



DETERMINATION

External review pursuant to the *Freedom of Information Act 1991*

Applicant for review:	Hon Rob Lucas MLC
Agency:	Minister for Families and Communities
Ombudsman file reference:	81022D01
Determination:	The Minister's determination is reversed.

REASONS FOR DETERMINATION

Background

1. On 8 October 2009 the applicant applied to the Minister for Families and Communities (**the Minister**) under the *Freedom of Information Act 1991* (**the FOI Act**) for access to:

As at 1 October 2009, the names and positions of all staff within the Minister's office, including departmental staff appointed to the Minister's office.
2. One document within the scope of the application was located, namely a 'Directory of staff of Hon Jennifer Rankine MP (undated)' (**the document**).
3. By determination dated 14 December 2009, an accredited FOI officer, Ms Jill Francis, expressed the view that telephone numbers relating to the people listed in the document were outside the scope of the application. Ms Francis refused access to the names of the people who held ministerial appointments (**ministerial officers**) under section 20(1)(b) or section 20(1)(c) of the FOI Act, on the basis that such information was publicly available via the *South Australian Government Gazette*. In addition, Ms Francis refused access to the names of public servants employed in the Minister's Office (**departmental officers**), as she considered them to be exempt under clause 4(1)(a) of Schedule 1 to the FOI Act (documents affecting law enforcement and public safety). Ms Francis explained that she had been 'informed that unrelated yet unsolicited direct contact has recently been made with staff contained in the list provided and that staff have indicated they have been concerned regarding their safety as a result of that contact.' The document was released to the applicant with the claimed exempt and out of scope matter deleted in accordance with section 20(4) of the FOI Act.
4. On 24 December 2009 the applicant applied for internal review, reiterating his request for access to the names of ministerial officers and departmental officers employed in the Minister's Office as at 1 October 2009. The applicant noted that the Minister (and indeed other Ministers) had previously released such information. In addition, he referred to the Minister's on air invitation of 23 December 2009 to a member of the media to meet her staff and look at the list. The applicant submitted that:

There is a clear public interest in knowing the names and positions of Ministerial and Departmental staff working in your Ministerial office. There is also no provision in the FOI legislation to allow release of the document to a member of the media whilst at the same time refusing access to a Member of Parliament.

5. Following internal review, the Minister released the names of the six ministerial officers, but maintained that the names of departmental officers were exempt under the FOI Act. The Minister explained that:

The very nature of my portfolios involves dealing with family and personal difficulties, at times with emotions at heightened levels impacting on my staff, on occasions through threatening and intimidating behaviours. I support the safety and well being of my staff and consider that it is paramount that they be protected from any possible violent actions or reprisals.

External review process and parties' submissions

6. On 12 January 2010 the applicant sought external review by my Office, reiterating the submissions he had made in his application for internal review.
7. On 25 January 2010 I wrote to the Minister requesting relevant documentation, and submissions in justification of the Minister's determination, including responses to certain issues (these appear in bold in the extract from the Minister's response set out below).
8. The Minister responded by letter dated 10 February 2010:

The reasons for claiming clause 4(1)(a) Schedule 1 to the FOI Act to refuse access to each of the names of the 17 departmental officers.

The following details below have been provided by the Office of the Minister for Families and Communities:

'The position details of every staff member was released, thereby giving details of each position and the number of positions in the Minister's office. Without knowing the reasons for the applicant also wanting to know the names of staff it is assumed, if released, the names could be distributed widely. The need to release an individual's name was considered in terms of the benefit of doing so, weighed against the need to satisfy a duty of care and the likelihood of increasing potential risk to a member of staff's safety.

On a number of occasions Ministerial staff have had cause to be concerned about threats made to this Office and the safety of those in it. That's why, when consulted about the release of their names publicly for the purpose of responding to an FOI request and upon legal advice, staff decided to sign a letter advising they felt that the public release of their names could increase a risk to their personal safety [the letter contains 14 signatures, although the identities of the signatories are not always apparent].

Since taking responsibility for the portfolio of the Department for Families and Communities on 23 July 2009, this Office has received several direct and indirect threats, of various nature. The following represents some of the issues over the last 6 months.

1 July 2009 - message left on answering machine advising person believed he was being used by the Government as bait in the hope that ... will kill him - SAPOL notified.

27 August 2009 - Disability SA portfolio - Person entered Ministerial Office building foyer area and defaced Minister's signage as the Minister for Disability as well as the Attorney's and Solicitor General's signage. CCTV captured event.

25 September 2009 - Families SA portfolio - Department alerted Minister's Office following an incident where customer made a number of abusive and threatening phone calls as well as entering a Families SA office threatening to "come after staff" - SAPOL was notified.

30 October 2009 - Families SA portfolio - Customer sent a disturbing email to an officer in the Department containing, amongst other things, a list of the names and home addresses of a Departmental officer [although not one of the departmental officers listed in the document], and two current Ministers including Minister Rankine. The Department forwarded email to alert Minister's office.

SAPOL was notified and remedial action was taken to minimise any further opportunity to gain access to Minister's personal details via the internet.

The Department also advised us that this customer had a history of violence and was believed to have a psychiatric condition. Further, that in the past the relevant District office would engage a security guard each time this person visited because of his threatening and intimidating behaviour which included walking on staff cars. He had been released from James Nash House 4 months prior, and from Glenside 3 ½ months prior to sending the email detailing the names and addresses of a staff member and two Ministers.

4 November 2009 & ongoing - Housing SA portfolio - Customer contacted the Minister's Office in person and refused to leave until he had seen the Minister. His unwanted behaviour included alleging corruption in Housing SA, refusing to pay rent on a number of occasions and threatening to 'burn the house down'. He has personally approached Housing SA staff in the carpark of their workplace demanding action. He has also made threats on more than one occasion that he will be returning to the Ministerial Office and will be bringing a 'surprise' for the Minister.

Staff have met with the customer on more than one occasion in the Minister's Office and been impacted upon by his behaviour, including being yelled at and accused of being liars and corrupt, as well as comments such as "I've been imprisoned before - in Iran and once in Iraq". This comment was followed a few weeks later by the Modbury Housing SA office contacting the Minister's office advising that the customer was on his way into the office and had said "he was going to see the Minister and that she would be in for a surprise and he did not care if he was imprisoned". SAPOL was notified.

18 November 2009 - Families SA portfolio - Ministerial staff working at Parliament House during sitting time received a call from a customer threatening that if the Minister did not return his call by "4pm today there would be no office at Golden Grove" - "I will destroy it and then other offices until I hear from her." SAPOL was notified, attended the Golden Grove Electorate office, and made contact with the customer directly.

This is just a representation of incidents over the last 6 months or so. It does not include all of the abusive or concerning behaviours which Ministerial staff deal with on a daily basis. This information is supplied to present a picture of some of the types of issues dealt with by staff. In light of the threatening email received in October, where someone had deliberately researched names and home addresses, it is believed that releasing names of all Ministerial staff could increase a risk to their personal safety. Balanced against the benefits of releasing names and position details, it was determined a more responsible action to release only position details, particularly in the absence of any sound reason for also requiring the release of a person's name in addition to their position.

These types of events impact on all staff. Even when threats are not made personally to each member of staff, there is still a sense of insecurity and uncertainty created in the workplace when these events occur. Measures are taken in the Ministerial Office to protect staff including ... duress alarms ...

Further, in accordance with the *Occupational Health, Safety and Welfare Act 1886* and the employer's duty of care, action must be taken to ensure the health, safety and welfare of employees. Releasing information that would make it easier to target staff was viewed, and continues to be viewed as taking an unnecessary risk.'

The findings on any material questions of fact underlying your reasons for refusing access to the names of the 17 departmental officers on the basis of clause 4(1)(a).

- a. Releasing names of staff in the Minister's Office could be reasonably expected to endanger their lives and/or physical safety.
- b. There has been a history of threats against the Minister and the Minister's staff. There have also been incidents of disturbing and aggressive behaviour directed at the Minister and the Minister's staff.
- c. The nature of the work handled by the Minister's Office make it likely that the Minister's staff will continue to be exposed to aggressive and disturbing behaviour.
- d. Staff of the Office all feel so strongly about the issue that they have signed a letter expressing their concerns and fears.

...

Further, I comment that in justifying a claim of clause 4(1)(a) your office should show in its submissions that:

- a) ***the degree of harm reasonably expected to be suffered through disclosure of the names of the departmental officers is 'endangerment to life' or 'endangerment to physical safety' of any person***
- b) ***it is the disclosure of the names of the departmental officers which could reasonably be expected to endanger the life or physical safety of any person.***
- c) ***The basis for the expectation of endangerment to life or physical safety is reasonably based.***

The various incidents and threats, or a substantial proportion of them, threaten the life or physical safety of the Minister and/or Ministerial staff. A degree of anonymity of staff is an important safeguard and precaution, making it more difficult for the staff to be traced to their homes. Releasing names would further compromise safety, and of course the safety of the families of staff, resulting in an escalation of risk. The expectation of endangerment is based on reasonable grounds. The incidents are real. Their significance cannot be discounted. Staff have expressed the same fears and concerns, making it clear that the fears and concerns are neither idiosyncratic nor a result of subjective overreaction.

I also seek your comment on the assertion that on 23 December 2009, you indicated to Mr Mike Smithson on 5AA that you were prepared to show him the list of the names of the 17 departmental officers being required by the applicant. I am informed that you stated:

...I would be me more than happy for you (Mr Mike Smithson) to come in here and meet my staff, look at the list..

Providing an opportunity for Mike Smithson to view a list of staff names and extending that invitation to actually meet staff is considered to be vastly different to that of releasing an internal document for public distribution. The reason for not releasing names was not for the Ministerial Office to operate within a shroud of secrecy, but rather to minimise any potential risk to the personal safety of staff.

If this assertion is accurate, I make the preliminary comments that your words to Mr Smithson tend to undermine your claim of clause 4(1)(a) in your determination to refuse access to the names of the departmental officers.

The assertion is not correct, as stated in previous response, providing the opportunity for a journalist to view a list of staff names and positions and meet staff is not considered comparable with that of publicly releasing a document listing staff names. Therefore it is not considered that the invitation undermines a decision to protect staff by not releasing their names publicly.

9. On 24 March 2010 representatives of my Office met with representatives of the Minister's Office, and expressed ongoing reservations about the claim of exemption. The Minister's Office was nevertheless afforded a further opportunity to provide evidence to support the claimed nexus between release of the names and the claimed endangerment to the life or physical safety of departmental officers.
10. The response on behalf of the Minister's Office dated 12 April 2010 included the following:

... The Minister's Office Manager ... has advised that Ministerial staff have expressed genuine concern that the release of their names will diminish their personal safety. It is significantly easier to research an individual's address once you have their name, and this has already been demonstrated in relation to both public servants and Ministers as discussed in this agency's initial response, dated 10 February 2010. I refer you to the attached email from ..., a Families SA client with known mental health issues. The police took his revelation of names and addresses very seriously, as did the Ministerial staff. This situation clearly demonstrates a direct link established between the release of a name and a threat to that person's life or physical safety.

Although our refusal to release the staff list has so far been focused solely on Schedule 1, Clause 4(1) of the FOI Act, I wish also to direct your attention to Schedule 1, Clause 16, which reads as follows:

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—
 - (iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions; or
 - (v) to have a substantial adverse effect on the conduct of industrial relations by an agency; and
 - (b) would, on balance, be contrary to the public interest.

Disclosure of the Ministerial staff list under the FOI Act can reasonably be expected to have a substantial adverse effect on the effective performance of the agency, given the high level of insecurity and anxiety that will be experienced by listed staff. It is anticipated that staff will experience a debilitating level of stress while undertaking routine tasks such as answering the telephone, addressing clients at Reception, and even entering and leaving the building. The result of this can reasonably be expected to have a substantial adverse effect on the conduct of industrial relations if staff believe that their safety has been compromised to the extent that they cannot undertake their regular duties without feeling threatened.

I note that the applicant has stated that there is 'a clear public interest in knowing the names and positions of Ministerial and Departmental staff working in [Minister Rankine's] Ministerial office'. While it cannot be disputed that the revelation of this list promotes transparency of government in keeping with the spirit of the FOI Act, it is not in the public interest, nor in the spirit of the Act, to release information that is likely to be used for malicious purposes and cause serious physical and psychological harm to staff should it fall into the wrong hands. Release of information under the FOI Act is essentially release of information to the world. As you are aware, it is not within the parameters of the legislation to place restrictions on what an

applicant can do with information obtained under the Act. Although there is no immediate cause to suspect that the applicant in this particular case will provide copies of the list to DFC clients deemed to be a safety risk, there is also nothing to prevent him from doing so, nor from it inadvertently falling into the hands of those who do pose a risk to staff safety. In addition, releasing such information under the FOI Act sets a very dangerous precedent for future applications of a similar nature.

I note that, in correspondence dated 25 January 2010, you sought comment on the assertion made by Minister Rankine to Mr Mike Smithson on 5AA radio that she was prepared to show him the list of staff names and even introduce him to staff. This comment supports the applicant's assertion that there is a clear public interest in knowing who is employed within the Minister's Office, whilst also acknowledging that the FOI Act is not an appropriate vehicle for information of this nature. This agency is not averse to providing the applicant with the staff list outside of the FOI Act, thereby permitting an enforceable confidentiality agreement.

...

The OHSW Act

The Minister's Office Manager has also expressed concern that she may be compromising her obligations to staff under the *Occupational Health, Safety and Welfare Act 1986* (the OHSW Act) if she complies with a direction from your Office to release the list of staff names under the FOI Act. I refer you to section 19 of the OHSW Act, which states as follows:

19—Duties of employers

- (1) An employer must, in respect of each employee employed or engaged by the employer, ensure so far as is reasonably practicable that the employee is, while at work, safe from injury and risks to health and, in particular—
 - (a) must provide and maintain so far as is reasonably practicable—
 - (i) a safe working environment;

I refer you also to the attached letter from Housing SA to ..., a[nother] Housing SA client. This letter was forwarded by the Operations Officer in that office to protect her staff in light of her obligations under the OHSW Act. Ministerial staff also regularly encounter ... as a client. Housing SA advised that this client provided them with grounds to engage a security guard on site. The Minister's Office Manager has advised that she is considering similar action, although this will not mitigate the risk of such clients contacting Ministerial staff by other means. The release of their names under FOI will make such contact considerably easier, giving irate clients the opportunity to search names and phone records, possibly leading to a private address. This has created a serious level of anxiety among Ministerial staff which is not conducive to providing a safe working environment...

11. The response dated 12 April 2010 also stated that the South Australia Police had been asked to conduct a risk assessment of the Minister's Offices, 'due to the ongoing safety concerns experienced by staff', but that it would not be completed before the end of April. On 23 June 2010 my Office invited the Minister's Office to provide a copy of the risk assessment. My Office was advised that formal risk assessments are to be conducted for all ministerial offices, but that 'it is unclear when the formal assessment of Minister Rankine's Office will take place'. In addition, my Office was invited to make enquiries of the South Australia Police about 'concerns for the safety of the office staff'. Given the submissions already provided on behalf of the Minister, the onus on the Minister to justify her determination, and the fact that my external review concerns only the document, I have elected not to contact the South Australia Police.

Exemption clauses

Clause 4(1)(a)

12. Clause 4(1)(a) provides that:

(1) 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; or

13. The Department must show that the apprehended endangerment could reasonably be expected *as a consequence* of disclosure of the particular matter in the document in question (as opposed to other circumstances).¹

14. The Department must show that the degree of harm reasonably expected to be suffered through disclosure of the document is ‘endangerment to life or physical safety’ of any person. That expectation must be:

objectively judged ... in light of all the relevant evidence, ... and not simply on the basis of what evidence is known to persons claiming to be at risk of endangerment [my emphasis].²

Clauses 16(1)(a)(iv) and 16(1)(a)(v), with clause 16(1)(b)

15. Clause 16(1)(a)(iv) with 16(1)(b)

To justify a claim of exemption under clause 16(1)(a)(iv) with 16(1)(b) it is necessary to show that:

(a) the document contains information, the disclosure of which could reasonably be expected to have a substantial adverse effect on the effective performance by an agency of its functions

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

16. Clause 16(1)(a)(v) with 16(1)(b)

To justify a claim of exemption under clause 16(1)(a)(v) with 16(1)(b) it is necessary to show that:

(a) the document contains information, the disclosure of which could reasonably be expected to have a substantial adverse effect on the conduct of industrial relations by an agency

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

¹ *Murphy and Queensland Treasury & Others* (1995) 2 QAR 744 at [54].

² *Murphy and Queensland Treasury & Others* (1995) 2 QAR 744 at [47] per the Queensland Information Commissioner.

17. The phrase 'substantial adverse effect' is important when considering the clauses 16(1)(a)(iv) and 16(1)(a)(v). It is not defined in the FOI Act. In the decision of *Konieczka v South Australian Police*³ Judge Boylan concludes that the phrase refers to an effect that is 'sufficiently serious or significant to cause concern to a properly informed reasonable person'.⁴ In addition, he agrees with counsel for the agency that the test 'is a high one'.⁵

Other relevant provisions

18. Section 12 of the FOI Act provides that 'a person has a legally enforceable right to be given access to an agency's documents in accordance with this Act'.
19. Under section 20(1)(a) of the FOI Act, 'an agency may refuse access to a document if it is an exempt document'.
20. Section 48 of the FOI Act places the onus on the Department to justify its determination in my external reviews.
21. One of the 'principles of administration' in the FOI Act is that the Act 'should be interpreted and applied' so as to further its objects.⁶ Section 3 of the FOI Act includes the following:

3—Objects

- (1) The objects of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament—
- (a) 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
 - (b) to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies.
- (2) The means by which it is intended to achieve these objects are as follows:
- (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 F expression of opinions) and the preservation of personal privacy; ...

22. In addition, section 20(4) of the FOI Act provides that:

if-

- (a) it is practicable to give access to a copy of a document from which the exempt matter has been deleted; and

³ [2006] SADC 134 (unreported, Judge Boylan, 8 December 2006).

⁴ [2006] SADC 134 (unreported, Judge Boylan, 8 December 2006) at paragraph 17, citing *Re Thiess and The Department of Aviation* (1986) 9 ALD 454, at paragraph 24.

⁵ [2006] SADC 134 (unreported, Judge Boylan, 8 December 2006) at paragraph 18.

⁶ Section 3A(1)(a) of the FOI Act.

- (b) it appears to the relevant agency (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to such a copy,

the agency must not refuse to give access to the document to that limited extent.

23. Section 39(11) of the FOI Act provides that in my external review, and based on the circumstances existing at the time of the reviews, I may confirm, vary or reverse the Department's determinations.

Consideration of submissions and conclusion

24. I have had regard to the submissions received from the parties to the review; the document under review; the applicable law; and the present circumstances.

Clause 4(1)(a)

25. The majority of examples provided to support the clause 4(1)(a) claim do not, in my view, constitute a threat to the life or personal safety of departmental staff. Based on the examples provided by the Minister, she and other Ministers and their Offices appear to be the primary focus of the threats. The veiled threat directed towards a specific departmental officer (whose name does not appear in the document) appears to stem from their involvement in a particular matter, and not purely as a result of disclosure of their name. Serious though this is, I am not satisfied that *disclosure* of the names in the document could reasonably be expected to result in the lives or physical safety of those named in the document being endangered.
26. While I accept that it is easier to search for information about a person using their name, it does not logically follow that disclosure of the names of departmental officers could reasonably be expected to endanger their lives or physical safety. In any event, a search using '45 Pirie Street' as the location and 'Families and Communities' as the 'organisational unit' via www.sadirect.sa.gov.au suggests that only eight of the departmental officers referred to in the document are still employed in the Minister's Office as at 23 June 2010.⁷ Such information is readily accessible within the public sector.
27. My understanding is that the Minister (and indeed other Ministers) have previously released such information. In addition, following internal review, the Minister released the names of ministerial officers listed in the document to the applicant, names which would have appeared in the *South Australian Government Gazette* in any event. I have not heard that the life or physical safety has been endangered as a result of such previous disclosures. The Minister has not claimed there is a link between the examples she has provided and the previous disclosures of such lists.
28. Departmental staff may be at risk from disgruntled clients, as suggested by the examples provided by the Minister (and which, I might add, the Minister's Office appears to be managing), but I am not satisfied that *disclosure* of their names in the document could reasonably be expected to endanger their lives or physical safety.

⁷ Two of the departmental officers currently employed in the Minister's Office have the same first names but different last names to those listed in the document. It is unclear whether they are the same people. For present purposes I have assumed that they are.

29. The Minister claims that the offer she made to Mr Smithson on the radio 'to meet my staff, look at the list' is 'vastly different to that of releasing an internal document for public distribution' under the FOI Act. The Minister's offer to Mr Smithson does not appear to have been restricted in any way. This being so, Mr Smithson would have been in a position to report the names of departmental officers he obtained as a result of accepting the Minister's offer. As such, there is no discernible difference between the effect of releasing the names of departmental staff on the document to Mr Smithson in accordance with the Minister's offer, and releasing them to the applicant under the FOI Act.

Clauses 16(1)(a)(iv) and 16(1)(a)(v), with clause 16(1)(b)

30. The Minister has not persuaded me that *disclosure* of names could reasonably be expected to have a *substantial* adverse effect on the effective performance of her functions or on the conduct of industrial relations in her Office, as required by clause 16(1)(a)(iv) or clause 16(1)(a)(v), respectively. In saying this, I note that half of the departmental officers listed in the document no longer appear to be employed in the Minister's Office. In addition, as mentioned above, risks to staff appear to exist already, and are being managed by the Minister with appropriate security measures and reporting.
31. I have balanced the Minister's submissions, including her concerns about the effect of the names being released, against the public interest in promoting accountability and public participation within representative government, as envisaged by the objects of the FOI Act. I am not satisfied that release would, on balance, be contrary to the public interest, as required by clause 16(1)(b).

Conclusion

32. I **reverse** the Minister's determination under section 39(11) of the FOI Act. The names of departmental officers ought to be released to the applicant.

Right of appeal

33. Any person aggrieved by my determination may appeal to the District Court of South Australia under section 40(2) of the FOI Act.
34. The Minister may also appeal against my determination, but only on a question of law and only with the permission of the court, under section 40(1) of the FOI Act.
35. Under section 40(3) of the FOI Act, any such appeals should be commenced within 30 days after receiving notice of my determination; or in the case of a person who is not given notice of my determination, within 30 days after the date of my determination.

Richard Bingham
SA OMBUDSMAN

29 June 2010