

Determination

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

Applicant	[the applicant]
Agency:	Department of Further Education, Employment, Science and Technology
Ombudsman reference:	2011/06884
Agency reference:	BR11/2231
Provisional Determination:	The determination of the agency is varied.

REASONS

Background

1. By application under the *Freedom of Information Act 1991 (FOI Act)* made to the agency and dated 19 May 2011, Mr Stephen Griffiths MP requested access to a number of documents on behalf of the applicant. Mr Griffiths sought:

The following documents relating to [business name]:

1. The initial letter to DFEEST raising concerns about [business name] that initiated an investigation (2009);
 2. The brief to Mr Kym Modra detailing what he was asked to investigate within [business name] (Investigations Unit DFEEST, out-posted from Crown Solicitor's Office)
 3. Transcripts and audio recordings from interviewed [business name] staff and students throughout the investigation (2009-2010);
 4. The report back to the Attorney General's Department / Crown Solicitor from Mr Kym Modra and Ms Christine Moir (head of the Investigations Unit within DFEEST);
 5. Summaries of mediation processes for User Choice / Productivity Places Program and those provided to Mr Raymond Garrand;
 6. The panel report for each User Choice application completed by [business name] since 2004 (include all 3 reports for 2011 application);
 7. Audit report from Mr Chris Pyne / Slobodanka Trajkovic;
 8. Request to National Audit & Registration Agency (NARA) from DFEEST requesting the NARA audit and the subsequent report back to DFEEST from NARA;
 9. Briefing documents / reports made by the Attorney General's Department to MR Garand regarding [business name];
 10. Departmental responses/advices/ panel reports related to Productivity Places Program;
 11. All formal complaints received by DFEEST in relation to TAFE SA and SA private RTO's regarding the misuse of government funding and subsequent action taken by DFEEST in relation to these complaints for the period between 2004 and 2011.
2. In a letter dated 22 July 2011, Mr Rory Stephenson, the agency's Accredited FOI Officer, granted the agency an extension of time in relation to Point 11 to 29 September 2011. The scope of Point 11 was subsequently amended so that Mr Griffiths sought access to the following documents:

1. All formal complaints, received by DFEEST (or the Minister for Employment, Training and Further Education) between 01 January 2004 and 19 May 2011 in relation to TAFE SA or SA Private RTOS's alleging that training provided under programs funded by PPP, User Choice or other South Australian government funding was:
 - a. Not delivered by funds were still claimed; OR
 - b. Not delivered in accordance with the funding contract but funds were still claimed; OR
 - c. Not delivered in accordance with the AQTF standards but funds were still claimed
2. Subsequent action taken by DFEEST in relation to any such complaint.
3. On 9 August 2011 Mr Stephenson made a determination in relation to Points 1-10. Mr Stephenson advised Mr Griffiths that the agency had identified 30 documents within the scope of the application, some of which he refused access in full and the remainder of which he claimed the agency does not hold.
4. On 30 August 2011 Mr Griffiths applied for an internal review of this determination. By letter dated 13 September 2011 the Chief Executive of the agency, Mr Raymond Garrand, confirmed the original determination. The applicant, who is the Continuous Improvement Manager at [business name], then sought an external review of the agency's determination in respect of Points 1-10.
5. I notified Mr Garrand of my review on 26 September 2011 and requested documentation and a report justifying the agency's determination. The agency provided me with that information by letter dated 14 October 2011.
6. By letter dated 26 September 2011 Ms Laura Bruce, the agency's Accredited FOI Officer, made a determination in respect of Point 11. Ms Bruce advised there were 82 documents totalling 4778 pages within the scope of Point 11 and determined to release 1 of these in full and 6 in part.
7. Mr Griffiths sought an internal review of this determination. By letter dated 31 October 2011, Mr Raymond Garrand advised that the original determination was confirmed. That said, the internal review varied the determination by removing some documents as being out of scope, amending the exemption clauses used for some exempt documents, and identifying an additional eight documents. No additional material was released as a result of the internal review. On 4 November 2011, the applicant sought an external review of this decision.

Provisional determination

8. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 6 September 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.
9. By letter dated 10 October 2012, the agency provided submissions in response to my provisional determination. The agency advised it accepts my provisional determination to release in full the documents relating to Points 6, 7, 8 and 9 referred to below. It also advised that it accepts my provisional determination in relation to document 73 in Point 11.
10. On 17 September 2012, the applicant provided me with a document entitled '[business name] Response to Provisional Report'. I have considered these submissions in my reasons for my determination.

Relevant provisions of the FOI Act

11. 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'.
12. 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; ...
13. 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.
14. 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, and it includes clause 12(1).
15. 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.
16. 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; and in my opinion, it is equally applicable in an external review.
17. 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 agency's submissions

18. In its original determination, the agency considered the application of Schedule 1 in relation to Points 1 and 6-10. I set out these submissions and consider their merit below.

¹ See section 4 and section 20(1)(a), FOI Act

19. The agency gave notice to Mr Griffiths in the original determination, in accordance with section 23(1)(b) of the FOI Act, that the documents within the scope of Points 2, 3, 4 and 5 of the application are not held by the agency.
20. The agency advised my office that the Crown Solicitor's Office (CSO) holds the documents which fall within the scope of Points 2-5, and based on the fact that the CSO is an exempt agency pursuant to Schedule 2 of the FOI Act, 'consequently [it] cannot consider access to these documents'.
21. Section 12 of the FOI Act confers on a person a legally enforceable right to be given access to 'an agency's documents' in accordance with the Act. Section 4 defines the word 'agency' to include 'an administrative unit of the Public Service' but specifies it does 'not include an exempt agency'. Exempt agencies are listed in Schedule 2 of the Act and include the Crown Solicitor.
22. However, section 4(4) of the FOI Act provides:

An agency is to be taken to hold a document if the agency has an immediate right of access to the document.
23. In my view this means that if an agency has an immediate right of access to a document, the agency is bound to make a determination in respect of that document. The phrase 'an immediate right of access' is not defined in the FOI Act and has not been judicially considered. It is therefore necessary to apply the ordinary meaning of the words to the phrase and to read it in the context of the objects of the Act. In my view, there will be occasions that an agency does have an immediate right of access to documents physically held by the CSO, for example documents provided to the CSO by the agency.
24. In light of this reasoning, I requested the agency to re-consider its position in relation to the documents falling within the scope of Points 2-5 inclusive. The agency did so and I consider their response below.

The relevant exemption provisions in Schedule 1

25. In **Attachment 1**, I have set out the clauses in Schedule 1 to the FOI Act which the agency has claimed in its determination. I have also set out my views about the operation of these clauses, and what needs to be shown to justify claiming these provisions as a basis for refusing access to documents. I have applied those views in my consideration of the agency's determination below.

Consideration of the submissions and the agency's determination

Point 1

26. The agency determined to refuse access to the one document that falls within the scope of Point 1 by virtue of clause 12(1) of Schedule 1 to the FOI Act.
27. The agency argues that disclosure of the document would be an offence under section 7 of the *Whistleblowers Protection Act 1993* which provides:
 - (1) A person to whom another makes an appropriate disclosure of public interest information must not, without the consent of that person, divulge the identity of that other person except so far as may be necessary to ensure that the matters to which the information relates are properly investigated.

- (2) The obligation to maintain confidentiality imposed by this section applies despite any other statutory provision, or a common law rule, to the contrary.
28. I am satisfied that the document comprises 'public interest information' as defined in section 4 of the Whistleblowers Protection Act:
- information that tends to show—
- (a) that an adult person (whether or not a public officer), body corporate or government agency is or has been involved (either before or after the commencement of this Act)—
 - (i) in an illegal activity; or
 - (ii) in an irregular and unauthorised use of public money; or
 - (iii) in substantial mismanagement of public resources; or
 - (iv) in conduct that causes a substantial risk to public health or safety, or to the environment; or
 - (b) that a public officer is guilty of maladministration in or in relation to the performance (either before or after the commencement of this Act) of official functions;
29. I also accept that the author of that document made an 'appropriate disclosure' of that information in accordance with section 5 of the Whistleblowers Protection Act (that is, that they believed on reasonable grounds that the information was true and that they made the disclosure to an appropriate authority). Further, the author of the document has not consented to the release of their identity; in fact, they specifically requested it not be divulged. In my view the identity of the author is linked to the contents of the document such that to disclose any of the document would risk disclosing the identity of that person.
30. Accordingly, I agree with the agency that disclosure of the document would be an offence under section 7 of the Whistleblowers Protection Act. In my view, subsection 7(2) makes it clear that that provision overrides any provisions of the FOI Act; access cannot be provided pursuant to the FOI Act.

Point 2

31. The agency submits the following in relation to Point 2:
- DFEEST instructed CSO to commence an investigation of [business name]. Subsequently, Mr Modra was instructed by CSO to commence an investigation. As such, DFEEST holds no document in relation to Mr Modra's brief in this matter.
32. I agree with the agency's submission. The brief to Mr Kym Modra, a Government Investigations Officer from the Attorney General's Department, was created by the Crown Solicitor's Office (CSO) in undertaking its functions and was not intended to be used by or provided to the agency. In my view, the agency does not hold or have an immediate right of access to the brief.

Point 3

33. The agency obtained copies of 8 typed transcripts of recordings and 16 records of interview between [business name] staff and students. The interviews took place during an investigation into [business name] during 2009-2010 and were conducted by Mr Kym Modra. The agency has submitted that all of these transcripts and records of interview are exempt by virtue of clauses 10 and 12 of Schedule 1 to the FOI Act.

34. In my view, the transcripts are exempt by virtue of clause 10 of the FOI Act (that is, they are subject to legal professional privilege). The transcripts were created by an agent of the CSO and provided to the CSO in order to provide legal advice to the agency. In other words, they were created by an agent of the agency's solicitor for the dominant purpose of providing legal advice to the agency. In light of my view that clause 10 applies, I have not considered the application of clause 12 to the documents.

Point 4

35. The agency submitted that there is no report from Mr Modra and Ms Christine Moir in existence. There is, however, a report entitled 'Investigator's Statement' prepared by Mr Modra and provided to the CSO. Although this was not provided to the agency until requested during this process, arguably the agency had an immediate right of access to it as it was referred to in a letter of advice from Ms Katherine Dellit of the CSO to Mr Garrand dated 28 December 2010. The agency submits it is exempt under clause 10.
36. I agree that the report is exempt by virtue of being subject to legal professional privilege. It was created by an agent of the CSO and provided to the CSO in order to provide legal advice to the agency. In other words, it was created by an agent of the agency's solicitor for the dominant purpose of providing legal advice to the agency.
37. The agency also provided me with a copy of a handover brief from Mr Modra to Ms Dellit. The agency submits that given the nature of this document, it would not have an immediate right of access to it (as opposed to the above Investigator's Statement which was referred to in the letter dated 28 December 2010). I agree with the agency. In any event, I consider the brief would be exempt under clause 10 for the same reason that the Investigator's Statement is exempt.

Point 5

38. In reconsidering whether it has an immediate right of access to any Point 5 documents, the agency queried the scope of the applicant's request. By email to my officer dated 16 July 2012, the applicant confirmed that she sought the following:

Any briefings (including reports, meeting notes and telephone attendances) provided to the CE from agency officers about meetings between those officers and [business name] staff for the period May 2012 to the date of the FOI application.

39. The agency subsequently conducted searches for such documents and submits that it found no documents within the scope of the applicant's request. Ms Emily Strickland of my office perused copies of six documents located as a result of the searches. I agree that none of these fall within the scope of the request.

Point 6

40. The agency determined to refuse access to the three panel reports for each User Choice application submitted by [business name] since 2004. The agency refused access under clause 9(1) of the FOI Act.
41. The agency submits that the panel reports:

reveal the workings and recommendations of the panel which was assembled to assess [business name]'s applications for User Choice Funding (as per Departmental Policy). The panel reports are submitted to the delegate who makes a decision based upon the information contained therein...

42. and further that

It is not in the public interest to release the documents, as their disclosure would compromise the internal processes of its decision making, by revealing options and recommendations that being considered by the agency.

43. I accept that the panel reports contain advice and recommendations prepared for the purpose of the decision-making functions of the agency. I therefore accept that they satisfy clause 9(1)(a). Whether or not the panel reports are exempt under clause 9(1) therefore turns on public interest considerations.

44. Clause 9(1)(b) requires the agency to balance the public interest factors for and against disclosure, and show that the factors against disclosure outweigh those in favour of disclosure.

45. In my view, the agency has not demonstrated it has engaged in this balancing process; and it has merely asserted a public interest reason not to release the documents.

46. According to Judge Bowering in the case of *Everingham v Director -General of Education*.²

In each case the documents must be viewed in the light of all relevant circumstances, their contents and purposes assessed, and that done, the question of balance decided.

47. In my view, there are a number of factors which support the disclosure of the documents. There is a public interest in the achievement of the objects and intent of the FOI Act, which are to promote openness in government and accountability of ... government agencies'.³ There is also a public interest in revealing the reasons an agency came to a decision; and it is my view that this is exactly what the panel reports do - they reveal the reasons for the agency's decisions not to approve the applicant's funding applications.

48. In light of the content of the documents, I am also of the view that the agency's submission that disclosure of the documents may 'compromise the internal processes of its decision-making' is unmeritorious.

49. On balance, I am not satisfied that it would be contrary to the public interest to release the panel reports. Accordingly, they are not exempt under clause 9(1).

Point 7

50. The agency determined to refuse access to the audit report from Mr Chris Pyne / Slobodanka Trajkovic by virtue of clause 16(1) of the FOI Act. I refer to my comments in Attachment 1 regarding the operation of clause 16(1).

51. The agency specifically relies on paragraph (a)(i) and submits:

These documents were prepared specifically for the purpose of conducting a programmed audit by this agency. The release of this document could reasonably be expected to prejudice the effectiveness of further audits undertaken by DFEEST. It is not in the public interest to release this document as its disclosure would compromise the internal processes of conducting audits by DFEEST.

² *Everingham v Director -General of Education*, D2959, 13 November 1992 per Judge Bowering.

³ Section 3(1)(a).

52. The agency's submission, in my view, does not provide an explanation of why clause 16(1) applies to the document; it merely paraphrases the provision.
53. Further, I have considered the contents of the audit report and I am not of the view that its disclosure could reasonably be expected to prejudice the effectiveness of a 'method or procedure' for the conduct of future audits. The audit report does not reveal anything unexpected in terms of the method or procedure involved in an audit of this nature.
54. In light of this, it is not necessary for me to consider whether the public interest limb of clause 16 has been satisfied.

Point 8

55. The agency determined that one document falls within the scope of Point 8 ('Request to National Audit & Registration Agency (**NARA**) from DFEEST requesting the NARA audit and the subsequent report back to DFEEST from NARA'). The agency refused access to that document pursuant to clause 16(1), and the explanation provided was substantively the same as that provided in relation to Point 7.
56. For the reasons set out above in relation to Point 7, I am not satisfied that the NARA audit report protected from disclosure under clause 16(1) of the FOI Act. The agency has not provided an explanation of how the disclosure of the report might prejudice the effectiveness of future audits, and there is nothing in the document which convinces me this is the case.
57. In light of this, it is not necessary for me to consider whether the public interest limb of clause 16(1) has been satisfied.
58. The agency has requested that, in the alternative, I consider the application of clause 9(1). My provisional view was that the NARA audit report contains matter that falls within the ambit of clause 9(1)(a). I based this on the agency's advice that it was used by the agency in making a decision as to [business name]'s ongoing registration. The applicant submits that this could not have been the case because at the time the agency was not the relevant registering body. In any event, I am not satisfied that it would be contrary to the public interest to release the NARA report. I have reached this conclusion in light of the material contained in the report and of the fact that the audit relates to the applicant's organisation. Accordingly, my view is that it is not exempt under clause 9(1).

Point 9

59. The agency advises there are seven documents which fall within the scope of Point 9, that these documents are subject to legal professional privilege; and, accordingly, that they are exempt documents by virtue of clause 10 of Schedule 1 to the FOI Act.
60. In my view, all of the documents within the scope of Point 9 comprise confidential communications between the agency and the CSO and were created for the dominant purpose of giving legal advice.
61. At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It is the client who is entitled to the benefit of the privilege, and who may waive it. The agency has advised it does not waive privilege over these documents.
62. Accordingly, I agree with the agency that the nine documents within the scope of Point 9 are exempt from disclosure pursuant to clause 10.

Point 10

63. The agency originally determined to refuse access to the documents within the scope of Point 10 by virtue of clauses 4(2)(a)(i) and 7(1)(b) of Schedule 1 to the FOI Act.
64. However, the agency has advised me that:
- ...given that [business name] are now acting in their own capacity, we are satisfied that these documents may be released to the applicant. We note that the applicant may hold copies of these documents as they were addressed to [business name].
65. I understand that there are 14 documents totalling 17 pages within the scope of Point 10 to be released to the applicant.

Point 11

66. The internal review decision determined that 82 documents relating to 11 complaints fall within the scope of this request. The agency submits that various clauses under Schedule 1 apply to exempt 75 of these documents in full and 6 in part. One document is released in full.
67. During the external review process, the applicant confirmed that she did not seek an external review with respect to the following documents which were partially released by the agency: documents 44, 45, 46, 73, and 81.
68. I now consider whether the remaining documents are exempt under the FOI Act below. For ease of reference, in **Attachment 2**, I have set out a schedule summarising my views for Point 11.

Complaints 2 and 5

69. In my view, where an investigation relating to a complaint is ongoing, clause 4(2)(a) of Schedule 1 to the FOI Act may apply to exempt relevant documents from release.
70. The complaints (investigations) under consideration appear to relate to possible contraventions of the *Training and Skills Development Act 2008* and, in my view, where the investigation is ongoing, the release of the documents relating to them could reasonably be expected to prejudice those investigations. Further, I am of the view that any public interest in favour of releasing such documents is outweighed by the fact that these matters involve unresolved allegations which are not in the public domain and which have not been determined. Further, the privacy of those businesses concerned is a real and persuasive consideration.
71. I am advised that the investigations numbered 2 and 5 on the document schedule attached to the internal review determination are ongoing. Accordingly, I am satisfied that the documents relating to those investigations are exempt under clause 4(2)(a) of Schedule 1 to the FOI Act. (I note that the agency claimed various exemptions in relation to these documents, although not clause 4(2)(a)).

Complaints 1, 4, 6 and 8

72. The complainant submits that the documents associated with complaints 1, 4, 6 and 8 are exempt under clause 12 of Schedule 1 to the FOI Act, by virtue of section 72A of the Training and Skills Development Act. The latter provides:
- A person must not divulge or communicate information acquired by reason of being, or having been, employed or engaged in, or in connection with, the administration of this Act, except—

- (a) with the consent of the person to whom the information relates; or
- (b) in connection with the administration of this Act; or
- (c) to a member of the police force of this State or of the Commonwealth or another State or a Territory; or
- (d) to a person concerned in the administration of a corresponding law; or
- (e) for the purposes of legal proceedings.

Maximum penalty: \$20 000.

73. I am satisfied that the documents in question comprise information acquired by reason of being employed or engaged in, or in connection with, the administration of the Training and Skills Development Act and that the release of them would constitute an offence under that Act. The exceptions in section 72A (a) - (c) do not appear to apply. Accordingly, clause 12 of Schedule 1 to the FOI Act applies to exempt the documents from release.

Complaint 3

74. I agree with the agency that document 8 (an email between the CSO and agency staff) is exempt from release by virtue of clause 10 of Schedule 1 to the FOI Act as it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.
75. Further, I am of the view that the remaining documents (7 and 9-14 inclusive) are exempt pursuant to clause 7(1)(c) of the FOI Act. The agency has advised the documents relate to DFEEST's engagement with a Registered Training Organisation (RTO) in DFEEST's capacity as the regulator, and that they contain information that was obtained under the *Training and Skills Development Act 2003* (as distinct from the 2008 Act which contains the secrecy provision referred to above).
76. I agree with the agency's submissions that as the documents comprise communications concerning 'an assessment of a Registered Training Organisation and their ability to conduct their business', they contain matter concerning the business affairs of the relevant RTO. I am also of the view that the disclosure of the information could reasonably be expected to have an adverse effect on those affairs.
77. Further I consider it would, on balance, be contrary to the public interest to release the information. I am of the view that any public interest in favour of releasing such documents is outweighed by the fact that these matters involve unresolved allegations which are not in the public domain and which have not been determined. Also, the privacy of those businesses concerned is a real and persuasive consideration.

Complaint 9

78. The agency has claimed various exemption clauses for the documents relating to complaint 9.
79. The agency submits that clause 10 of Schedule 1 to the FOI Act applies to documents 66, 68, 69 and 70. I agree that these documents contain matter that would be privileged from production in legal proceedings on the ground of legal professional privilege and accordingly are exempt from release.
80. Complaint 9 relates to the employment of an agency staff member. In my view, documents 67, 71, 72, 75, 76, 77, 78, 79 and 80 comprise employment records and as such concern the 'personal affairs' of a staff member within the meaning of the

definition in section 4 of the FOI Act. Further, in my view it would be unreasonable to disclose them to the applicant in view of the privacy of the individual concerned. I am therefore satisfied that these documents are exempt pursuant to clause 6 of the FOI Act.

81. I note that document 77 identifies a 'whistleblower'. This information is, in addition, protected by section 7 of the Whistleblowers Protection Act.
82. Document 73 has been partially released. I agree that the identity of the person about whom allegations were made is exempt by virtue of clause 6(1). However, I am of the view that the words immediately preceding that person's name in paragraph 3 are not exempt. The addressee's name should be deleted because of section 7(1) and (2) of the Whistleblowers Protection Act.

Complaint 11

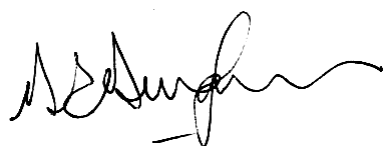
83. Complaint 11 on the document schedule comprises one document numbered 82. This document appears to be an email chain beginning with an email from Mr Stan Ganey, Senior Program Officer of the agency, dated 17 November 2010. During the external review process the agency discovered that, in error, it had not provided the applicant with a copy of the redacted version of document 82 (rather, it had incorrectly marked part of document 81 as being document 82). A copy of document 82 was provided to the applicant on 23 August 2012. By email of the same date, Ms Bruce submitted that the redacted parts of the document are exempt, variously, by virtue of clauses 6, 9 and 7(1)(c) of Schedule 1 to the FOI Act. The redacted version of the document shows which exemption is claimed for each redacted part.
84. The majority of the document has been redacted pursuant to clause 7(1)(c) of the FOI Act. The agency submits:

...it would be contrary to the public interest to disclose information provided by [a client] as it has the potential to discourage the provision of such information in the future to DFEEST from RTOs. DFEEST relies on open communication with RTO's to mediate matters. This fosters a climate of continuous improvement within the education sector and benefits consumers of the sector...
85. I have also considered the applicant's submission that the information contained in the document may assist in understanding whether the agency has treated it equitably or whether other RTOs have not be subject to the same scrutiny.
86. I am satisfied that the name of the organisation to which the complaint relates and the content of the email from an officer of that organisation to DFEEST comprises information concerning the business or professional affairs of that organisation. I am also of the view that the disclosure of that information could reasonably be expected to have an adverse effect on those affairs. Further, I am of the view that any public interest in favour of releasing such documents is outweighed by the fact that these matters involve unresolved allegations which are not in the public domain and which have not been determined. Accordingly, I agree that the material redacted pursuant to clause 7(1)(c) is exempt under that provision.
87. The subject field in each of the emails in document 82 comprises a reference number, about which the agency submitted in its response to my provisional determination 'may identify the organisation' to which the complaint relates. For the reasons given above, I am of the view that clause 7(1)(c) of Schedule 1 to the FOI Act applies to that reference number.

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88. I am satisfied that the information marked as exempt by virtue of clause 6(1) of the FOI Act falls within the ambit of that provision, as it comprises an employee's employment record, and in my view, its disclosure would be unreasonable.
89. The agency submits that the last sentence of Mr Ganev's email is exempt pursuant to clause 9 of Schedule 1 to the FOI Act. Although I am of the view that clause 9(1)(a) is satisfied, I am not convinced that the disclosure of the information would, on balance, be contrary to the public interest (as required by clause 9(1)(b)). The agency has not offered submissions, and I see no argument against disclosure of the information. It is my view that this information should be released.

Determination

90. 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 horizontal flourish extending to the right.

Richard Bingham
SA Ombudsman

11 October 2012

Att

Attachment 1 - 2011/06884

Relevant exemption clauses under Schedule 1 to the FOI Act

The *Freedom of Information Act 1991* (the FOI Act) provides that an agency is entitled to refuse access to an 'exempt document'. The term 'exempt document' is defined as 'a document which is an exempt document by virtue of Schedule 1.'⁴ Schedule 1 to the FOI Act contains a list of clauses which may be claimed by an agency as a basis for refusing access to a document.

Clause 4(2)(a)(i) and 4(2)(b)

4- Documents affecting law enforcement and public safety

- (2) A document is an exempt document if it contains matter the disclosure of which -
- (a) could reasonably be expected -
- (i) to prejudice the investigation of any contravention or possible contravention of the law (including any revenue law) whether generally or in a particular case;
 - (ii) ...
 - (iii) ...
 - (iv) ...
 - (v) ...
 - (vi) ...; and
- (b) would, on balance, be contrary to the public interest.

Clause 4(2)(a)(i) may apply in circumstances where the release of documents may impede an investigation into a breach or possible breach of the law. The phrase 'whether generally or in a particular case' suggests that it is not necessary for there to have been an actual breach of the law, but rather, could apply to unspecified contraventions, which have either occurred or may occur in the future.⁵

Exemption under clause 4(2)(b) requires that it would be, on balance, contrary to the public interest to release the document. The current legal position is that while the concept of the public interest cannot be clearly defined, the following factors are of relevance:⁶

- the age of the document
- the importance/significance/sensitivity of the issues discussed
- the continuing relevance of the issues in relation to matters under consideration
- the extent to which the subject matter of the documents is already in the public domain
- fulfilling the objects of the FOI Act
- whether disclosure would contribute to debate on a matter of public interest
- whether disclosure would enhance scrutiny of government decision making processes and improve accountability and public participation.

⁴ *Freedom of Information Act 1991*, section 20(1)(a); section 4.

⁵ *DZ v Commissioner of Police, New South Wales Police Service* [2002] NSWADT 274 (20 December 2002) at [62].

⁶ See *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* [1993] QICmr2 (30 June 1993); *Re Lianos and the Department of Social Security* (1985) 7 ALD 475, *Re Hulls and Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

It has been suggested that the following factors are possibly not relevant to the question of what is contrary to the public interest:⁷

- that disclosure would confuse the public
- that disclosure would lead to a loss of confidence in government
- that disclosure might cause the applicant to misinterpret or misunderstand the information contained in the document, or the incomplete or draft nature of the document.

The strength of these factors will depend on the contents of the documents.

Further, the agency is required to engage in a balancing process in considering whether disclosure would be contrary to the public interest.⁸

Clause 6

6—Documents affecting personal affairs

- (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)
- (2) A document is an exempt document if it contains allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead) the truth of which has not been established by judicial process and the disclosure of which would be unreasonable.

In order for a document to be considered exempt under clause 6(1), the following elements must be established:

- a. the document contains the personal affairs of someone other than merely the applicant's the term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act); and
- b. it would be unreasonable to release it

To succeed in claiming clause 6(2) as a basis for refusing access to a document in an external review, it is necessary to demonstrate that:

- a. The document contains allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead)
- b. The truth of those allegations or suggestions of criminal or other improper conduct has not been established by a judicial process
- c. The disclosure of that information would be unreasonable

The following factors are relevant to interpreting whether a disclosure would be unreasonable under clause 6:

... 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.⁹

In addition, unreasonableness has 'at its core, public interest considerations',¹⁰ such as the protection of personal privacy (the FOI Act generally does not restrict the use of information

⁷ *Re Chapman & Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 43 ALD 139 at 152

⁸ *Iplex Info Tech v Department of Info Tech Services SA* (decision no. DCCIV-96-1064, 16 June 1997), Judge Lunn.

⁹ *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALD N257 at 259.

¹⁰ *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429 at 438 (Lockhart J).

once it is released); the objects of the legislation being satisfied; and ensuring transparency and accountability within representative government. It is also recognised that there is a public interest in individuals receiving fair treatment in accordance with the law; being accorded procedural fairness within the administrative processes of government; and having access to what is recorded about them.

Clause 7(1)(b) and 7(1)(c)

7—Documents affecting business affairs

- (1) A document is an exempt document—
 - (b) if it contains matter—
 - (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
 - (B) would, on balance, be contrary to the public interest; or
 - (c) if it contains matter—
 - (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
 - (B) would, on balance, be contrary to the public interest.

To justify a claim that a document is exempt pursuant to clause 7(1)(b), each of the following criteria must be satisfied:

- (a) the document contains information (other than trade secrets) that has a commercial value to any agency or person. The term 'commercial value' is not defined in the FOI Act, and should be accorded its ordinary meaning
- (b) disclosure of that information could reasonably be expected to destroy or diminish the commercial value of the information
- (c) the disclosure would, on balance, be contrary to the public interest.

To justify a claim that a document is exempt pursuant to clause 7(1)(c), it is necessary to demonstrate that:

- (a) information in the document consists of information (other than trade secrets or information that has a commercial value to any agency or any other person) concerning the business, professional, commercial or financial affairs of an agency or person.
- (b) disclosure of that information could reasonably be expected to either:

- (i) have an adverse effect on those affairs.

It will be sufficient:

if any adverse effect is established... However, it must be something which can be properly categorised as an adverse effect and not something so de minimus [sic] that it would be properly regarded as inconsequential... It will be sufficient if the adverse effect is produced by that document in combination with other evidence...¹¹

- (ii) prejudice the future supply of such information to the government or to an agency.

- (c) disclosure of the information would, on balance, be contrary to the public interest.

The public interest considerations set out in relation to clause 4(2)(b) also apply to clause 7(1)(b) and 7(1)(c).

Clause 9(1)

9—Internal working documents

- (1) A document is an exempt document if it contains matter—
 - (a) that relates to—
 - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and
 - (b) would, on balance, be contrary to the public interest.

To justify a claim that a document is exempt pursuant to clause 9(1), it must be shown that the document in question satisfies paragraphs (a) and (b) of clause 9(1). The scope of clause 9(1)(a) is wide, particularly given the words ‘that relates to’. Clause 9(1)(b) introduces a public interest test, which limits the expansive scope of clause 9(1)(a).

The public interest considerations set out in relation to clause 4(2)(b) also apply to clause 9(1)(b).

Clause 12

12—Documents the subject of secrecy provisions

- (1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act.
- (2) A document is not an exempt document by virtue of this clause unless disclosure of the matter contained in the document, to the person by or on whose behalf an application for access to the document is made, would constitute such an offence.

Clause 12 enables an agency to refuse access to documents which are the subject of secrecy provisions in other legislation.

¹¹ *Ipex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54 at 65.

Clause 13(1)

13–Documents containing confidential material

- (1) A document is an exempt document–
- (a) if it contains matter the disclosure of which would found an action for breach of confidence; or
 - (b) if it contains matter obtained in confidence the disclosure of which–
 - (i) might reasonably be expected to prejudice the future supply of such information to the Government or to an agency; and
 - (ii) would, on balance, be contrary to the public interest.

To succeed in claiming clause 13(1)(a) it is necessary to demonstrate that the relevant document contains matter ‘the disclosure of which would found an action for breach of confidence’. The obligation of confidence may be contractual or equitable, and ‘would’ should be read as ‘could’.¹²

An equitable obligation of confidence is a duty not to disclose information because the information was given and received in circumstances which would make it unconscionable for the confidant to disclose the information in a way the confider has not authorised. A number of criteria must be satisfied.¹³

- (a) the information must be capable of being identified with specificity.
- (b) the information must have the necessary quality of confidence.
- (c) the information must have been received in circumstances which import an obligation of confidence.
- (d) there must be actual or threatened misuse of the information.

It may also be necessary for the confider to show ‘(at least for confidences reposed within government), that unauthorised use would be to the detriment of the’ confider.¹⁴ If detriment is an essential element, my view is that it is easily established.

To succeed in claiming clause 13(1)(b) as a basis for refusing access to a document, each of the following criteria must be satisfied:

- (a) the information in the document was obtained on a confidential basis¹⁵
- (b) disclosure of the information might reasonably be expected to prejudice the future supply of such information to the Government or an agency
- (c) disclosure must, on balance, be contrary to the public interest.

The public interest considerations set out in relation to clause 4(2)(b) also apply to clause 13(1)(b).

¹² *Bray and Smith v WorkCover* (1994) 62 SASR 218 at 226 to 227.

¹³ *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150 (Unreported, Judge Brebner, 9 December 2010) at [38] affirming the test from *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443.

¹⁴ See, however, *Trevorrow v State of South Australia* (2005) 94 SASR 44.

¹⁵ *Re Maher and Attorney General's Department* (1985) 7 ALD 731 at 737.

Clause 16(1)(a)(i) and 16(1)(b)

16—Documents concerning operations of agencies

- (1) A document is an exempt document if it contains matter the disclosure of which—
- (a) could reasonably be expected—
 - (i) to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency; or
 - (ii) ...
 - (iii) ...
 - (iv) ...
 - (v) ...; and
 - (b) would, on balance, be contrary to the public interest.

To succeed in claiming clause 16(1)(a)(i) as a basis for refusing access to a document, each of the following criteria must be satisfied:

- (a) there must be a reasonable expectation that disclosure would prejudice the effectiveness of the procedures or methods for the conduct of tests, examinations or audits; and
- (b) disclosure must, on balance, be contrary to the public interest.

The terms 'tests', 'examinations', and 'audits' are not defined in the FOI Act, and should be accorded their ordinary meaning.

The public interest considerations set out in relation to clause 4(2)(b) also apply to clause 16(1)(b).

Attachment 2 - 2011/06884
 Ombudsman's Provisional Views in relation to Item 11

Complaint Number	Document Number	Exemption Clause
1	1-5 (inclusive)	Clause 12
2	6	Clause 4(2)(a)
3	7 and 9-14	Clause 7(1)
	8	Clause 10
4	15-18 (inclusive)	Clause 12
5	19 - 42 (inclusive), 88, 89, 90	Clause 4(2)(a)
6	43	Clause 12
7	44, 45, 46	Partial exemption; No external review sought.
8	47 - 65 (inclusive); 83 - 87 (inclusive)	Clause 12
	66, 68, 69 and 70	Clause 10
9	67, 71, 72, 77 and 80	Clause 6(1) and in the alternative clause 9(1)
	73	Partial exemption (clause 6(1)); release 2 words in third paragraph; delete addressee's details (Whistleblower's Protection Act).
	74	Released in full ; No external review sought
	75 76 78 79	Clause 6(1)
10	81	Partial exemption; No external review sought.
11	82	Partial exemption - clauses 7(1) and 6(1). Release the last sentence of Mr Ganev's email (over which the agency has claimed clause 9(1)).