



## Determination

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

<b>Applicant:</b>	Mr Michael Brown MP
<b>Agency:</b>	Electoral Commission of South Australia
<b>Ombudsman reference:</b>	2023/02857
<b>Agency reference:</b>	ECSA23/002
<b>Determination:</b>	The determination of the agency is <b>confirmed</b> .
<b>Date of Ombudsman's determination:</b>	14 September 2023
<b>Issues considered:</b>	Whether disclosure of documents would reveal information about an elector not recorded on the electoral roll Whether disclosure of documents relating to the personal affairs of any person unreasonable
<b>Exemption clauses relied upon:</b>	6A, 6(1)
<b>Legislation considered:</b>	<i>Freedom of Information Act 1991</i>

## REASONS

### Application for access

1. By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant requested access from the agency to:

I request copies of those documents designated as Form RO44A, held by ECSA relating to the non-party candidates for the Districts of Florey and Newland from the 2022 State Election.”

### Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.

### Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

### Provisional determination

4. I provided my tentative view about the agency’s determination to the parties, by my provisional determination dated 21 August 2023. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency’s determination.
5. Neither party provided a submission in response to the provisional determination, accordingly this determination is issued in the same terms.

### Documents in issue

6. The agency identified 2 documents within the scope of the application, to which partial access was provided.

### Issues in this review

7. Having regard to the agency’s submissions and the exemption clauses provided in Schedule 1 of the FOI Act, it is for me to determine whether to confirm, vary or reverse the agency’s determination in regard to the documents in issue in this external review.

### Consideration

#### Clause 6A

8. Clause 6A is a rarely used exemption. It provides that information ‘about an elector obtained in the course of the administration of the *Electoral Act 1985* or the *Local Government (Elections) Act 1999*; but not recorded on an electoral roll (as defined in that Act)’, is exempt.
9. Curiously, it does not contain a public interest balancing exercise, akin to clause 9(1), and there is no question of whether it would be reasonable or unreasonable to disclose the information, akin to clause 6(1). It is therefore my view that parliament has taken the view that the class of information which clause 6A exempts, is a unique species of information within the FOI Act.

10. In its internal review determination, the agency advised:

The form R044A is the form approved by the Electoral Commissioner for the purposes of a nomination under section 53A of the EA. Section 53A requires in the case of a nomination for election as a member of the House of Assembly that the nomination form be signed by at least 20 electors for the relevant district.

Schedule 1, Clause 6A of the FOI Act provides that documents are exempt where the information is obtained through the course of the administration of the EA, but is not contained on the electoral roll. While the relevant elector details contained on the R044A forms subject of your request are contained on the electoral roll, the information that they have supported a particular candidate's nomination for election is not. Given the context of the R044A forms, these two pieces of information cannot be separated.

11. I agree with the agency. While the personal details of each of the electors are recorded on the electoral roll, disclosing their information is simultaneously disclosing information that is *not* recorded on the electoral roll. Accordingly, I am of the view that the information is exempt pursuant to clause 6A of the FOI Act.

Clause 6(1)

12. In the alternative, the agency has applied clause 6(1) to the redacted information.
13. For a document to be exempt pursuant to clause 6(1):
- it must contain information concerning the personal affairs of any person (not including the applicant); and
  - the disclosure of that information would be unreasonable.
14. The term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act. Among other things, it provides that 'personal qualities or attributes' are a person's personal affairs. The term has also been held to involve 'matters of private concern to an individual'<sup>1</sup> and the 'composite collection of activities personal to the individual concerned'.<sup>2</sup>
15. I am satisfied that the names and addresses of third parties appearing on the R044 form relate to the personal affairs of those named, particularly in light of the fact that the context in which they appear relates to their support of a candidate for election.
16. The second step in ascertaining whether clause 6(1) applies is whether disclosure would be unreasonable.
17. In the matter of *Hall v SA Police*<sup>3</sup> the District Court considered the following factors as relevant in determining whether disclosure of information concerning the personal affairs of any person would be unreasonable:<sup>4</sup>
- the sensitivity (past or present) of the personal information;
  - any view about the disclosure expressed by the person to whom the personal information relates;
  - the relationship between the personal information and any other information in the documents;

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<sup>1</sup> *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625 citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1986) 13 FCR 85 at 88-89.

<sup>2</sup> *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

<sup>3</sup> *Hall v SA Police* [2019] SADC 5.

<sup>4</sup> *Hall v SA Police* [2019] SADC 5 [166].

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- how the personal information was obtained by the agency (whether voluntarily or involuntarily and whether or not in confidence);
- whether and to what extent the personal information was already known to the applicant;
- the nature of any interest which the applicant can demonstrate in
  - i. the information in the document other than the personal information; or
  - ii. the personal information.

18. The following dicta from *Page v Metropolitan Transit Authority*<sup>5</sup> was referred to by the District Court in support of the above factors:<sup>6</sup>

a balancing of interests: the right to personal privacy of an individual whose personal affairs may be unreasonably disclosed by granting access to the information and the object of the Act to extend as far as possible the right of the community to have access to information in the possession of the Government or Agencies. More particularly, this balancing exercise requires a consideration of all the circumstances, including the interest that the applicant has in the information in question, 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.

19. In arriving at the conclusion that the release of the redacted details would be unreasonable, the agency determined:

Where the SACAT decision in *Martin v Electoral Commissioner & Anor* [2021] SACAT 86 makes reference to section 54 of the EA it does so in relation to the voluntary nomination of a candidate. The information provided at the declaration of nominations under section 54 also varies in relation to a candidate and those elector details provided on the R044A form. While the R044A form is required to be produced, it is only the candidate's name and address which must be declared, and not the electors who have signed their nomination form under section 53A of the EA.

There is in my view a significant difference between the situation being dealt with in this SACAT decision, and the one currently before me. The decision of SACAT related to a candidate's personal information. The position of a candidate in voluntarily providing their information to nominate themselves is one where they have made a decision to open their lives to public comment and scrutiny, and thus there will necessarily be a different reasonableness test applied when discussing the public interest elements of disclosure.

The electors signing the R044A form have not made such a decision. They have assisted a candidate in meeting their nomination requirements, however have made no such decision to open their lives to public scrutiny or participate in public office. As such, those same arguments cannot be applied in this instance merely because the details are provided on a nomination form.

I can see no public interest in providing this information beyond transparency that a candidate has met nomination requirements, which is addressed by the form being available at the declaration of nominations. In fact, I view the release as being against the public interest by virtue that it may have the effect of discouraging electors from supporting independent candidates and diluting the pool of nominations for elections.

20. I agree with the agency; the case of *Martin v Electoral Commissioner & Anor* [2021] SACAT 86, is distinguishable because it relates to the personal affairs of a candidate and not an elector. The weight that the agency gives to the position that the electors have not chosen to open up their lives to public scrutiny, like the candidate, is a fair and appropriate position.

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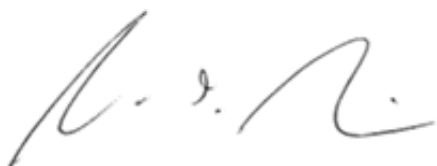
<sup>5</sup> *Page v Metropolitan Transit Authority* (1988) 2 VAR 243.

<sup>6</sup> *Page v Metropolitan Transit Authority* (1988) 2 VAR 243 [246] quoted in *Hall v SA Police* [2019] SADC 5 [167].

21. In addition, I am of the view that it would be unreasonable to disclose the information because:
- the relationship between the personal details and the form is such that disclosure may undermine the secrecy of a vote
  - in my view the information would have been obtained with an expectation of confidence
  - the information is not known to the applicant
  - it is unclear why the applicant seeks to uncover the information, save for vetting the credibility/authenticity of the electors, which is the role of the Electoral Commission and not the applicant
22. Accordingly, I am of the view that the information is exempt pursuant to clause 6(1) as the information relates to the personal affairs of third parties not known to the applicant, and because disclosure of that information to the applicant would be unreasonable for the reasons given above.

### Determination

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

A handwritten signature in grey ink, appearing to read 'W. Lines', is positioned above the typed name.

Wayne Lines  
**SA OMBUDSMAN**

14 September 2023

## APPENDIX 1

## Procedural steps

Date	Event
6 March 2023	The agency received the FOI application dated 6 March 2023.
13 April 2023	The agency determined the application.
17 April 2023	The agency received the internal review application dated 17 April 2023 .
27 April 2023	The agency confirmed the determination.
26 May 2023	The Ombudsman received the applicant's request for external review dated 26 May 2023.
31 May 2023	The Ombudsman advised the agency of the external review and requested submissions and documentation.
9 June 2023	The agency provided the Ombudsman with its submissions and documentation.
21 August 2023	The Ombudsman issued his provisional determination and invited submissions from the parties.