to whether or not the document is an exempt document under a provision of Part 2 of Schedule 1.
120. In accordance with section 39(10) my Office has attempted to locate the whereabouts of the interested parties using information contained in the documentation provided by the agency, a statutory office and the results of Electoral Roll and Internet searches, including the White Pages.
121. My Office also sought further information from the agency. The agency, however, advised that it does 'not hold any contact details for these interested parties, beyond that which is apparent from the documents which are the subject of the FOI application.'

⁴⁹ Division 2 of Part 3 sets out the obligation to consult interested parties. Within that division, section 26 set out the obligations with respect to documents 'containing information concerning the personal affairs of any person'.

-
122. I located three interested parties and consulted them directly by providing them with a copy of my provisional determination. Only one of these interested parties responded to my provisional determination.
123. Unfortunately, my Office has been unable to identify the whereabouts of the six remaining interested parties with any degree of certainty, a problem which is compounded by the age of the documents under review.⁵⁰
124. The Electoral Roll revealed two results matching the name of one of the interested parties. Given the possibility that one of these people is the interested party referred to in one of the documents under review, my Office wrote to both, in very general terms, and asked them to contact my Office if they believed the document concerned them. Only one of these people contacted my Office. The information they provided to one of my legal officers indicated that they were not the person referred to in the document under review.
125. Using contact details obtained from the statutory office, my Office:
- emailed one further interested party, without success
 - wrote to two other interested parties by post, also without success.⁵¹
126. Since issuing my provisional determination, I have received no additional information that would assist me to locate the interested parties.
127. I consider that I have discharged my obligations under section 39(10) by taking all reasonably practicable steps to locate the interested parties, and thereby obtain their views about the documents.



Wayne Lines
SA OMBUDSMAN

10 September 2018

⁵⁰ The documents under review are all [a number of] years old. Two of the interested parties are only referred to in the documents by their last names. The agency provided their first names to my Office by email dated 25 July 2018.

⁵¹ This correspondence was returned to my Office, marked 'NATA RTS'.

APPENDIX - 2018/03527

Procedural steps

Date	Event
2 February 2018	The agency received the emailed FOI application.
9 March 2018	The agency determined the application.
13 March 2018	The agency received the internal review application by email.
27 March 2018	The agency confirmed the determination. ¹
27 March 2018	The Ombudsman received the applicant's on-line request for external review.
3 April 2018	The Ombudsman advised the agency of the external review and requested submissions and documentation.
17 April 2018	The agency provided the Ombudsman with its submissions and documentation.
9 May 2018	By email, the applicant agreed to exclude documents released to him following the original determination from the external review.
15 May 2018	By telephone, Ombudsman SA sought and obtained information from the Law Society of South Australia.
	Ombudsman SA sought and obtained additional information from the agency, by telephone.
29 May 2018	Ombudsman SA requested and received additional information from the applicant, by email.
31 May to 5 June 2018	By email, Ombudsman SA sought and received additional information from the agency.
17 July to 25 July 2018	Ombudsman SA sought and received additional information from the agency, by email.
24 July 2018	Ombudsman SA searched the Electoral Roll.
2 August to 6 August 2018	Ombudsman SA sought and received additional information from a statutory office, by email and telephone.

¹ I note, however, that the agency also purported to reverse its determination with respect to documents that it released in response to its initial determination.

7 August 2018	The agency provided views about Ombudsman SA's proposed consultation process by telephone.
	The Ombudsman issued his provisional determination to the parties, and provided publicly accessible documents to the agency.
	By email, the applicant responded to the Ombudsman's provisional determination.
9 August 2018	An interested party responded to my provisional determination by telephone.
20 August 2018	By telephone a representative of a statutory office sought clarification from Ombudsman SA and provided a preliminary response to the Ombudsman's provisional determination.
21 August 2018	The agency responded to the Ombudsman's provisional determination, by email.
	By email, a statutory office responded to the Ombudsman's provisional determination. At the request of the statutory office, Ombudsman SA also provided some further clarification.
3 September 2018	Ombudsman SA invited further submissions from a statutory office.
5 September 2018	The statutory office provided further submissions by email.