

Determination

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

Applicant	Mr David Pisoni MP
Agency	Minister for Education and Child Development
Ombudsman reference	2013/00262
Agency reference	12MECD3812
Determination	The determination of the agency is varied.

REASONS

Background

1. By application under the *Freedom of Information Act 1991 (the FOI Act)* dated 2 November 2012, and received by the agency on 6 November 2012, the applicant requested access to all documents, including files, emails, correspondence and notes/transcripts of telephone conversations that mention an incident of sexual abuse at a named school from January 2010 until present.
2. The agency failed to determine the application within the timeframe imposed by the FOI Act and was therefore deemed to have refused access to any documents within the scope of the application for access.
3. The applicant requested an internal review of this determination, by application dated 6 December 2012.
4. The agency failed to conduct an internal review within the timeframe imposed by the FOI Act and was therefore deemed to have confirmed the 'deemed determination' to refuse access to any documents within the scope of the application for access (**the agency's determination**).

External review

5. By application dated 7 January 2013, the applicant requested my external review of the agency's determination under section 39 of the FOI Act.
6. By letter dated 19 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.
7. On 6 June 2013, it was agreed by the applicant and the agency that the name of any person who has, or may have, committed an offence against a child would not be pursued by the applicant. The name of a person who has committed an offence against a child should be deleted from the documents prior to release.

Provisional determination

8. 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 its submissions, I proposed to vary the agency's determination pursuant to section 39(11) of the FOI Act.
9. On 26 June 2013, my legal officers met with the agency's FOI officer and the Chief of Staff to discuss my provisional determination and take submissions. The agency provided submissions in response to my provisional determination. I have considered these submissions in my reasons for my determination.
10. 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 and the interested party with my provisional determination. I considered I was unable to disclose any meaningful information to the applicant and the interested party for response, as to do so would have disclosed information that the agency claimed to be exempt,¹ and whether or not any additional documents exist within the scope of the application.
11. I am now in a position to proceed to a final determination.

Consideration

12. The FOI Act provides that a person has a legally enforceable right to be given access to an agency's documents in accordance with the Act.
13. After considering an application for access to a document, an agency must determine whether access to the document is to be given or refused.
14. An agency may refuse access to a document if it is an exempt document. The term 'exempt document' is defined as a 'document which is an exempt document by virtue of schedule 1'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access.

Clause 12

15. Clause 12 of Schedule 1 provides that a document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act.
16. Sections 58(1) and 58(3) of the *Children's Protection Act 1993* (the CP 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

¹ See *Freedom of Information Act 1991* section 39(15).

- (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.
17. For an offence to lie under section 58(1) (and clause 12(1) to therefore apply) each of the following needs to 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 CP 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.
18. I firstly note that the information sought concerns personal information relating to a person who, on 9 February 2012, was convicted of a crime concerning the abuse of a child. Section 58(1) protects the confidentiality of personal information relating to a person alleged to have abused a child. I am of the opinion that in the circumstance where a conviction has occurred, section 58(1) does not operate to protect the information relating to the offender. I am therefore of the opinion that information relating to the offender is not protected under clause 12(1).
19. The information sought concerns the sexual abuse of a child. There is no doubt that this is personal information of a child. I consider point a) is satisfied.
20. I consider point b) is satisfied. Section 8 of the CP Act provides that the Minister for Education and Child Development (**the Minister**) has a number of mandated functions under the CP Act. On balance, I am satisfied that the Minister is a person engaged in the administration of the CP Act. I am also satisfied that the Minister obtained the information during the course of being engaged in the administration of the CP Act.
21. I turn then to consider whether point c) is satisfied. That is, whether to give access to the information sought would be a divulgence of the information. The word 'divulge' is not defined in the CP Act. The ordinary meaning of the word given in major dictionaries is:
- Macquarie Dictionary* (3rd 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.
22. The District Court decision of *Ward v Courts Administration Authority* [2003] SADC 18 considered the operation of section 58 of the CP Act. In that decision 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.²
23. 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 CP 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

² At paragraph 57.

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 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.³

24. I am mindful of the objects and principles of the CP 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*.
25. 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 information which would otherwise offend section 58(1), 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).
26. 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.
27. I turn then to consider whether, in this case, release of the information sought would be to divulge that information within this interpretation of the term.
28. In certain circumstances, the mere act of admitting or denying that documents exist within the scope of an application would, in and of itself, divulge personal information and constitute an offence against section 58(1) of the CP Act. Where this circumstance exists, section 23(4) of the FOI Act provides that 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.
29. The threshold issue in this matter is whether in a notice of determination, the admission that documents exist would confirm that there had been an incident of sexual abuse of a child at the particular school from beginning January 2010 and as such, would itself constitute an offence against section 58(1) of the CP Act.
30. In the South Australian Government Gazette, dated 10 December 2012, the Governor of South Australia appointed Mr Bruce DeBelle AO QC to be a Commissioner pursuant to the *Royal Commissions Act 1917*.

³ At paragraph 57

31. The information in the Gazette refers to:
 - allegations of sexual assault
 - committed by the Director of the Out of School Hours Care service at [a named] school
 - against a child in his care
 - in 2010.
32. I note that the Government Gazette provides that:

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 Australian 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.
33. I proceed on the basis that the disclosure of this information in the Government Gazette does not constitute a breach of section 58(1) of the CP Act.
34. I am of the opinion that the information sought in this FOI request does not go beyond the information provided in the Gazette. I therefore consider that to confirm documents exist within the scope of the access request would not result in a 'divulgence' of personal information of a child, and as such would not offend section 58(1) of the CP Act.
35. I advised the agency of this view in my provisional determination. On 26 June 2013 the agency submitted that, in this instance, it accepted this interpretation of section 58(1).
36. The agency identified 50 documents within the scope of the application. Documents 41, 44 are outside of the scope of the subject matter of the application; documents 1, 22 - 35, 37, 38, 39, 42, 48, 49, 50 are dated after the application for access. These documents are therefore excluded. My determination relates only to those documents within the scope of the application.
37. I turn now to consider whether there is matter contained in the documents that is exempt pursuant to clause 12(1) on the basis that it would be an offence against section 58(1) of the CP Act to release that information. In my opinion the release of any matter which would reveal information that extends beyond that which had been published in the Gazette would be a divulgence under section 58(1).
38. In considering the documents identified by the agency, I consider that it would be an offence to release information identifying the child's gender and any information relating to the nature of the abuse as this has not been officially disclosed. This information is exempt pursuant to clause 12(1) and should be deleted from the documents before release, in accordance with section 20(4) of the FOI Act.
39. I am of the opinion that to release the information in document 8 would be to divulge personal information of a child and as such it would be an offence against section 58(1). The document is therefore wholly exempt pursuant to clause 12(1).

Clause 6(1)

40. Clause 6(1) of Schedule 1 provides that 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).
41. I am of the opinion that the names and contact details of parents whose children attend the school is information concerning these people's personal affairs and it would be

unreasonable to disclose this information. I therefore consider this information should be deleted from the documents before release, in accordance with section 20(4) of the FOI Act.

42. I am of the opinion that the address of a person who has committed an offence against a child is information concerning that person's personal affairs and it would be unreasonable to disclose that information. I therefore consider this information should be deleted from the documents before release, in accordance with section 20(4) of the FOI Act.

Clause 6(3a)

43. Clause 6(3a) of Schedule 1 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.
44. 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 each of the documents contains information which concerns a child (**the child**).
45. Section 39(10) 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.
46. 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.
47. 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.
48. In considering the documents identified within the scope of this application, I consider that releasing the name and any details of the child's school, and the name of the principal may lead to the identification of the child and as such disclosure of this information would be unreasonable having regard to the need to protect the child's welfare. I consider that the child's gender and details of the abuse, which I have determined above to be exempt pursuant to clause 12(1), is also exempt pursuant to clause 6(3a).
49. I consider this information to be exempt pursuant to clause 6(3a) and as such should be deleted from the documents before release, in accordance with section 20(4) of the FOI Act.

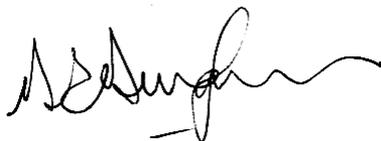
Clause 17(c)

50. Clause 17(c) of Schedule 1 provides that a document is an exempt document if it contains matter the public disclosure of which would, but for any immunity of the Crown, infringe the privilege of Parliament.
51. Documents 36, 40 and 45 are Parliamentary Briefing Notes and I am of the opinion that they are fully exempt pursuant to clause 17(c).

Determination

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

53. I have provided the agency with a copy of the relevant documents, with the parts I consider are exempt highlighted in blue and the documents I consider to be 'out of scope' highlighted in red. In my view the remainder of the information in the documents should be released to the applicant.

A handwritten signature in black ink, appearing to read 'Richard Bingham', with a long, sweeping flourish extending to the right.

Richard Bingham
SA OMBUDSMAN

27 June 2013

Att