

Determination

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

Applicant	Hon Robert Brokenshire MLC
Agency	Department for Education and Child Development
Ombudsman reference	2013/02308
Agency reference	DECD12/8248
Provisional 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 16 November 2013, the applicant requested access to:

contents of all critical incidents arising during 2012 (to the date of this request, 16.11.2012) mentioning 'sex' whereby the incident involved allegations where (a) the alleged perpetrator was an adult person and (b) the alleged victim was a child.

Names and other identifying information - except for DECD zone in which the school exists - may be masked.

2. The agency's accredited FOI officer made a determination on 14 February 2013 and wrote:

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 1991, I cannot confirm or deny the existence of any document(s) you seek.

...

It is therefore an offence to divulge documents that contain such 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. If documents as those you describe in your application existed, they would be exempt from disclosure pursuant to Clause 12(1) of the FOI Act and access to this type of document would be refused. However, to disclose that documents did or did not exist would be personal information within the meaning of section 58 of the Children's Protection Act, and it would be an offence to divulge that fact. That information would be exempt information. Consequently, without confirming or denying the existence of the documents that you seek I have determined to refuse your request.

3. The applicant requested an internal review of this determination, by application received by the agency on 21 February 2013.

4. Mr Keith Bartley, Chief Executive of the agency then confirmed the determination on 25 February 2013 (**the agency's determination**).

External review

5. By application dated 27 February 2013, the applicant requested my external review of the agency's determination under section 39 of the FOI Act.
6. By letter dated 7 March 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.

Relevant provisions of the FOI Act

7. 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'.
8. 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'.¹ Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access.
9. Clause 12 of Schedule 1 to the FOI Act, for example, 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.
10. An agency needs to be mindful of these provisions and offending secrecy provisions in legislation in drafting its notice of determination. For example, simply acknowledging the existence of documents in the notice of determination may offend such provisions. This may result in the notice being an exempt document under clause 12(1). More significantly, it may also result in the commission of an offence.
11. Section 23(4) of the FOI Act provides:
 - (4) An agency is not required to include in a notice any matter if its inclusion in the notice would result in the notice being an exempt document.
12. In a notice of determination, section 23(4) provides the agency with a discretion to exclude exempt information. In my view, it is inconceivable that the Act would have intended that an agency could include information in its notice of determination which would result in a breach of legislative secrecy provisions and the commission of an offence.

¹ See *Freedom of Information Act* 1991 s 4 and s 20(1)(a).

13. 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

14. I provided my tentative view about the agency's determination to the agency by my provisional determination dated 21 May 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.
15. The agency responded to my provisional determination by email dated 29 May 2013.
16. It is often my practice to provide an applicant 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 with my provisional determination. I considered I was unable to disclose any meaningful information to the applicant for response, as to do so would have disclosed information that the agency claimed to be exempt,² and whether or not any documents exist within the scope of the application.
17. In light of the agency's response to my provisional determination, however, I am now in a position to provide the applicant with details of my provisional determination and proceed to a final determination.
18. In my provisional determination, I wrote:

Consideration of the agency's determination

14. The agency's determination is made up of two elements. First, the agency determined that it 'could not confirm or deny the existence of any document(s)' as to do so would result in the notice of its determination being an exempt document (section 23(4)). Second, the agency determined that if documents did exist, 'they would be exempt from disclosure' pursuant to clause 12(1) of Schedule 1 to the FOI Act, by virtue of section 58(1) of the *Children's Protection Act 1993*.
15. I note that the applicant sought access to the 'contents of all critical incidents... mentioning "sex"'. According to the agency's 'Critical Incident Reporting' information sheet:³

A critical incident is defined as any significant or threatening event, which could be contentious or dangerous and may include:

- a major disruption to the site's routine
- intervention or action by police or other agencies
- violence
- intruders
- weapons
- disaster e.g. fire or flood
- drug incidents
- assaults
- death or serious injury to a student or staff member

The first element

16. In my view, the circumstances under which a 'critical incident' report is made are vast and varied. Further, I consider that the scope of the applicant's request for information is very broad, as it is not confined to a specific incident, time, person or location.

² See section 39(15) of the Freedom of Information Act 1991.

³ Available online at <http://www.decd.sa.gov.au/docs/documents/1/MossCriticalIncidentRepor.pdf>

17. I am not persuaded that the agency confirming or denying the existence of any documents would breach any legislative secrecy provision (such as section 58(1) of the Children's Protection Act).
18. Further, I note that the agency has published online a summary of statistics relating to 'critical incidents' in 2012.⁴ It is unclear to me if the agency informed the applicant of this publically available information.

The second element

19. In my view, the documents contain exempt information under clause 12(1) of Schedule 1 to the FOI Act, by virtue of section 58(1) of the Children's Protection Act.
20. Section 58(1) of the Children's Protection Act provides:

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.

21. The prohibition in section 58(1) in the Children's Protection Act applies whether or not divulgence of the personal information would be unreasonable,⁵ 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.
22. 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'

23. 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.⁶

⁴ <http://www.sa.gov.au/upload/franchise/Education,%20skills%20and%20learning/2012Stat/DECDCriticalIncidentsByRiskFact or2012.pdf>

⁵ Compare this with exemption clause 6(1) in Schedule 1 to the FOI Act, which talks of personal affairs information as being exempt if its disclosure would be unreasonable.

⁶ *Ward v Courts Administration Authority* [2003] SADC 18 (Unreported, Judge Smith, 21 February 2003) [44] - [45].

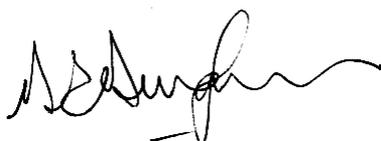
24. I note that the scope of the applicant's application is narrowed to the extent that he does not seek access to '[n]ames and other identifying information'. In light of this, all identifying information should be removed from the documents.
25. Further, I am satisfied that some of the information within the documents is exempt under clause 12(1) of Schedule 1 to the FOI Act by virtue of section 58(1) of the Children's Protection Act. I have enclosed a copy of the relevant documents with the information that I consider to be 'out of scope' or exempt highlighted in blue. In my view, the remainder of the information within the documents should be released to the applicant.
26. I note that the information that I propose to determine to release is mostly procedural, and in my view, does not constitute 'personal information' within the meaning of section 58(1) of the Children's Protection Act.

Provisional determination

27. In summary, I consider that the agency's determination to neither confirm nor deny the existence of any documents was wrong, and that there is exempt information within the documents.
 28. If the agency concedes my view in relation to the first element of its determination, 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.
19. By email dated 29 May 2013, the agency confirmed that it did not object to the views expressed in my provisional determination.
 20. In light of this, I can now confirm that 3 documents exist that fall within the scope of the applicant's FOI application.
 21. Further, for the reasons set out in my provisional determination above, I am satisfied that some of the information within the documents is exempt under clause 12(1) of Schedule 1 to the FOI Act by virtue of section 58(1) of the Children's Protection Act. I have enclosed a copy for the agency of the relevant documents with the information that I consider to be 'out of scope' or exempt, highlighted in blue. The remainder of the information within the documents should be released to the applicant.
 22. In my view, the information that I have determined to release is mostly procedural, and does not constitute 'personal information' within the meaning of section 58(1) of the Children's Protection Act.

Determination

23. In light of the above, I vary the agency's determination pursuant to section 39(11) of the FOI Act.



Richard Bingham
SA OMBUDSMAN

30 May 2013