

Determination

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

Applicant	[Applicant]
Agency	Department of the Premier and Cabinet
Ombudsman reference	2013/02902
Agency reference	DPC13/0814
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 5 February 2013, the applicant requested access to:

... all records of communications between Safework SA [sic] representatives and The Australian Skills Quality Authority (ASQA) regarding myself or my company [the applicant's company]. All records of communications between Safework SA representatives and any other person or entity including,[sic] internal documents.
2. The agency failed to make a determination within the 30 day statutory timeframe and therefore was deemed to have refused access to the requested documents under section 19(2) of the FOI Act.
3. The applicant requested an internal review of this 'deemed refusal', by application received by the agency on 26 March 2013.
4. The agency failed to make an internal review determination within the 14 day statutory timeframe, and thus was taken to have confirmed its 'deemed refusal' under section 29(5) of the FOI Act (**the agency's determination**).

External review

5. By application dated 3 April 2013, the applicant requested my external review of the agency's determination under section 39 of the FOI Act.
6. By letter dated 10 April 2013, I notified the agency of my external 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.

Provisional determination

7. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 25 July 2013. I informed the parties that subject to my

receipt and consideration of submissions from the parties, I proposed to vary the agency's determination pursuant to section 39(11) of the FOI Act.

8. The applicant and third parties provided submissions in response to my provisional determination. I have considered these submissions in my reasons for my determination.

Relevant provisions of the FOI Act

9. 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.
10. 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.
11. To justify its determination, the agency must give reasons for its determination and show the findings on any material questions of fact underlying these reasons, together with a reference to the sources of information on which those findings are based. This is a requirement of an agency in the determination process under the FOI Act; and in my opinion, it is equally applicable in an external review.
12. 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.

The documents

13. The agency identified 72 documents as falling within the scope of the application. These include emails authored predominantly by the applicant and staff of SafeWorkSA and the Australian Skills Quality Authority (ASQA), including an ASQA audit report, relating to the applicant's status as a 'Registered Assessor' under the now repealed *Occupational Health Safety and Welfare Act 1986* and the owner of a Registered Training Organisation (RTO), [the applicant's company].

The relevant exemption provisions in Schedule 1

Clause 5(1)

14. Clause 5(1) of Schedule 1 to the FOI Act provides:

5—Documents affecting inter-governmental or local governmental relations

- (1) A document is an exempt document if it contains matter—
 - (a) the disclosure of which—
 - (i) could reasonably be expected to cause damage to intergovernmental relations; or
 - (ii) would divulge information from a confidential intergovernmental communication; and
 - (b) the disclosure of which would, on balance, be contrary to the public interest.

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

Clause 6(1)

15. Clause 6(1) of Schedule 1 to the FOI Act states:

6—Documents affecting personal affairs

- (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).

16. In order for a document to be considered exempt under clause 6(1), the following elements must be established:

- a. the document contains information concerning the personal affairs of someone other than merely the applicant; and
- b. it would be unreasonable to release it.

17. The following factors are relevant to interpreting whether a disclosure would be unreasonable under clause 6(1):

... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance.²

Clause 10(1)

18. Clause 10(1) of Schedule 1 to the FOI Act provides:

10—Documents subject to legal professional privilege

- (1) 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.

19. 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:

- a. confidential
- b. a communication between a client and their lawyer
- c. created for the dominant purpose of obtaining or giving legal advice or made for the dominant purpose of use in existing or anticipated legal proceedings³ ('dominant' has been held to mean a 'ruling, prevailing or most influential' purpose.⁴).

The agency's submissions

20. The agency submits that documents 5, 28 and 42 contain information about third parties which is outside of the scope of the application, and therefore that information should be deleted before release.

² *Re Chandra and Minister for Immigration and Ethnic Affairs (1984)* 6 ALD N257 at 259.

³ *Esso Australia Resources Limited v The Commissioner of Taxation (1999)* 201 CLR 49.

⁴ *Ibid.*, 64-65.

21. The agency claims that documents 46 and 47 are exempt under clause 10(1). The agency states:

Documents 46 and 47 contain legal advice provided internally within SafeWork SA by [an agency officer], who provides in-house legal advice to members of SafeWork SA. DPC contends that this advice would be protected by legal professional privilege and is therefore exempt from disclosure pursuant to clause 10 of Schedule 1 to the FOI Act.

22. The agency noted that documents 1-5, 8, 14, 27, 28, 30, 44 and 57 contain information about the operation of ASQA. While documents 1-5 were created by the Department of Further Education, Employment, Science and Technology, the function was subsequently transferred to ASQA, and the documents therefore relate to ASQA's operations. The agency noted that no consultation with ASQA had been conducted, but that it otherwise has 'no objection to the disclosure of the documents'.
23. The agency claims that document 58 contains information concerning the personal affairs of a third party which would be unreasonable to disclose and that information should therefore be deleted as exempt pursuant to clause 6(1).

The applicant's submissions

24. The applicant has provided general submissions about why he is seeking the documents, including expressing his frustrations about the process.

Consideration of the submissions and the agency's determination

25. I am satisfied that the information relating to third parties in documents 5, 28 and 42 is outside of the scope of the application and should be deleted.
26. I note the agency's claim that documents 46 and 47 contain matter which would be subject to legal professional privilege. These documents consist of emails sent to and from [an agency officer], who the agency has asserted provides 'in house' legal counsel. There is case law on the issue of whether legal advice prepared by 'in house' solicitors is exempt on the ground of legal professional privilege⁵, from which a number of propositions can be drawn, none of which have been addressed in the agency's submissions in response to my provisional determination.
27. Specifically, the agency has provided no detail about whether or not [the agency officer] held a current practising certificate at the time of the advice⁶ or whether he was acting in his capacity as legal counsel to the agency (within the context of a lawyer and client relationship) in providing the advice⁷. Further, the agency has made no submissions as to the nature of the advice provided, in particular whether document 46 and 47 were created for the dominant purpose of providing confidential legal advice with an appropriate degree of independence. In the absence of any evidence to support the claim that [the agency officer] was providing advice which would attract legal professional privilege, documents 46 and 47 cannot be exempt under clause 10(1).
28. Document 10 contains information concerning the personal affairs of a third party. Pursuant to section 39(10), I sent a copy of this document to the third party, inviting submissions regarding their views on whether the document is exempt under clause 6(1). The third party indicated to my officer via email dated 27 July 2013 that he has no objections to the release of the document. I am therefore satisfied that document 10 is not exempt under clause 6(1).

⁵ See *Re Proudfoot and Human Rights and Equal Opportunity Commission* 28 ALD 738 and *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.

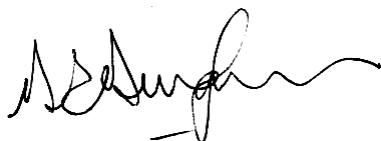
⁶ *Waterford v Commonwealth of Australia*, per Mason, Wilson, Deane and Dawson JJ.

⁷ *Re Proudfoot and Human Rights and Equal Opportunity Commission* at 734.

29. Documents 1-5, 8, 14, 27, 28, 30, 44 and 57 contain information about the operation of the ASQA, a federal government agency. Pursuant to section 39(10), I sent ASQA a copy of my provisional determination. I sought its views as to whether or not these documents are exempt under clause 5(1).
30. By letter dated 30 August 2013, the Chief Commissioner of ASQA, Mr Chris Robinson, stated:
- I do not believe that the documents you have provided are exempt under clause 5 and therefore support their release. I also note your advice that information relating to third parties in two documents you provided (documents 5 and 28) should be deleted and I wish to have it noted that I agree with this part of your determination.
31. It is my view that documents 1-5, 8, 14, 27, 28, 30, 44 and 57 are not exempt under clause 5(1).
32. I am satisfied that there is information in documents 56 and 58 which is exempt under clause 6(1). It is information concerning a third party's personal affairs, including full name and date of birth, which appears to have been obtained by SafeWorkSA from another party in order to search for the third party's assessment for a class on a SafeWorkSA database. The information is likely to have current relevance and I have not been provided with any evidence to satisfy me that the third party would consent to its disclosure in this context. Therefore, in my view it would be unreasonable to release this information taking into consideration all of the circumstances⁸. This information should be deleted before documents 56 and 58 are released to the applicant.⁹

Determination

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



Richard Bingham
SA OMBUDSMAN

13 September 2013

⁸ See *Re Chandra and Minister for Immigration and Ethnic Affairs (1984)* 6 ALD N257 at 259.

⁹ In accordance with section 20(4) of the *Freedom of Information Act 1991*.