

Determination

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

Applicant: Mr Rob Lucas MLC
Agency: Attorney-General's Department
Ombudsman reference: 2011/09154
Agency reference: 12/0134
Provisional determination: The determination of the agency is varied.

REASONS

FOI application for access

1. By application under the *Freedom of Information Act 1991* (**the FOI Act**) dated 27 October 2011, the applicant submitted a request to the Attorney-General for access in the following terms:

Since 1 January 2011, for all staff employed under a Ministerial contract, all documents (including emails and notes of telephone conversations) relating to the application for the cashing out of any leave entitlements (long service leave, recreation leave etc), and any agreement to cash out any leave entitlement.
2. The application was transferred to the Attorney-General's Department, as the documents were identified as being within the scope of the application were located with that agency.
3. Accredited FOI Officer of the agency, Ms Wilhelmina Chapman made a determination on 2 December 2011 to provide the applicant with a schedule of documents (**the document schedule**) but to refuse the applicant access in full to all of the documents pursuant to clause 6(1) of Schedule 1 to the FOI Act.
4. The applicant applied for an external review of the determination on 5 December 2011; and the Chief Executive of the agency, Mr Jerome Maguire confirmed Ms Chapman's determination on 9 December 2011 (**the agency's determination**).
5. The applicant subsequently applied to my office for an external review of the agency's determination.

External review

6. By letters dated 18 January 2012, I notified the applicant and the agency of my external review. I requested from the agency copies of all relevant documents, communications and correspondence.

Provisional determination

7. I provided my tentative view about the agency's determination to the agency, the applicant and the interested party under the FOI Act (Mr John Bistrovic) by my

provisional determination dated 16 February 2012. 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. By email dated 29 February 2012, Kathy Rozaklis advised that the agency did not wish to make any submissions. My office has not received any other submissions.

Relevant provisions of the FOI Act

9. The objects of the FOI Act are set out in section 3, to 'promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State'; and 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'.
10. It is further stated in section 3(2) that the means by which these objects are intended to be achieved are:
 - (a) ensuring that information concerning the operations of government (including, in particular, information concerning the rules and practices followed by government in its dealings with members of the public) is readily available to members of the public and to Members of Parliament; and
 - (b) conferring on each member of the public and on Members of Parliament a legally enforceable right to be given access to documents held by government, subject only to such restrictions as are consistent with the public interest (including maintenance of the effective conduct of public affairs through the free and frank expression of opinions) and the preservation of personal privacy; ...
11. Section 3A(1) states that the parliament has intended:
 - (a) that this Act should be interpreted and applied so as to further the objects of this Act; and
 - (b) that a person or body exercising an administrative discretion conferred by this Act exercise the discretion, as far as possible, in a way that favours the disclosure of information of a kind that can be disclosed without infringing the right to privacy of individuals.
12. 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, including clause 6(1)(a).
13. 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.
14. 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;² and in my opinion, it is equally applicable in an external review.

¹ Section 4 definition FOI Act, also section 20(1)(a).

² Section 23(f) FOI Act.

15. 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 exemption claimed by the agency - clause 6(1) of Schedule 1 to the FOI Act

16. Clause 6(1) reads:

- (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).

17. In order for a document to be exempt under clause 6(1), it must be shown that:

- the document contains information concerning the personal affairs of any person
- disclosure of the information would be unreasonable.

18. Section 4(1) of the FOI Act defines 'personal affairs' as follows:

Personal affairs of a person includes that person's-

- (a) financial affairs;
- (b) criminal records;
- (c) marital or other personal relationships;
- (d) employment records;
- (e) personal qualities or attributes,

but does not include the personal affairs of a body corporate..

19. The following factors are relevant to considering whether 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.³

20. In addition, unreasonableness has 'at its core, public interest considerations',⁴ such as the protection of personal privacy; fulfillment of the objects of the legislation; and ensuring transparency and accountability within representative government.

The documents

21. By cover letter dated 20 January 2012, Ms Chapman provided copies of the documents requested, including the document schedule itemising the documents identified within the scope of the application, namely:
- advice of separation from Mr John Bistrovic on 3 May 2011
 - calculation of payment in lieu of Mr Bistrovic's annual leave payment from Shared Services
 - manual payment advice from 11 May 2011 from Shared Services.
22. My office clarified with Ms Chapman that the document schedule provided to my office was identical to the document schedule provided to the applicant along with the initial determination on 2 December 2011.

³ *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALD N257 at 259.

⁴ *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429 per Lockhart J at 438.

The agency's argument

23. In her determination of 2 December 2011, Ms Chapman states that:

The documents relate to a payment of monies in lieu of annual leave. I consider that the documents relate to the personal financial affairs of an employee and it is an unreasonable disclosure of his personal affairs to release the documents to a third party.

24. In an internal memo, dated 7 December 2011, from Ms Chapman to Ms Kathy Rozaklis, Principal Adviser, Legal Strategy, Attorney-General's Department, Ms Chapman notes that Mr Bistrovic objects to the disclosure of the documents:

I spoke to Mr John Bistrovic about the release of the documents. He was concerned about the release of his financial details. However, his name was released to the applicant.

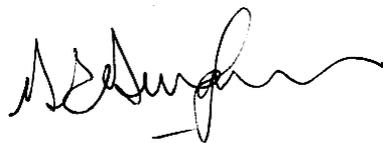
Consideration of the agency's argument under clause 6(1)

25. I understand that Mr Bistrovic was engaged at the relevant time as chief of staff of the former Minister for Emergency Services. It appears that he would have been a ministerial appointment (on a contractual basis) under section 72 of the *Public Sector Act 2009*.
26. In my view, Mr Bistrovic's remuneration details, including payments made in relation to the cashing out of his leave entitlements, constitute information concerning his personal affairs within the meaning of the definition in section 4 of the FOI Act and clause 6(1).⁵ They may constitute his 'employment record' or his 'financial affairs'.
27. In assessing whether disclosure of this information would be unreasonable, Ms Chapman's argument that 'it is an unreasonable disclosure of [Mr Bistrovic's] personal affairs to release the documents to a third party' is insufficient.
28. The remuneration details in the documents concern payments made to Mr Bistrovic as a public officer, from the public purse. While Mr Bistrovic objects to the disclosure of the information recording these payments, there is a public interest in favour of disclosure which centres on the need for accountability of expenditure of public monies. This outweighs Mr Bistrovic's objections, and any privacy (if any) which may attach to the details. In my view it would not be unreasonable to disclose the information.
29. I note there are many cases in which the remuneration of public officers has been disclosed under freedom of information legislation.⁶
30. Having said this, I consider that disclosure of Mr Bistrovic's contact details in the documents would be an unreasonable disclosure of information concerning his personal affairs. These details are printed on the 'Advice of Separation' from John Bistrovic dated 3 May 2011 and also appear twice in the document referred to as the 'Calculation of Payment in lieu of Annual Leave Payment'.
31. These contact details may be deleted under section 20(4) of the FOI Act, and a copy of the remainder of the documents provided to the applicant.

⁶ See *Lower Burdekin Newspaper Company Pty Ltd and Lower Burdekin Shire Council* [2003] QICmr 2 (24 February 2004); *Milthorpe v Mt Alexander Shire Council* (Unreported, Administrative Appeals Tribunal of Victoria, Deputy President Macnamara, July 1997); *Re: National Tertiary Education Industry Union (Murdoch Branch) and Murdoch University* [2001] WAICmr 1 (Information Commissioner Keighley-Gerardy, 2 January 2001).

Determination

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

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

Richard Bingham
SA OMBUDSMAN

19 March 2012