



OmbudsmanSA

## Determination

### External review - section 39 *Freedom of Information Act 1991*

Applicant	Ms Sheradyn Holderhead
Agency	Department for Education and Child Development
Ombudsman reference	2013/01514
Agency reference	DECD12/7556
Determination	The determination of the agency is varied.

## REASONS

### Background

1. By application under the *Freedom of Information Act 1991 (the FOI Act)* received by the agency on 12 November 2012, the applicant requested access to:

All correspondence between DECS/DECD and the Education Minister's Office relating to the arrest of a school staff member for charges of a sexual nature dated between December 2010 and now [12 November 2012].
2. The Principal Officer of the agency, Mr Keith Bartley made a determination pursuant to section 14A of the Act on 30 November 2012, to extend the time for the agency to deal with the application until 22 February 2013.
3. Pursuant to section 39 of the Act, the applicant applied to my office for an external review of the agency's section 14A determination.
4. On 10 January 2013, pursuant to section 39(5)(c) of the FOI Act, I effected a settlement between the parties that the agency make a determination in response to the application by Friday 18 January 2013.
5. On 15 January 2013 the agency's accredited FOI officer made a determination and wrote:

Following the extension of time to process your application under section 14A of the FOI Act, you narrowed the scope of your request to:

*All correspondence between DECD/DECD and the Education Minister's Office relating to the arrest of a school staff member for charges of a sexual nature dated between December 2010 and October 2011.*

As part of the discovery process, searches have been conducted for information in relation to your request. One (1) document relating to your application has been located.

I have considered this document with reference to the Freedom of Information Act 1991 and have determined to release the email dated 2 December 2010 in full.

6. The applicant requested an internal review of this determination, by application received by the agency on 22 January 2013. In her internal review application, the applicant wrote:

The agency did not process my application in its original format despite the Ombudsman's finalisation clearly stating the broader and original scope.

### External review

7. The agency failed to make a determination within the statutory timeframes; therefore by application dated 11 February 2013, the applicant requested my external review under section 39 of the FOI Act.
8. By letter dated 11 February 2013, I notified the agency of my review. I requested all relevant documents, including additional evidence and argument which the agency considered justified its determination, in light of the provisions of section 48 of the FOI Act.
9. On the basis that the agency failed to make an internal review determination within the 14 day statutory timeframe, in accordance with section 29(5) of the FOI Act, the agency was deemed to have determined to confirm the original determination.
10. On 14 February 2013, Mr Bartley made a purported determination to vary the agency's original determination. Mr Bartley wrote:

The discovery process has identified relevant documents matching the scope of your [original] application. I have examined these documents listing them in the attached Schedule and have determined as follows:

#### Release in full

- Document groups 1, 2.

#### Refuse access

- Document 3 - exempt clause 1(a)(b)
- Document 4 - exempt clause 17(c)

#### Release in part

- Document 5 - exempt in part clause 10(1).

...

In accordance with section 23(4) of the Freedom of Information Act 1991 and in conjunction with the confidentiality provisions of the Children's Protection Act 1993, I cannot confirm or deny the existence of any other documents you seek.

11. While the agency's determination of 14 February 2013 was not a determination at law, for the purposes of my external review, I will treat it as part of the agency's submissions.

### Relevant provisions of the FOI Act

12. The objects of the FOI Act are set out in section 3, to 'promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State'; and 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'.
13. The FOI Act provides that upon receipt of an application for access to documents, an agency is entitled to make a determination to refuse access where the documents are 'exempt'. The term 'exempt document' is defined as 'a document which is an exempt document by virtue of Schedule 1.'<sup>1</sup> Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access.

<sup>1</sup> See *Freedom of Information Act 1991* section 4 and section 20(1)(a).

14. Under section 48 of the FOI Act, the onus is on the agency to justify its determination 'in any proceedings'. In my opinion, this includes the external review process.
15. Section 39(11) of the FOI Act provides that I may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

### **Provisional determination**

16. I provided my tentative view about the agency's determination to the agency by my provisional determination dated 21 June 2013. I informed the agency that subject to my receipt and consideration of submissions, I proposed to vary the agency's determination pursuant to section 39(11) of the FOI Act.
17. On 26 June 2013, my legal officers met with the agency's FOI officer and the Acting Director of the Chief Executive's office to discuss my provisional determination and take submissions.
18. During this meeting, and by confirmation email dated 26 June 2013, the agency did not raise any objections to the views expressed in my provisional determination.
19. It is often my practice to provide an applicant and interested party with my provisional determination, to elicit comments in response before finalising my views under section 39(11). In this instance, I did not provide the applicant or any interested party with my provisional determination. I considered I was unable to disclose any meaningful information to these parties for response, as to do so would have disclosed information that the agency claimed to be exempt,<sup>2</sup> and whether or not any additional documents exist within the scope of the application.
20. In light of the agency's response to my provisional determination, however, I am now in a position to provide the applicant and interested party with details of my provisional determination and proceed to a final determination.
21. In my provisional determination, I wrote:

19. By letter dated 28 February 2013, the agency provided me with a copy of the 19 documents relevant to this review. As I understand it, the agency has confirmed the existence of the first 5 documents, but has neither confirmed nor denied the existence of the remaining 14.

...

38. As I understand it, the agency has neither confirmed nor denied the existence of the remaining 14 documents, as it believes that to do so would constitute an offence under section 58(1) of the *Children's Protection Act 1993*.

39. In my view, the scope of the FOI application is quite broad, in so far as it does not refer to a specific incident, school or person. In light of the broad nature of the application, it remains unclear how confirming the existence of the remaining 14 documents would breach section 58(1). In my view, the existence of the remaining 14 documents should be confirmed.

...

### **Provisional determination**

73. In summary, I consider that the agency's determination to neither confirm nor deny the existence of documents 6 through 19 is wrong, and that there is exempt information within the documents.

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<sup>2</sup> See *Freedom of Information Act 1991* section 39(15).

74. If the agency concedes my view, a practical way forward would be for me to confirm the existence of the relevant documents and proceed to determine the exempt status of those documents in my final determination.
22. As noted above, by email dated 26 June 2013, the agency confirmed that it did not object to the views expressed in my provisional determination.
23. In light of this, I can now confirm that an additional 14 documents exist that fall within the scope of the applicant's FOI application. I will now proceed to make a determination on all 19 documents.

## Consideration of documents 1 - 5

### *Documents 1 and 2*

24. According to the document schedule provided by the agency, documents 1 and 2 may be released to the applicant in full. I agree with this view and will not consider these documents further.

### *Document 3*

25. Document 3 consists of four pages and appears to be an email chain (pages one and two) and an attached draft cabinet document (pages three and four). The agency has claimed that document 3 is exempt under clause 1(1)(a) and (b) of Schedule 1 to the FOI Act.
26. Clause 1(1)(a) and (b) of Schedule 1 to the FOI states:
- (1) A document is an exempt document-
    - (a) if it is a document that has been specifically prepared for submission to Cabinet (whether or not it has been so submitted); or
    - (b) if it is a preliminary draft document referred to in paragraph (a); or...
27. Based on the nature and contents of pages three and four of document 3, I am satisfied that it is a draft cabinet document, and therefore exempt under clause 1(1)(b), however, I do not agree that the first two pages are also exempt. I note in particular that clause 1(2)(ab) of Schedule 1 to the FOI Act states that a document is not exempt merely because it was attached to a document referred to in subclause (1).
28. In my view, the first two pages of document 3 are not exempt under the FOI Act and should be released to the applicant.

### *Document 4*

29. The agency has claimed that document 4 is exempt under clause 17(c) of Schedule 1 to the FOI Act.
30. Clause 17(c) of Schedule 1 to the FOI Act provides:
- A document is an exempt document if it contains matter the public disclosure of which would, but for any immunity of the Crown—
- (a) ...
  - (b) ...
  - (c) infringe the privilege of Parliament.

31. The concept of parliamentary privilege has developed from the *Bill of Rights 1688*, Article 9 which says that 'freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament'.<sup>3</sup>
32. The intention behind the privilege is to allow Parliament to proceed with the business of making legislation without undue influence. In South Australia, there is no statute law specifically defining the privilege (as there is in other jurisdictions in Australia); and thus, the words in Article 9 are an appropriate guide.
33. The 'proceedings of Parliament' are protected by the privilege. Case law in South Australia suggests that the meaning of 'proceedings in Parliament' is broad.<sup>4</sup> Also, in the case of *O'Chee v Rowley*,<sup>5</sup> 'proceedings in Parliament' was considered to include actions, documents, and acts done in preparation for what will be said or done in Parliament. However, there must be sufficient proximity between a prepared document and the parliamentary proceedings in order to achieve protection.
34. The protection of parliamentary privilege developed from Article 9 is also a broad protection. It has been suggested that the term 'impeach' can mean 'hinder, challenge or censure'.<sup>6</sup>
35. In the context of the Queensland *Freedom of Information Act 1991* (Qld), the Queensland Information Commissioner has said:

An unauthorised disclosure of 'proceedings in Parliament' will constitute an infringement of the privileges of Parliament, and hence, if the matter in issue can properly be characterised as a 'proceeding in Parliament', it will be exempt matter under s.50(c)(i) [the equivalent of clause 17(c)] of the FOI Act, unless its public disclosure has been authorised ....<sup>7</sup>

36. This view is equally applicable in South Australia. Disclosure of 'proceedings in Parliament' under the FOI Act may amount to an 'unauthorised disclosure' and thus offend Article 9.
37. Based on the nature and contents of document 4, I am satisfied that it is exempt under clause 17(c) of Schedule 1 to the FOI Act.

### **Document 5**

38. Document 5 appears to be an email chain including legal advice provided by the Crown Solicitor's Office. The agency has claimed that document 5 is exempt in part under clause 10(1) of Schedule 1 to the FOI Act.
39. Clause 10(1) states:
 

A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the grounds of legal professional privilege.
40. Legal professional privilege exists to protect the confidentiality of communications between a lawyer and client. 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 legal proceedings on the grounds of legal professional privilege. The information must be:

<sup>3</sup> This is applicable to South Australia by virtue of section 38 *Constitution Act 1934* (SA).

<sup>4</sup> See *Australian Broadcasting Corporation v Chatterton* (1986) 46 SASR 1 per Pryor J citing comments by Ayelsworth JA in the Ontario Court of Appeal case of *Roman Corp Ltd v Hudsons Bay Oil & Gas Ltd* (1972) 23 DLR (3d) 292 at 298. *Rann v Olsen* (2000) 76 SASR 450 at pp461, 470 per Doyle CJ.

<sup>5</sup> (1997) 142 FLR per McPherson JA at pp 18-19.

<sup>6</sup> The First Report Joint Select Committee on Parliamentary Privilege (UK), First Report March, 1999, paragraph 36.

<sup>7</sup> *Ainsworth Nominees Pty Ltd and the Criminal Justice Commission* Decision No. 99010 Application S 87/94 para 59.

- confidential
- communication between a client and their lawyer
- created for the *dominant* purpose of obtaining or giving legal advice or made for the dominant purpose of use in existing or anticipated legal proceedings.<sup>8</sup>

41. I am satisfied that the portions of document 5 claimed by the agency to be exempt are subject to legal professional privilege and therefore exempt under clause 10(1).

### Legislation relevant to the agency's determination

42. Sections 58(1) and 58(3) of the Children's Protection Act provide:

#### 58—Duty to maintain confidentiality

- (1) A person engaged in the administration of this Act who, in the course of that administration, obtains personal information relating to a child, a child's guardians or other family members or any person alleged to have abused, neglected or threatened a child, must not divulge that information.

Maximum penalty: \$10 000.

... [not applicable]

- (3) This section does not prevent—
- (a) a person from divulging information if authorised or required to do so by law; or
  - (b) a person from divulging statistical or other data that could not reasonably be expected to lead to the identification of any person to whom it relates; or
  - (c) a person engaged in the administration of this Act from divulging information if authorised or required to do so by his or her employer.

43. Clause 12 of Schedule 1 to the FOI Act provides:

#### 12—Documents the subject of secrecy provisions

- (1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act.
- (2) A document is not an exempt document by virtue of this clause unless disclosure of the matter contained in the document, to the person by or on whose behalf an application for access to the document is made, would constitute such an offence.

44. Section 20(1)(a) of the FOI Act provides that an agency may refuse access to an exempt document. This gives the agency a discretion to give access to a document, despite its exempt status. That said, in my view, the FOI Act could not have intended for this discretion to extend to documents which are exempt under clause 12(1) above - the release of which would constitute an offence against legislated secrecy provisions.

### Interpretation of section 58(1) of the Children's Protection Act

45. The prohibition in section 58(1) in the Children's Protection Act applies whether or not divulgence of the personal information would be unreasonable,<sup>9</sup> or whether the subjects of the information consent to its release. Subject to the exceptions in section 58(3)(a)-(c), section 58(1) provides absolute protection of the information.

<sup>8</sup> *Esso Australia Resources Limited v The Commissioner of Taxation* (1990) 201 CLR 49.

<sup>9</sup> Compare this with exemption clause 6(1) in Schedule 1 to the FOI Act, which talks of personal affairs information as being exempt its disclosure would be unreasonable.

46. For an offence to lie under section 58(1) (and clause 12(1) to therefore apply):
- the information in the document must be personal information relating to a child, a child's guardians or other family members or any person alleged to have abused, neglected or threatened a child
  - the information must have been obtained by a person engaged in the administration of the Children's Protection Act and during the course of that administration
  - the giving of access of the information under the FOI Act would be to 'divulge' that information
  - none of the exceptions in section 58(3) apply.

#### ***Meaning of 'personal information'***

47. The term 'personal information' is not defined. The only authority on section 58(1) is the District Court decision in the case of *Ward v Courts Administration Authority* [2003] SADC 18. In that decision, the court (Judge Smith) said that the words include:

- information, news, intelligence, opinions, recommendations
- pertaining to, concerning or affecting a person or having the capacity to do so.

For example, information which discloses or tends to disclose the identity, address or location of a person or from which such particulars could be deduced will be personal information about that person. The fact that the information may be known to other persons, or the person seeking it cannot affect its character.<sup>10</sup>

#### ***Meaning of 'a child'***

48. A 'child' is defined in section 6 of the Act as a person under the age of 18 years.

#### ***Meaning of 'divulge'***

49. The word 'divulge' is not defined. The ordinary meaning of the word given in major dictionaries is:
- *Macquarie Dictionary* (3<sup>rd</sup> ed): to disclose or reveal (something private, secret, or previously unknown)
  - *Shorter Oxford Dictionary*: to make something publicly known; publish (statement, book etc); make a public announcement about (a person); declare or tell openly (something private or secret); to disclose, reveal. Become publicly known. make common, impart generally.

50. In *Ward*, the judge said:

In my view, the plain and ordinary meaning of 'divulge' is to disclose. It does not necessarily convey the imparting of that which is previously unknown. Further, given the objectives and principles underlying the CP act, I am of the view that the word 'divulge' should be construed to give paramountcy to protecting the child's interests. Its meaning should not be confined to the disclosure of otherwise unknown or secret information. It should include that.

51. In *Ward*, the applicant requested access to certain documents prepared for a Family Care Meeting, which had been convened by the agency under the provisions of the Children's Protection Act to secure the care and protection of four of his children. The applicant, and some of his children and family attended the meeting. It appears that the personal information in the documents concerned the applicant and his children, but it was difficult to know which information may or may not already have been known to the applicant. Further, even if the information was known to the applicant, he may not have been aware that it had been obtained by the agency. The judge considered that in this

<sup>10</sup> *Ward v Courts Administration Authority* [2003] SADC 18 (Unreported, Judge Smith, 21 February 2003) [44] - [45].



situation, 'disclosure of the fact of that holding would amount to divulgence'. The judge was of the view that adopting a narrow interpretation of the word 'divulge' would require the agency to engage in 'an intolerable task of speculating about what the applicant may or may not know':

There are difficulties in the qualified construction. For instance, whilst some information might be known to an applicant he or she may not be aware that it has been obtained by the agency. So in accessing the information the applicant will know that the agency has that information. The disclosure of the fact of that holding would amount to divulgence. Also, such a narrow interpretation would require the agency to indulge in what I would regard as an intolerable task of speculating about what the applicant may or may not know. In the end, the more expansive meaning is consistent with ensuring the protection of the child and so consistent with the objectives of the Act.

52. The judge noted that he was not bound by the ACT Administrative Appeals Tribunal decision in *Re Lapham and OCA* (1998) 53 ALD 485. In that case, the tribunal referred to the situation where:

... the contents of a document to which access is sought are already fully known by the person seeking access. In such a case, there can be no question of disclosing the contents of the document to the person; disclosure does not comprehend the act of making available that which is already known.

### *Consideration of the meaning of 'divulge'*

53. I am mindful of the objects and principles of the Children's Protection Act and the paramountcy of protecting children's best interests, and interpreting section 58(1) in conformity with these objects and principles. It is also appropriate that I follow the expansive interpretation of the word 'divulge' in *Ward*.
54. In saying this, I consider that *Ward* should be confined to its facts, in so far as the court was concerned about what the particular applicant knew or did not know. In my view, there is scope in the reasoning in *Ward* and in the dictionary meanings of the word 'divulge' above to allow lawful disclosure of section 58(1) information, where that information has been previously disclosed and is officially and legitimately in the public domain and is accessible by the public. Examples are where the information is reported in *Hansard*, the Government Gazette, or where the information has been previously disclosed by the agency, provided that that disclosure was not in itself a contravention of section 58(1) of the Act.
55. This interpretation obviates the need to engage in what the judge in *Ward* considered to be the 'intolerable task of speculating' about what an FOI applicant (or the public) may or may not know.

### **Information officially and legitimately in the public domain**

56. In the Government Gazette dated 10 December 2012, page 5480 (**the Gazette**), the following information was 'published by authority':

On 31 October 2012, the Minister for Education and Child Development announced the establishment of an independent review into the discrepancy between the accounts of South Australia Police and the Department for Education and Child Development relating to the non-disclosure to the school community of the allegation of child sexual abuse by a staff member in the Out of School Hours Care service, [named] School.

...

The events and circumstances surrounding the non-disclosure to the school community of allegations of sexual assault committed by the Director of the Out of School Hours Care service at [named] School against a child in his care in 2010.



57. I am proceeding on the basis that the disclosure of this information in the Gazette does not constitute a breach of section 58(1) of the Children's Protection Act.
58. In light of this, in my view, it would not constitute an offence against section 58(1) to release documents confirming the fact that there was an incident of sexual assault committed by the Director of the Out of School Hours Care service at a school against a child in his care in 2010.
59. I note that while the Gazette identifies the particular school involved in the incident, I have not done so in my provisional determination on the basis that in my view, the name of the school is exempt information under clause 6(3) of Schedule 1 to the FOI Act.

### Consideration of the remaining 14 documents

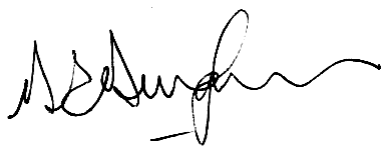
60. In my view, and in relation to the documents that concern the incident described in the Gazette, the release of any matter which would reveal information of the type described in section 58(1) that extends beyond that which had been published in the Gazette would be a divulgence under section 58(1).
61. In light of this, I consider that it would be an offence to release information that tends to identify the child. This might include the child's name or gender. Further, I consider that it would be an offence to release any particulars of the incident, beyond that which has been published in the Gazette. In my view, this kind of information would also be exempt under clause 6(3) of Schedule 1 to the FOI Act.
62. Documents 12, 13 and 15 refer to the gender of the child involved in the incident. Documents 13 and 15 contain particulars of the incident. Document 12 also identifies a school that is not the referred to in the Gazette. In my view, this information is exempt pursuant to clause 12(1), by virtue of section 58(1), and as such should be deleted from the documents before the remainder can be released to the applicant, in accordance with section 20(4) of the FOI Act.
63. In my view, clause 6(3a) of Schedule 1 may also be relevant to the remainder of the documents.
64. Clause 6(3a) provides, *inter alia*, that a document is an exempt document if it contains matter consisting of information concerning a person who is presently under the age of 18 years, and the disclosure of which would be unreasonable, having regard to the need to protect that person's welfare.
65. Clause 6(3a) applies to broader information than clause 6(1) insofar as the information need only 'concern a person who is presently under the age of 18 years'. It is not necessary that the information be characterised as 'information concerning the personal affairs' for the exemption to apply. I am of the opinion that some of the documents contains information that concerns a child (**the child**).
66. Section 39(10) of the FOI Act provides that I must not make a determination that access is to be given to a document to which, *inter alia*, clause 6 applies, unless I take steps as are reasonably practicable to obtain the views of any interested persons as to whether or not a document is an exempt document.
67. In order to fulfill my obligations under section 39(10) I contacted the representatives of the child and sought their views on whether any of the information in the documents was exempt.
68. By letter dated 29 May 2013, the representatives of the child advised that it was their view that it would be unreasonable to release any information which tended to reveal

the identity of the child. Having regard to the need to protect the child's welfare, I agree with this submission.

69. In considering the documents identified within the scope of this application, in my view releasing the name of any person alleged to have/ convicted of, abusing a child, the name of the child's school, the names of any members of the school's governing council, and the principal of that school, would tend to identify the child.
70. Documents 12, 13, 15 and 17 contain the name of a person alleged to have/has been convicted of, abusing a child. Documents 7, 8, 9, 10, 12, 13, 14 and 15 contain the name of the school. Documents 8, 12 and 15 contain the names of the school's governing council members. Documents 8, 9, 10 and 12 contain the name of the principal of the school. In my view, this information is exempt pursuant to clause 6(3a) and as such should be deleted from the documents before the remainder can be released to the applicant, in accordance with section 20(4) of the FOI Act.
71. Documents 13 and 15 also contain information concerning the personal affairs of other individuals. In my view, this information is exempt from release under clause 6(1) of Schedule 1 to the FOI Act.
72. Further, in my view, documents 6 and 11; pages 1 - 5, 10, 11, 13 - 21 of document 13; and documents 16, 18 and 19, do not contain any information 'relating to the arrest of a school staff member for charges of a sexual nature', and are therefore outside the scope of the application.
73. Finally, document 17 is an email chain titled 'Information for Parliament'. I am satisfied that document 17 is exempt under clause 17(c) of Schedule 1.

#### **Determination**

74. In light of the above, I vary the agency's determination pursuant to section 39(11) of the FOI Act.
75. I have provided the agency with a copy of the relevant documents, with the parts I consider are exempt highlighted in blue and the parts I consider to be 'out of scope' highlighted in red. The remainder of the information within the documents should be released to the applicant.



Richard Bingham  
**SA OMBUDSMAN**

27 June 2013