OmbudsmanSA

Determination

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

Applicant	**The Hon Rob Lucas MLC**
Agency	**Minister for Transport & Infrastructure**
Ombudsman reference	**2017/05339**
Agency reference	**17MTR/0935**
Determination	**The determination of the agency is reversed.**

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:

> As at 10 January 2017 the names and titles of all staff in the Ministers (sic) office including Ministerial staff and department staff appointed to the Ministers (sic) office

Background

2. For ease of reference, the procedural steps relating to the application 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 4 August 2017. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to reverse the agency's determination.

5. The Crown Solicitor's Office (**CSO**) provided submissions on behalf of the agency in response. Those submissions supplemented the CSO's earlier submissions on behalf of the agency.

6. The Commissioner for Public Sector Employment also provided submissions.

7. I also received submissions from the Premier's Chief of Staff, Mr Daniel Romeo. These included representations made on behalf of Mr Kevin Naughton, Chief of Staff to the Hon. Martin Hamilton-Smith MP, and representations made by The Office of the Hon. Leon Bignell MP.

8. On 22 August 2017, at the request of the CSO, my Legal Officers met with a number of Ministers' office managers including Mr Matthew Sarunic, the agency's office manager. A number of submissions were made in response to the provisional determination during this meeting although Mr Sarunic did not make any specific submissions.

9. In making this determination, I have considered all submissions received.

Relevant law

10. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.[1]

11. 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.

12. The agency claims that the single document in issue is exempt pursuant to clause 4(1), clause 6(1) and clause 16(1).

13. Clause 4(1) relevantly provides that:

> A document is an exempt document if it contains matter the disclosure of which could reasonably be expected –
>
> (a) to endanger the life or physical safety of any person

14. Clause 6(1) provides:

> 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).

15. Clause 16(1) relevantly provides:

> A document is an exempt document if it contains matter the disclosure of which –
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> (a) could reasonably be expected –
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> …
>
> (iii) to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or
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> (iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions; …
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> … and
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> (b) would, on balance, be contrary to the public interest

16. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.

17. 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.

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[1] Freedom of Information Act 1991, section 12.

Documents in issue

18. The agency identified one document within the scope of the application:

> Internal telephone directory of the Minister's office.

Issues in this review

19. It is for me to determine whether the agency has justified its determination to refuse access to the document.

Parties' submissions

The Agency

20. In its original determination, the agency provided a list of the titles of public sector roles in the Minister's office as at 10 January 2017 and directed the applicant to the Government Gazette for details of Ministerial staff. These details are published annually by the Gazette.

21. On internal review, the agency offered the following reasons in support of its claim the document was exempt:

> I uphold the initial determination. I deem that the identities and emails of staff not listed in the Government Gazette to be exempt pursuant to section 4(1) of the Act, as disclosure of the identities as employees of this office, to the public, could endanger the life or physical safety of these individuals.
>
> When dealing with matters relating to this portfolio, physical threats to all staff members have been received. Measures are taken within this office to protect the identities of staff who are exposed to such threats. Therefore, disclosure of this information is likely to put the welfare of staff within the office at risk, and is therefore on balance, contrary to the public interest.
>
> Please note that mobile phone numbers of staff are also considered exempt pursuant to section 6(1) of the Act, as these numbers are provided for internal use and are also used for personal reasons.

22. By letter received on 14 July 2017, the CSO provided submissions on behalf of the agency. They include the following reasons in support of the claims of exemption:

Clause 4(1)

- clause 4(1)(a), in employing the expression "could reasonably be expected", recognises that there must be a reasonable basis to expect a risk of danger to life or physical safety (including a reasonable apprehension of such danger) if information were disclosed
- this has been variously expressed as requiring the feared consequence to be a realistic or material possibility and not a remote or imaginary one, or that the chance of it occurring ought to be "fair", "sufficient" or "worth noting"[2]
- the "physical safety" of a person is not solely concerned with actual safety, but includes also the person's perception of safety. If a person feels unsafe as a result of disclosure of information, that disclosure may "endanger the life or physical safety" of that person within the meaning of cl 4(1)(a)[3]
- threats to an agency (as the internal review determination explained occurs) are clearly relevant in considering whether it is reasonable to expect harm to persons

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2 Centrelink v Dykstra [2002] FCA 1442, [24]; Horrocks v Department of Justice [2012] VCAT 241, [71].

3 O'Sullivan v Victoria Police [2005] VCAT 532, [19], ('O'Sullivan').

if it is revealed they work there. Further, in addition to threats against the office generally, threats have in some cases been made against individual members of staff
- it would not be unreasonable for persons who receive intimidating or threatening calls or correspondence to fear for their physical safety if their personal details were disclosed. The agency submits that the risk of danger to the physical safety of staff if their identities were disclosed is a real possibility, and certainly cannot be considered absurd or fanciful.

23. While the CSO concedes that the names and titles of job positions within the Minister's office are not likely to be exempt under clause 6(1), he submits that the personal mobile phone numbers of public servants constitute those persons' personal affairs and should be exempt under this clause.

24. In any event, I note that access to a list of public servants' mobile phone numbers is outside the scope of the application and submissions related to this issue have not been considered.

25. The CSO also submitted that the document was exempt under clause 16:

Clause 16(1)(a)(iii), (iv)
- as with clause 4(1), clause 16(1) requires an objective assessment or prediction as to whether a particular consequence "could reasonably be expected" to occur if information were disclosed. The same test applies to both
- in the context of clause 16(1), "substantial" does not require that the predicted adverse effect be a "considerable", "solid", or "big" effect, but simply an adverse effect "which is sufficiently serious or significant to cause concern to a properly concerned reasonable person".[4] Although a matter of degree, it is a higher threshold than the mere "slight" adverse effect that will satisfy the business affairs exemption in clause 7[5]
- in *Re He and Family Court of Australia*, it was held that the names of staff in the Adelaide District Registry of the Family Court were exempt under the Commonwealth equivalents to clauses 16(1)(a)(iii) and (iv).[18] In that case there was an "understanding" within the Registry that the names of officers would not be disclosed without their express consent. That informal policy arose out of the circumstance that the employees operated in an emotional and potentially volatile environment. Although no employee had actually been assaulted by a member of the public, the AAT recognised there were legitimate concerns that the disclosure of names would allow people to discover employees' personal details, such as home addresses and other contact details[6]
- the agency submits that similar considerations apply in the present matter
- Ministers occupy prominent and politicised positions. As a result, their offices attract a significant body of persons seeking the intervention of the Minister or to complain about some government action or inaction. By contrast, the public servants working within Ministerial offices are not senior decision makers. They are there to assist the Minister
- the risk is the exposure of public servants in their working environments to highly volatile and emotional complainants, a number of whom are constant callers. There are clear avenues for members of the public to make complaints or express dissatisfaction to or about Ministers and government actions. The provision of the names or other details of those public servants may encourage complainants, particularly constant callers, to contact individual staff directly

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4 *Re Thiess and Department of Aviation* [1986] AATA 141; (1986) 9 ALD 454, 463 [24]; *Treglown v SA Police* [2011] SADC 139, [202]-[203].

5 South Australia (Department of Planning, Transport and Infrastructure) v Brokenshire [2015] SADC 68, [35]-[36].

6 [2000] AATA 1107, ('*Re He*').

rather than through the agency. This has potential to be highly distressing to staff, and to impact on their ability to perform their ordinary functions.

26. The CSO then addressed the additional requirement that the disclosure of the document must be contrary to the public interest:

- clause 16(1), as with a number of exemptions under the Act, includes an additional requirement that disclosure would be contrary to the public interest. That requires a finding that, on balance, the factors in the public interest against disclosure outweigh the factors in favour of disclosure
- there is little apparent public benefit to be gained by release of the names and contact details of public servants working within Ministerial offices. The only significant factor favouring disclosure that appears to be relevant is the general consideration of fostering transparency in government
- this must be weighed against the effect on the proper functioning of the agency and management of its personnel and detriment to the staff themselves.

Further submissions from the agency

27. By letter dated 28 August 2017, the CSO provided further submissions on behalf of the agency.

28. In its further submissions, the CSO:
- restated his position that it is not only the applicant's motives for seeking access to a document that are to be considered. Release of a document under the FOI Act is release to the world at large
- referred to the case of *Department of Agriculture and Rural Affairs v Binnie*[7] in this regard
- cited several further cases which he submits support the proposition that safety is not just about physical safety, but also the perception that one is safe
- posited that the relevant public service classifications provide a guide to any assessment of seniority of the roles of staff whose names may be provided to the applicant under this FOI request.

The Applicant

29. When applying for external review, the applicant stated:

> It is my view that these names are in the public interest and should be released…
>
> I maintain that the release of the identities corresponding to public sector positions pose no material risk to the welfare of staff and that Ministerial staff, whom work for the Minister as well, have their names published publically. For many years, we have received after FOI applications the names and associated public sector positions of all staff without any concerns for the welfare and safety of staff…
>
> Additionally, the Government Gazette only refers to staff employed as at 3rd November 2016 and there may have been movement of staff, public or otherwise, within the Minister's Office.

30. On 18 October 2017 my Senior Legal Officer received a telephone call from the applicant, who explained his reasons for seeking access to the document. While an applicant's reasons for seeking access to a document are not strictly relevant, I am satisfied that the applicant does not seek to misuse the document in the event that he gains access to it.

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[7] [1989] VR 836, 844

The Commissioner for Public Sector Employment

31. As stated, the Commissioner for Public Sector Employment, Ms Erma Ranieri made submissions to my Office. I have no obligation to take Ms Ranieri's views into account. Nevertheless I will summarise and address her submissions.

32. Ms Ranieri submitted that:
    - while the names of staff who work in senior ministerial roles are published in the Gazette as this level of exposure is expected by the incumbents of these roles, the same would not be expected of public service employees within the office
    - that it is of the utmost importance that the South Australian public sector provides a safe and supportive environment for all employees at all times
    - the disclosure of individual employee names would fail to ensure safety of employees for many reasons, including making it easier for members of the public to make inappropriate contact with, harass and stalk employees
    - given the above, the Commissioner cannot see how it would be considered in the public interest to release the names of the relevant employees[8].

The Premier's Chief of Staff

33. The Premier's Chief of Staff, Mr Daniel Romeo also made submissions to my Office. I have no obligation to take Mr Romeo's views into account. Nevertheless I will summarise and address his submissions.

34. Mr Romeo submitted that:
    - many ministerial offices do not have security and therefore any member of the public can visit and speak directly to the receptionist
    - callers to Ministers' offices can become abusive and sometimes threatening to the call taker
    - if the names of public servants are released to the applicant, this may deter public servants currently working in departments from taking up opportunities to work in Ministers' offices.

35. Mr Romeo provided submissions on behalf of Mr Kevin Naughton, Chief of Staff to the Hon. Martin Hamilton-Smith MP. These submissions included a number of examples of security incidents which have occurred and which he submits supports the position that staff names should not be released to the applicant. Some of these examples include:
    - on the day following Minister Hamilton Smith's announcement of his decision to leave the Liberal Party, staff were verbally abused and their office was vandalised
    - two staff have been abused over the counter and over the phone
    - one staff member has received constant telephone calls from a particularly abusive member of the public. This member of the public attended the office without notice on one occasion, leaving the particular staff member in tears. The staff member had to be escorted to her car by another staff member
    - in the 1980s, a former public sector colleague of Mr Naughton was murdered by her ex-husband.

36. Mr Romeo also provided submissions on behalf of the Office of the Hon. Leon Bignell MP. An incident was referred to which involved a group of protestors attempting to gain access to the Ministerial office . Owing to security measures in the building, the protestors were unable to gain entry. Despite the presence of the protestors, the Minister's office manager exited the secure area of the office in order to collect a parcel. The protestors shoved this staff member and all of the protestors were able to

[8] Letter to my office dated 8 August 2017

gain access to the building.[9] The Minister's Chief of Staff spent half an hour negotiating with the protestors before they eventually left.

Consideration of submissions and conclusion

37. On internal review the agency determined that release of the information requested was exempt under clause 4(1) as it could expose public servants employed within the Minister's office to danger to their lives or physical safety. The agency referred to threats made to staff, and noted that the agency takes measures to protect the identities of staff as a result.

38. The agency concluded that disclosure of the information sought was likely to put the welfare of staff within the office at risk.

39. Staff in a Minister's office consists of Ministerial staff and of public servants who have been assigned from their Department or other administrative unit. Staffing requirements will depend on the nature of the Minister's portfolio(s).

40. Section 71 of the *Public Sector Act 2009* provides that Ministerial advisers' names and employment details must be reported to Parliament and published. There is no comparable requirement to publish the names of departmental staff.

41. Departmental staff are public servants. They are employed by the Chief Executive of the relevant Department on behalf of the Crown for the purposes of the Department.[10]

42. While the agency is correct in stating there is a distinction between Ministerial and Departmental staff, this distinction does not exist in the eyes of the public. In the ordinary case, a complainant who calls or attends a Minister's office would be unaware of whether they were speaking to a ministerial staffer or a public servant. The agency's submissions appear to be based on the premise that whereas ministerial staff willingly assume the disapprobation that might come with association with a Minister, public servants do not. While I accept this, I reject a suggestion that public servants working within Ministers' offices thereby face a higher risk of negative interactions than do ministerial staff.

Clause 4(1)(a)

43. The issue is whether the release of names and job positions within the agency's office could reasonably be expected to endanger the life or physical safety of any person.

44. There was judicial consideration of the term "reasonably expected" in the matter of *State Of South Australia (Department Of Planning, Transport & Infrastructure) v The Honourable Robert Brokenshire MLC*[11] ,albeit as it related to clauses 7, 15 and 16 of the FOI Act. Her Honour Judge McIntyre stated:

> (…)Nevertheless under each clause it is necessary to consider the reasonably expected consequences of disclosure. The expectation must be based on reason and cannot be fanciful, farfetched or speculative.

45. The agency has submitted that while the test is objective, clause 4(1) is concerned with what could reasonably be expected to, or what *might happen*[12], citing *Department of*

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[9] I note that Mr Romeo's account of this incident differs slightly from the account given by the office manager, Ms Karastamatis, during the meeting with my legal officers on 22 August 2017. On that occasion Ms Karastamatis advised that one of five or six protestors had pushed past her but had been unable to gain access to the office due to the presence of another security door.
[10] Public Sector Act 2009 (SA), ss 25, 30.
[11] [2015] SADC 68
[12] Letter from CSO dated 28 August 2017, paragraph 15.

Agriculture and Rural Affairs v Binnie[13] . In that case, the applicant was seeking access to "Returns of Animal Usage for Experimental Purposes" submitted by registered experimenters in accordance with the requirements of the *Protection of Animals Act 1966* (Vic) and its regulations.

46. In that matter Marks J observed:

> In the instant case, the information is about experiments on animals. It cannot be doubted that information of this kind should be generally available. But the evidence shows, and common experience tells, that the activity is one which touches strong emotions, often without justification, in some animal lovers. It is my view that these names are in the public interest and should be released…[14]

47. I note that the applicant in *Department of Agriculture and Rural Affairs v Binnie*[15] had stated that he wanted to be able to "target" particular institutions that carried out experiments that cause suffering to animals[16].

48. I also note that in Binnie, evidence was given by a Professor Short that he personally and his department had received bomb threats after he had appeared on television, and that violence had broken out in the UK over similar experiments being conducted on mice. Professor Short was given police protection.

49. It has been submitted on behalf of the agency that the clause 4(1) exemption justifies a decision against disclosure if disclosure would result in a "reasonable apprehension" that a person's physical safety could be endangered. If this is a re-statement of the requirement that disclosure could reasonably be expected to endanger the life or physical safety of any person I agree[17]. However, on a plain reading of the provision, it does not extend to cover the unjustified subjective fears of a person. Rather, a document is only exempt if an objective judgement is made that disclosure would put their physical safety in danger.[18]

50. The CSO submits that "safety is about the apprehension that one is safe". In *O'Sullivan*[19] an applicant with a long criminal history which included assault and stalking, was denied access to documents which would have identified the names of police officers who had accessed the applicant's police records during a certain time period.[20]

51. In *O'Sullivan* the court found that the applicant had also made several statements in which he had said he had a "hatred of police" and that he would "track down" certain officers he considered were harassing him.[21] It was in these factual circumstances that the court found that the release of documents could reasonably have been expected to endanger the physical safety of the police officers in question.

52. In *O'Sullivan*, Justice Stuart Morris referred to *Binnie*[22] and noted:

> The Full Court explained that the words "reasonably likely" do not mean more than a fifty percent chance. Rather it is explained that the words meant a chance of an event occurring which is real, not fanciful or remote; and it said that a chance which is "reasonable" is one that is sufficient or worth noting. The Full Court also observed that

[13] [1989] VR 836, 844
[14] [1989] VR 836, 844
[15] [1989] VR 836, 844
[16] [1989] VR 836, 844
[17] *Centrelink v Dykstra* [2002] FCA 1442.
[18] Freedom of Information Act 1991, clause 4(1)
[19] [2005] VCAT 532
[20] [2005] VCAT 532, [18].
[21] [2005] VCAT 532, [13].
[22] [1989] VR 836, 844

> what has to be reasonably likely is not the physical safety of persons engaged in law enforcement, but rather the endangerment of physical safety. Hence the exemption in section 31(1)(e) applies if it is reasonably likely that there is a danger to physical safety, not that physical harm itself will necessarily occur.[23]

53. In considering the applicant's statements about his hatred of police, Justice Morris considered that even if the applicant had only intended to "tease" or "take the micky out of" the police, his actions still had the effect of intimidating the relevant officers. In that regard, Justice Morris said that physical safety is also about the perception that one is safe. I am not aware of any other case law that supports this approach to the interpretation of the words in clause 4(1) and I decline to follow it. [24]

54. The decision in *Binnie* was considered by my Queensland counterpart in *Murphy and Queensland Treasury*[25]. In *Murphy* the applicant was seeking the names of several taxation officers who were involved in decisions relating to the land tax affairs of a company, of which the applicant was a director and which was the trustee of the applicant's family trust. In that matter, the Information Commissioner remarked:

> In *Binnie's* case, there was evidence from one of the registered experimenters that both he and his department had received bomb threats after a prior appearance on television in a discussion about animal experimentation. Evidence was also given of bomb threats to animal experimenters in Western Australia, and instances of physical violence in the United Kingdom. The source of danger that was in contemplation in *Binnie's* case was of physical violence inflicted upon people in the vicinity of institutions conducting animal experiments, by unknown persons having heightened emotional reactions to the conduct of experiments on animals (see also per Young CJ at pp.837-8). The comments of Marks J must be viewed in that context.
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> In its submission in reply … the respondent asserts that a reasonable expectation of harassment or pressure is sufficient to satisfy s.42(1)(c) of the Queensland FOI Act. That assertion is, in my opinion, based on a misreading of the first sentence in the passage quoted above from the judgment of Marks J in *Binnie's* case. I think it is clear that Marks J was referring to harassment or pressure involving danger to the physical safety of persons. Indeed, given the terms of the exemption provision with which he was dealing, Marks J could not have been referring to anything else.[26]
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> (…)It is clear from *Binnie's* case itself, and other decided cases, that a source (or sources) of danger to the life or physical safety of persons must be in contemplation, and there must be evidence of a risk that disclosure of information in issue would endanger a person's life or physical safety. (The extent of the evidence of risk and the likelihood of the risk, needed to satisfy the test of exemption may vary according to the different phrasing used between the Commonwealth/Queensland exemption provisions and the Victorian exemption provision.)[27]

55. I note that that even though evidence was given in *Murphy and Queensland Treasury*[28] of oral abuse and menacing statements made by the applicant, the Information Commissioner determined that the applicant should have been provided with access to the names of the relevant taxation officers.

56. It bears emphasis that it is not for agencies to assume that release of information of the type sought will result in the endangerment of life or physical safety of its staff members. This was articulated in *AB v Department Human Services:*

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[23] [2005] VCAT 532 at [15]
[24] Compare for instance the decisions in *Psyhopoulos v Northern Sydney Central Coast Area Health Service* [2011] NSWADT 151, *Richards v Clarence Valley Council* [2009] NSWADT 243, *Callejo v Department of Immigration and Citizenship* [2010] AATA 244.
[25] QICmr 23; (1995) 2 QAR 744
[26] QICmr 23; (1995) 2 QAR 744 at [50]
[27] QICmr 23; (1995) 2 QAR 744 at [53]
[28] QICmr 23; (1995) 2 QAR 744

> This doesn't mean agencies of government should simply assume unreasonableness, as a matter of course. On the contrary, the Act requires disclosure unless the agency is affirmatively satisfied, for some tangible reason, that disclosure would be unreasonable in the particular circumstances of the case (assuming, for present purposes that there are no other relevant exemptions). The file of a government department is likely to obtain the names of many departmental officers. In the normal course there will be no justification for deleting their names.[29]

57. In *Re Toren and Secretary, Department of Immigration and Ethnic Affairs*[30] the Commonwealth AAT found that, despite evidence of personal vendettas and obvious bad blood between the applicant's brother and the author of the documents in issue (a Mr Wachtel), it was not satisfied that a case for exemption under s.37(1)(c) of the *Commonwealth Freedom Of Information Act* had been established.

58. The CSO also cites the matter of *Coulston v Office of Public Prosecutions*[31], as authority for the proposition that physical safety concerns a person's perception as to whether he or she is safe. In that matter a convicted murderer was seeking plans hand drawn by investigators of the location of certain murders and where three bodies had been found, as well as photographs of the location of the murders. The notion of safety being about "perceptions as to safety" was in the context of personal information being provided to an applicant with a history of violent crime. It was said:

> The current occupiers of the house would be likely, in my view, to feel considerable apprehension if such information is provided to a convicted criminal who is capable of the random violence described by the court in Marke's case.[32]

59. In my view, it is drawing quite a long bow to suggest that the Victorian cases of *O'Sullivan*[33] and *Coulston v Office of Public Prosecutions,*[34], which concern violent applicants with vendettas, can be applied to the matter at hand, namely an MP requesting a telephone contact list. Therefore, I remain satisfied that the application does not trigger the exemption under clause 4(1).

60. Much of the case law invoked by the CSO, in which the names of public servants were found to be exempt under clause 4(1), are instances where an applicant appeared to be specifically targeting certain person(s) with their FOI request.

61. The CSO has cited *Kristoffersen and Centrelink*[35]. I note that in that matter, the FOI Officer who processed the FOI request had made his determination based on information that "there had been a history of threats and abuse by the applicant to Centrelink staff"[36]. It should be noted that in that case, the Tribunal was satisfied that 'the applicant would have little interest in being provided with such information, given that it dates back many years.'

62. In my provisional determination I stated that in the present case, the agency has not established a sufficient nexus between disclosure of the document to the applicant and danger to Departmental staff. In my view, the agency has not justified its conclusion that the release of the document could reasonably be expected to endanger the physical safety of Departmental staff.

63. In reaching this conclusion I note that, even though Ministerial staff are already subject to their names being publically released and have been for some time, my attention has

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[29] [2001] VCAT 2020 at [38]
[30] Commonwealth AA, Q93/578
[31] [2010] VCAT 1234
[32] 2010] VCAT 1234
[33] [2005] VCAT 532
[34] [2010] VCAT 1234
[35] [2004] AATA 689
[36] [2004] AATA 689, at [11]

not been brought to any instances of their physical safety having being threatened as a result of such publication.

64. I also observe that the agency (and indeed other Ministers) has previously released such information as is contained in the document. It has not been claimed that there is a link between the examples of negative behaviour provided and the previous disclosures of such lists.

65. In my provisional determination I stated that a cursory search of the internet revealed that at least one Departmental staff member had publically disclosed their job title and description. I inferred that this undermined the submission that departmental staff members are all in fear of having their names and positions made public. While I accept the submission of the CSO[37] that whether an individual staff member chooses to disclose that information is a matter for him or her, I remain of the view that the inference drawn is legitimate and somewhat undermines the submissions made on the agency's behalf.

66. It is not evident how any of the incidents to which my attention has been brought relate to the release of staff names. All of the incidents, while serious in nature, occurred despite the names of the ministerial staff involved being unknown to members of the public. I observe that it is incumbent on the agency to provide a safe workplace for his staff.

67. Mr Romeo, in his submissions stated that if the names of public servants are released to the applicant, this may deter public servants working in departments from taking up opportunities to work in Ministers' offices. This submission is contrary to advice given to my Officers that staff who work in Ministers' offices are assigned to the roles, rather than undertaking any formal application process. I am of the view that taking action against individuals on a case-by-case basis via police and court intervention is an appropriate way to mitigate concerns that staff may have about members of the public displaying problematic behaviours.

68. I conclude that the document is not exempt pursuant to clause 4(1)(a) of Schedule 1 to the FOI Act.

Clause 16(1)(a)(iii) and (iv)

69. In my view, the document is not exempt under clause 16(1)(a)(iii) or (iv). The agency has not established that disclosure could reasonably be expected to lead to a substantial adverse effect on the agency's management of its personnel or effective performance by the agency of its functions. A 'substantial adverse effect' has been defined to mean a negative effect "sufficiently serious or significant to cause concern to a properly concerned reasonable person".[38]

70. The reasons given in cases cited as authority by the agency indicate that they are not directly applicable in the present circumstances.

71. In my provisional determination, I noted that in *Re Bienstein and Commonwealth Ombudsman*,[39] the release of relevant names and telephone numbers was found to be capable of having a substantial adverse effect on the agency's performance of its functions because the inability of employees to filter phone calls "would create difficulties in the management of workloads and priorities". I indicated that this would not occur in the present case because contact details are not within the scope of the application. The CSO noted in response to my provisional determination that:

[37] Letter from CSO dated 28 August 2017, paragraph 16.
[38] Re Thiess and Department of Aviation [1986] AATA 141 at [24].
[39] [2005] AATA 1227 at [4].

> ….Re Bienstein did not only uphold a determination not to release telephone numbers, but also that of names. If the suggested distinction applied one would have expected that the determination would have been varied so as to release the names of the officers and only redact their telephone numbers,[40]

72. In my view this case is nevertheless distinguishable from the present application in that the applicant in *Re Bienstein and Commonwealth Ombudsman*,[41] appeared to be specifically targeting certain person(s) with her FOI request.

73. Similarly, in *Re He*,[42] the applicant was attempting to discover the name of a specific public servant in order to issue legal proceedings against her. Evidence was presented at the hearing that lower level officers might have become hesitant to use their delegated powers to sign documents and that industrial action could have resulted if disclosure was allowed.[43] That was found to constitute a substantial adverse effect on the agency's effective performance of its function and the names were not disclosed.

74. The agency has not identified any specific adverse effect that might flow from release of the document such as was identified by the agencies involved in *Bienstein* and *He*. In relying upon clauses 16(1)(a)(iii) and (iv) the CSO has submitted that:
    - threats to staff impact adversely on the efficiency and operations of an agency and will necessarily affect the effective performance by an agency of its functions
    - the general release of the names of staff would undermine and defeat the agency's staff welfare practice of not releasing the identities of its staff. This defeat could reasonably be expected to have a substantial adverse effect on the management of the agency's personnel and on the proper and efficient conduct of the agency's operations
    - given the small size of the agency's staff numbers an impact upon individual staff members will have a greater impact upon the agency as a whole than could be expected in larger administrative units. This has the potential to interfere with or distract from the agency's performance of its functions
    - the provision of names of public servants might encourage complainants, particularly 'constant callers' to contact individual staff directly rather than through the agency. This has the potential to be highly distressing to staff and to impact on their ability to perform their ordinary functions.

75. I am unpersuaded that disclosure of the document could reasonably be expected to have a substantial adverse effect on either the agency's ability to manage its personnel or to effectively perform its functions. In this regard I note that the agency states that hearing directly from the community is vital for him and invites persons to call or email his office to discuss any State Government issues that matter to them or their families.[44] This suggests that managing contact from members of the public is one of the agency's functions.

76. It is not suggested by the agency that staff are currently protected from threats or harassment because their names are kept confidential. Indeed the several examples of negative behaviour provided on the agency's behalf have apparently each occurred despite staff names being kept confidential. I am not persuaded that the disclosure of the document to the applicant would result in an increase in the frequency of instances of negative or objectionable behaviour. Given that the only details sought are the names of public servants and their titles, it is difficult to see how disclosure would enable 'constant callers' to directly contact public servants rather than having to go through a switchboard.

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[40] Letter from CSO dated 28 August 2017 at [22].
[41] [2005] AATA 1227 at [4].
[42] [2000] AATA 1107at [4].
[43] [2000] AATA 1107 at [36].
[44] http://www.stephenmullighanmp/com/au accessed 2 November 2017.

77. I conclude that the document is not exempt pursuant to either clause 16(1)(a)(iii) or (iv) of Schedule 1.

Seniority of staff

78. In the course of this matter a discussion has arisen concerning the seniority of the public servants working in the agency's office. The agency has submitted that the relevant public service classifications provide a guide to an assessment of the seniority of staff whose names may be provided to the applicant under this FOI request. The CSO suggested (citing the Victorian case of *Morgan v Department of Human Services*[45]) that public service staff with an ASO classification could not be considered to be in 'senior' positions. This proposition is said to be supported by the case, in which positions in the Victorian public service of VPS6 or below were determined to be 'junior' positions. These positions were said to be equivalent to South Australian positions of ASO8 or below.

79. In *Morgan*[46] evidence was accepted that:

> Many public servants below VPS 6 do not have the necessary skills to deal with difficult issues or members of the public and they do not have the expectation that they will deal with members of the public in a particular way.[47]

80. I note that in *Morgan* the personal details of staff of the agency were denied to an applicant who had a record of 'unsubstantiated allegations of criminal conduct'[48].

81. Given that the functions of the agency's office include the provision of advocacy services, advice and assistance, and information,[49] I consider that the staff employed in the agency's office are highly likely to have the necessary skills to deal with difficult issues and members of the public, and also that there is an expectation that they will deal with members of the public in a particular way. One would suggest from the particular type of roles that held by these staff members that this is exactly the purpose of their employment.

82. South Australian public service positions at even an ASO1 level require 'the ability to work and communicate effectively with a variety of clients' and also 'high levels of confidentiality, discretion and sensitivity'.[50]

83. After consideration of the agency's submissions, I am not persuaded by the agency's contention that some of the relevant job positions are filled by persons who are 'not typically senior public servants'. For example, it cannot be convincingly argued that the positions of Senior Ministerial Adviser, Senior Ministerial Liaison Officer or Senior Project Officer can be considered to be 'junior positions'.

84. I also consider that the role of front-facing staff in Ministers' offices is not substantially different from the role of customer service staff in other agencies and business units, in terms of requiring staff to liaise with members of the public, who are often disgruntled and angry. For example, staff in emergency departments, ambulance officers, staff of the Public Trustee, Fines Enforcement and Recovery Unit and the Office of the Director

[45] [2008] VCAT 2420
[46] [2008] VCAT 2420
[47] [2008] VCAT 2420 at [64]
[48] [2008] VCAT 2420 at [65]
[49] http://www.stephenmullighanmp.com.au/contact/ accessed 2 November 2017.
[50] See for example ASO1 position of "Administration Officer - Job ID# 2017-24011" advertised on www.vacancies.sa.gov.au accessed on 11 October 2017. An examination of historical ASO1 positions reveals similar requirements for candidates.

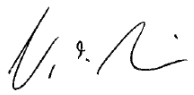
of Public Prosecutions are frequently required to deal with members of the public who display difficult behaviours.

Redactions

85. In my provisional determination, I referred to a submission from a representative of the Australian Services Union highlighting that a staff member who had been a victim of domestic violence might fear for their physical safety if the document was disclosed. I indicated that this could be rectified by that legitimate victim's name being redacted from the document before disclosure. The agency has failed to provide details of any such staff member but I am nevertheless of the view that if such circumstances exist, the names of any persons in those circumstances should be redacted.

Determination

86. In light of my views above, I reverse the agency's determination.



Wayne Lines
SA OMBUDSMAN

9 November 2017

APPENDIX

Procedural steps

Date	Event
18 January 2017	The agency received the FOI application dated 10 January 2017.
21 February 2017	The agency determined the application.
21 March 2017	The agency received the internal review application dated 16 March 2017.
6 April 2017	The agency confirmed the determination.
24 May 2017	The Ombudsman received the applicant's request for external review dated 5 May 2017.
1 June 2017	The Ombudsman advised the agency of the external review and requested submissions and documentation.
14 July 2017	The agency provided the Ombudsman with its documentation. The Crown Solicitor's Office (CSO) provided submissions on behalf of the agency.
4 August 2017	I provided the agency with my provisional determination.
8 August 2017	The Commissioner for Public Sector Employment provided submissions.
22 August 2017	Representatives of my Office met with representatives of the agency, the office of the Hon. Martin Hamilton Smith MP, the Office of the Hon. Stephen Mulligan MP, the office of the Hon. Leon Bignell MP and a representative from the Premier's Office.
25 August 2017	The Premier's Chief of Staff, Mr Daniel Romeo, provided submissions.
28 August 2017	The Crown Solicitor's Office (CSO) provided submissions on behalf of the agency.