

Determination

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

Applicant	Mr David Pisoni MP
Agency	TAFE SA
Ombudsman references	2015/02833, 02834, 02835, 02836, 02837
Agency references	BRIEFCTAFE/15/56, 57, 58, 59, 60
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 the contracts for the persons currently occupying the following positions within the agency:
 - Chief Financial Officer
 - Executive Director, Business Development and Regions
 - Executive Director, Education
 - Director, People and Culture
 - Director, Policy and Strategy.

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 18 May 2016. 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 agency advised me in writing that it had no submission to make on the provisional determination. I did not receive a response from the applicant.

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. In this matter the agency has refused access on the basis of the exemption set out in clause 6(1).
8. Clause 6(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).
9. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
10. 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.

Information in issue

11. The agency determined to partially release each contract. It determined that the private address of the executives and Schedule 2 of each contract were exempt and would not be released.
12. On 18 May 2015 my legal officer confirmed with the applicant that he was not seeking the private address of any of the executives.
13. The information in issue therefore is Schedule 2 to each contract which contains the Total Remuneration Package Value for the executives (**the TRPV**).

Issues in this review

14. The issues to be determined in this review are:
 - whether the TRPV of the executives is information concerning the personal affairs of the executives
 - whether disclosure of the TRPV would involve the unreasonable disclosure of information concerning the personal affairs of the executives.

Consideration

15. The first issue to be determined therefore is whether the TRPV of the executives is information concerning the personal affairs of the executives.
16. The personal affairs of a person is defined in section 4 of the Act to include, inter alia, that person's employment records. It is well settled law that a person's remuneration details are information concerning their personal affairs.²
17. I turn then to consider whether disclosure of the TRPV would involve the 'unreasonable disclosure' of that information.

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

² See for example: *Lower Burdekin Newspaper Company Pty Ltd and Lower Burdekin Shire Council* [2004] QICmr 2, *Asher v Department of State & Regional Development* [2002] VCAT 609.

18. The Australian Information Commissioner has considered the process for determining whether disclosure of personal affairs information would be unreasonable in the context of the personal affairs exemption. He points out that the guiding principles on unreasonable disclosure have been endorsed and applied consistently since the emergence of Freedom of Information laws in Australia, with four points standing out.³
19. The first is that a range of matters may require consideration. Justice Muscat of the District Court provided the following summary of some of the factors that may be relevant when considering if disclosure of a document containing personal information would be reasonable:⁴
- the nature of the personal information
 - the sensitivity (past and present) of the personal information
 - any view about disclosure expressed by any person to whom the personal information relates
 - the relationship between the personal information and any other information in the document
 - how the personal information was obtained by the agency (whether voluntarily or involuntarily and whether or not in confidence)
 - whether and to what extent the personal information was already known to the applicant
 - the nature of any interest which the applicant can demonstrate in-
 - the information in the document other than the personal information; or
 - the personal information.
20. Secondly, the matters to be considered are generally characterised as public interest considerations. This is demonstrated by the frequently quoted statement of Justice Lockhart in *Colakovski v Australian Telecommunications Corporation*:
- What is "unreasonable" disclosure of information ... must have as its core public interest considerations. The exemptions necessary for the protection of "personal affairs" ..and "business or professional affairs" .. are themselves, in my opinion, public interest considerations. That is to say, it is not in the public interest that the personal or business or professional affairs of persons are necessarily to be disclosed on applications for access to documents. The exemption from disclosure of such information is not to protect private rights, rather it is in furtherance of the public interest that information of this kind is excepted from the general right of public access .⁵
21. Thirdly, it is generally recognised that the factors to be considered will be competing and the decision of whether disclosure would be unreasonable involves a balancing process. The Full Federal Court in *Wiseman v Commonwealth* stated that:
- [w]hether or not disclosure would be "unreasonable" is a question of fact and degree which calls for a balancing of all the legitimate interests involved'.⁶
22. The fourth recurring principle noted by the Australian Information Commissioner is that the personal affairs exemption is to be applied on the basis that the personal information released is to be treated as a release 'to the world at large'.
23. I have considered each of these principles in determining whether it is unreasonable to release the remuneration details.
24. The agency obtained the views of the executives and I understand they have each indicated their objection to their remuneration details being released.

³ 'BA' and Merit Protection Commissioner [2014] AICmr 9, at para 60.

⁴ *Bradshaw v SA Police* [2012] SADC 184 [63] citing *Victoria Police v Marke* (2008) 23 VR 223 [19].

⁵ *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429, at para 34.

⁶ *Re Gordon Peter Wiseman v Commonwealth* [1989] FCA 434, at para 5.

25. The agency has used the SAES contract template published by the Office for the Public Sector for each of the executives.

26. Clause 15 of each contract provides as follows:

15 Disclosure of Contract

It is acknowledged and agreed that the policy of the South Australian Government requires a copy of this Contract (with Schedule 2 and the private address of the Executive having been deleted) to be provided for inspection to any person who makes a written request.

27. The agency submits that this clause in the contract expresses the parties agreement that upon a written request to the agency for inspection of their contract of employment the TRPV will not be disclosed by the agency.

28. The South Australian government's transparency policy does not extend to the release of the remuneration details of members of the South Australian Executive Service, except for Chief Executives. The relevant policy of the South Australian Government is contained in the *Department of Premier and Cabinet Circular PC027 - Disclosure of Government Contracts*⁷ which contains the following clause:

Executive Contracts

21. Copies of executive contracts will be made available for inspection on receipt of a written request to the Chief Executive of the public authority in which the executive is employed. In the case of contracts with Chief Executives, the written request must be made to the Commissioner for Public Employment and the contract provided will include the Total Remuneration Package Value (TRPV) and the schedule in which the TRPV appears, though this information will not be included in the case of other executive contracts. In all cases, the address of the executive will be excluded for privacy reasons.

29. Given clause 15 of the contract of the executives and the content of PC027, I consider it is reasonable for the executives to have an expectation that in accordance with the policy of the government their TRPV would not be publicly disclosed.

30. The Australian Information Commissioner has noted that it remains debatable as to whether:

individual salaries that are not publicly known should be released under the FOI Act; or whether they should be confidential and released only as part of a wider transparency strategy that applies more generally to public sector employees.⁸

31. The applicant submits that the public interest outweighs the interest of the individuals. He submits that the total remuneration details of all executives, not just the Chief Executive, should be published, and are published, in other states. The applicant cites the example of the NSW Department of Education and Communities which in its Annual Report for 2013, lists the name of senior executives and publishes the details of their remuneration package.

32. The example given by the applicant is one of salaries being published under a government transparency policy. I am not aware of any other Australian government that has a policy that the remuneration of senior executives, other than Chief Executives, is not to be released to the public. Nevertheless, this continues to be the

⁷ Available at <http://dpc.sa.gov.au/premier-and-cabinet-circulars> (at 11 May 2016).

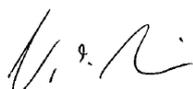
⁸ *BA' and Merit Protection Commissioner* [2014] AICmr 9, at para 91.

policy of the South Australian government and I consider it to be a strong public interest consideration against disclosure.

33. The agency acknowledges that there is 'strong interest in members of the public having access to how public money is spent'. However, the agency considers that having weighed the public interest against the preservation of personal privacy, it is unreasonable to release the TRPV.
34. The promotion of informed debate on expenditure of public funds and value obtained for that expenditure is a strong consideration in the favour of disclosure. I consider this will enhance accountability and transparency of the agency and is a public interest consideration in favour of disclosure.
35. The information already provided to the applicant indicates whether each executive is SAES 1 or SAES 2. The salary ranges of the South Australian Executive Service are published on the Jobs SA website; these are published in two bandwidths SAES 1 (\$152,974 - \$235,343) and SAES 2 (\$211,810 - \$353,017). The possible variation within each bandwidth is broad, and provides little information upon which the public can scrutinise whether it is obtaining value for money for performance of particular duties.
36. Pursuant to sections 32 and 33 of the *Public Corporations Act 1993 (SA)* the agency is required to comply with any applicable instructions of the Treasurer issued under the *Public Finance and Audit Act 1987*. The *Accounting Policy Framework* issued by the Department of Treasury and Finance pursuant to section 41 of the Public Finance and Audit Act requires the agency, in relation to employees whose normal remuneration is equal to or greater than the base executive remuneration level (\$141, 500), to publish - in relation to the \$10 000 band of remuneration that commences at the base executive remuneration level and each successive \$10 000 band - the number of employees whose total remuneration, falls within that band.⁹
37. These reporting obligations require the disclosure of the remuneration details of senior executives within a \$10,000 band width, albeit without identifying them individually. In my view this provides significant information upon which the public can assess the cost of having the duties of the executives performed without eroding the privacy of each individual, that is there has been no 'de facto' disclosure of each individual's remuneration. I consider this is a public interest consideration against disclosure.
38. I have weighed the legitimate interests of the public in knowing the details of the individuals' salaries against the effects of disclosure on those individuals. On balance, and for the reasons outlined above, I consider it would be unreasonable to release the remuneration details of the executives.

Determination

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



Wayne Lines
SA OMBUDSMAN

6 June 2016

⁹ Department of Treasury and Finance, *Accounting Policy Framework*, APS 4.8 issued 20 March 2016.

APPENDIX

Procedural steps

Date	Event
3 February 2015	The agency received the FOI application dated 30 January 2015.
4 March 2015	The agency failed to determine the application within the 30 day period required by the FOI Act, ¹ and is deemed to have refused access to the documents. ²
11 March 2015	The agency received the internal review application dated 10 March 2015.
26 March 2015	The agency varied the determination.
16 April 2015	The Ombudsman received the applicant's request for external review dated 15 April 2015.
22 April 2015	Ombudsman SA advised the agency of the external review and requested submissions and documentation.
4 May 2015	The agency provided Ombudsman SA with its submissions and documentation.
23 September 2015	The applicant provided Ombudsman SA with submissions.
16 October 2015	Ombudsman SA requested further information from the agency.
6 November 2015	The agency provided further information to Ombudsman SA.
18 May 2016	Ombudsman SA provided a provisional determination to the parties.

¹ *Freedom of Information Act 1991*, section 14(2).

² *Freedom of Information Act 1991*, section 19(2).