

Determination

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

Applicant	[Applicant]
Agency	Flinders University
Ombudsman reference	2018/02691
Agency reference	CF18/13
Determination	The determination of the agency is confirmed.

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (the **FOI Act**) the applicant requested access from the agency to:

Copies of written feedback on the change proposal titled 'A new Buildings and Property Structure Major Change and Implementation Proposal' specific to the position of [xxxxxxxxxxxxx].

Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in the appendix.

Jurisdiction

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

Provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 13 April 2018. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.
5. The applicant did not provide submissions in response. By email sent 17 April 2018 the agency informed my Office that it would not be providing any further submissions. Accordingly this determination is in the same terms as my provisional determination.

Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
7. 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.
8. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
9. 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.

Documents in issue

10. The agency identified eight documents within the scope of the application and refused access to each of them. The documents in issue are eight emails received from agency staff providing feedback in relation to the agency's change proposal.
11. In refusing access to the documents, the agency relied upon clause 13(1) of Schedule 1 to the FOI Act. Clause 13(1) provides:

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.

Issues in this review

12. The issue in this review is whether the agency has justified its refusal to grant access to the documents in issue on the basis that they are exempt documents.

Consideration

13. The agency submits that it owes a duty of confidence to stakeholders who provided feedback in relation to its change proposal.
14. The agency also states that the relationship between agency staff and the agency itself is indicative of the duty of confidence that exists.
15. It also argues that the circumstances in which the information in the documents was communicated gives rise to a duty of confidentiality.

¹ *Freedom of Information Act 1991*, section 12.

16. The agency asserts that an action for breach of confidence would be founded under the four limbed test set out by His Honour Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)*.²
17. As well as relying upon clause 13(1) the agency asserts that the documents are also exempt under clauses 7(1)(c) and 9 of the FOI Act.
18. Having regard to the contents of the documents and the agency's submissions it is my view that the documents are exempt under clause 13(1)(b) of Schedule 1 to the FOI Act.
19. I am satisfied that each of the following criteria are met:
 - the matter in the documents was 'received under an express or inferred understanding that [it] would be kept confidential'³
 - disclosure of the matter in the documents might reasonably be expected to prejudice the future supply of such information to the agency
 - disclosure of the matter in the documents would, on balance, be contrary to the public interest.
20. I am satisfied that the agency owes a duty of confidentiality to its stakeholders, including the staff members who provided feedback on the change proposal. I note that persons who were invited to provide feedback were specifically told that any feedback provided would remain confidential.
21. I am also satisfied that the future supply of similar information to the agency would be prejudiced by disclosure of the documents. In this regard the agency has outlined its need to receive full and honest feedback to effectively exercise its decision-making functions. If stakeholders were to feel they were unable to provide feedback to the agency without risking disclosure, the agency would likely be at a disadvantage when requesting feedback about proposals in the future.
22. In considering where the public interest lies in this matter I have had regard to the submissions of the agency. Public interest considerations relevant to this matter include:

In favour of disclosure:

- fulfilling the objects of the FOI Act, particularly the public interest in promoting openness and accountability of the agency and its staff
- the ongoing relevance of the information to the applicant
- the fact that expectations of confidentiality are 'always subject to the provisions of the FOI Act and cannot be affected by any representation ... that greater confidentiality might be accorded to material than properly reflects the effect of the FOI Act'.⁴

Contrary to disclosure:

- objections to disclosure raised by the agency
- assumptions of confidentiality on the part of those who provided feedback
- there is a broad public interest in the agency's strategic planning and decision-making functions being as sound as practicable. An important way of achieving this is ensuring that full and frank feedback is provided to it. This can only be ensured when there is confidentiality between the agency and those from whom it invites feedback.

² *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at [443].

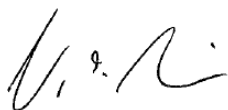
³ See *Re Maher and Attorney-General's Department* (1985) 7 ALD 731 at [737].

⁴ *Iplex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54 at [70].

23. I am satisfied that disclosure of the documents in issue would, on balance, be contrary to the public interest. My view is that the assumptions of confidentiality on the part of those who provided the material in the documents is the more persuasive factor in this matter, and outweighs the factors in favour of disclosure.
24. Accordingly I am satisfied that the documents are exempt under clause 13(1)(b) of Schedule 1 to the FOI Act.
25. Bearing in mind section 20(4) of the FOI Act, I have turned my mind to the question of whether it would be practicable for the agency to disclose the documents after redacting the names of the authors. However, given the limited number of responses provided to the agency, I do not believe this would effectively de-identify the responses.

Determination

26. In light of my views above, I confirm the agency's determination.



Wayne Lines
SA OMBUDSMAN

14 May 2018

APPENDIX

Procedural steps

Date	Event
10 January 2018	The agency received the FOI application dated 10 January 2018.
24 January 2018	The agency determined the application.
24 January 2018	The agency received the internal review application dated 24 January 2018.
7 February 2018	The agency confirmed the determination.
7 March 2018	The Ombudsman received the applicant's request for external review dated 7 March 2018.
7 March 2018	The Ombudsman advised the agency of the external review and requested submissions and documentation.
23 March 2018 to 9 April 2018	The agency provided the Ombudsman with its submissions and documentation.
13 April 2018	The Ombudsman issued his provisional determination and invited submissions from the parties.
17 April 2018	The agency advised the Ombudsman that it would not be making further submissions.