

## Determination

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

Applicant	Mr David Pisoni MP
Agency	Minister for Education and Child Development
Ombudsman reference	2013/00274
Agency reference	12MECD3988
Determination	The determination of the agency is varied.

## REASONS

### Background

1. In the South Australian Government Gazette, dated 10 December 2012, the Governor of South Australia appointed Mr Bruce DeBelle AO QC to be a Commissioner pursuant to *Royal Commissions Act 1917* to inquire into and report on:

The events and circumstances surrounding the non-disclosure to the school community of allegations of sexual assault committed by the Director of the Out of School Hours Care service at [a named school] against a child in his care in 2010.

2. By application under the *Freedom of Information Act 1991* (**the FOI Act**) received by the agency on 16 November 2012, the applicant requested access to:

All documents (including, but not limited to, files, emails, notes of telephone conversations) held by the office of the Minister for Education that have been forwarded to or requested by Justice DeBelle from Tuesday 30 October until present.

3. The agency failed to determine the application within the timeframe imposed by the FOI Act and was therefore deemed to have refused access to any documents within the scope of the application for access.
4. The applicant requested an internal review of this determination, by application dated 18 December 2012.
5. The agency failed to conduct an internal review within the timeframe imposed by the FOI Act and was therefore deemed to have confirmed the 'deemed determination' to refuse access to any documents within the scope of the application for access (**the agency's determination**).

### External review

6. By application dated 7 January 2013, the applicant requested my external review of the agency's determination under section 39 of the FOI Act.
7. By letter dated 19 February 2013, I notified the agency of my review. I requested all relevant documents, including additional evidence and argument which the agency

considered justified its determination, in light of the provisions of section 48 of the FOI Act.

8. On 6 June 2013, it was agreed by the applicant and the agency that the name of any person who has, or may have, committed an offence against a child would not be pursued by the applicant. The name of a person who has committed an offence against a child should be deleted from the documents.

### Provisional determination

9. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 21 June 2013. 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.
10. On 26 June 2013, my legal officers met with the agency's FOI officer and the Chief of Staff to discuss my provisional determination and take submissions. During this meeting the agency did not raise any objections to the views expressed in my provisional determination.
11. It is often my practice to provide an applicant and interested party with my provisional determination, to elicit comments in response before finalising my views under section 39(11). In this instance, I did not provide the applicant and interested party with my provisional determination. I considered I was unable to disclose any meaningful information to the applicant for response, as to do so would have disclosed information that the agency claimed to be exempt,<sup>1</sup> and whether or not any additional documents exist within the scope of the application.
12. In light of the agency's response to my provisional determination, however, I am now in a position to provide my determination.

### Consideration

13. The FOI Act provides that a person has a legally enforceable right to be given access to an agency's documents in accordance with the Act.
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.'<sup>2</sup> Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access.

### *Clause 12(1)*

15. Clause 12(1) of Schedule 1 provides that a document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act.
16. Sections 58(1) and 58(3) of the *Children's Protection Act 1993* (the CP Act) provide:

#### **58—Duty to maintain confidentiality**

- (1) A person engaged in the administration of this Act who, in the course of that administration, obtains personal information relating to a child, a child's guardians or other family members or any person alleged to have abused, neglected or threatened a child, must not divulge that information.  
Maximum penalty: \$10 000.

<sup>1</sup> See *Freedom of Information Act 1991* section 39(15).

<sup>2</sup> See section 4 and section 20(1)(a), FOI Act.

... [not applicable]

- (3) This section does not prevent—
- (a) a person from divulging information if authorised or required to do so by law; or
  - (b) a person from divulging statistical or other data that could not reasonably be expected to lead to the identification of any person to whom it relates; or
  - (c) a person engaged in the administration of this Act from divulging information if authorised or required to do so by his or her employer.

17. For an offence to lie under section 58(1) (and clause 12(1) to therefore apply) each of the following needs to apply:
- a) the information in the document must be personal information relating to a child, a child's guardians or other family members or any person alleged to have abused, neglected or threatened a child
  - b) the information must have been obtained by a person engaged in the administration of the CP Act and during the course of that administration
  - c) the giving of access of the information under the FOI Act would be to 'divulge' that information
  - d) none of the exceptions in section 58(3) apply.
18. I firstly note that the information sought concerns personal information relating to a person who, on 9 February 2012, was convicted of a crime concerning the abuse of a child. Section 59(1) protects the confidentiality of personal information relating to a person alleged to have abused a child. I am of the opinion that in the circumstance where a conviction has occurred, section 58(1) does not operate to protect the information relating to the offender. I am therefore of the opinion that the information relating to the offender is not protected under clause 12(1).
19. The information sought concerns the sexual abuse of a child. There is no doubt that this is personal information of a child. I consider point a) is satisfied.
20. I consider point b) is satisfied. Section 8 of the CP Act provides that the Minister for Education and Child Development (**the Minister**) has a number of mandated functions under the CP Act. On balance, I am satisfied that the Minister is a person engaged in the administration of the CP Act. I am also satisfied that the Minister obtained the information during the course of being engaged in the administration of the CP Act.
21. I turn then to consider whether point c) is satisfied - that is, whether to give access to the information sought would be a divulgence of the information. The word 'divulge' is not defined in the CP Act. The ordinary meaning of the word given in major dictionaries is:
- *Macquarie Dictionary* (3<sup>rd</sup> ed): to disclose or reveal (something private, secret, or previously unknown)
  - *Shorter Oxford Dictionary*: to make something publicly known; publish (statement, book etc); make a public announcement about (a person); declare or tell openly (something private or secret); to disclose, reveal. Become publicly known. Make common, impart generally.
22. The District Court decision of *Ward v Courts Administration Authority* [2003] SADC 18 considered the operation of section 58 of the CP Act. In that decision the judge said:

In my view, the plain and ordinary meaning of 'divulge' is to disclose. It does not necessarily convey the imparting of that which is previously unknown. Further, given the objectives and principles underlying the CP Act, I am of the view that the word 'divulge' should be construed to give paramountcy to protecting the child's interests. Its meaning

should not be confined to the disclosure of otherwise unknown or secret information. It should include that.<sup>3</sup>

23. In *Ward*, the applicant requested access to certain documents prepared for a Family Care Meeting, which had been convened by the agency under the provisions of the CP Act to secure the care and protection of four of his children. The applicant, and some of his children and family attended the meeting. It appears that the personal information in the documents concerned the applicant and his children, but it was difficult to know which information may or may not already have been known to the applicant. Further, even if the information was known to the applicant, he may not have been aware that it had been obtained by the agency. The judge considered that in this situation, 'disclosure of the fact of that holding would amount to divulgence'. The judge was of the view that adopting a narrow interpretation of the word 'divulge' would require the agency to engage in 'an intolerable task of speculating about what the applicant may or may not know':

There are difficulties in the qualified construction. For instance, whilst some information might be known to an applicant he or she may not be aware that it has been obtained by the agency. So in accessing the information the applicant will know that the agency has that information. The disclosure of the fact of that holding would amount to divulgence. Also, such a narrow interpretation would require the agency to indulge in what I would regard as an intolerable task of speculating about what the applicant may or may not know. In the end, the more expansive meaning is consistent with ensuring the protection of the child and so consistent with the objectives of the Act.<sup>4</sup>

24. I am mindful of the objects and principles of the CP Act and the paramountcy of protecting children's best interests, and interpreting section 58(1) in conformity with these objects and principles. It is also appropriate that I follow the expansive interpretation of the word 'divulge' in *Ward*.
25. In saying this, I consider that *Ward* should be confined to its facts, in so far as the court was concerned about what the particular applicant knew or did not know. In my view, there is scope in the reasoning in *Ward* and in the dictionary meanings of the word 'divulge' above to allow lawful disclosure of information which would otherwise offend section 58(1), where that information has been previously disclosed and is officially and legitimately in the public domain and is accessible by the public. Examples are where the information is reported in *Hansard*, the Government Gazette, or where the information has been previously disclosed by the agency, provided that that disclosure was not in itself a contravention of section 58(1).
26. This interpretation obviates the need to engage in what the judge in *Ward* considered to be the 'intolerable task of speculating' about what an FOI applicant (or the public) may or may not know.
27. I turn then to consider whether, in this case, release of the information sought would be to divulge that information within this interpretation of the term.
28. As outlined above, in the South Australian Government Gazette, dated 10 December 2012, the Governor of South Australia appointed Mr Bruce DeBelle AO QC to be a Commissioner pursuant to the *Royal Commissions Act 1917*.
29. The information in the Gazette refers to:
- allegations of sexual assault
  - committed by the Director of the Out of School Hours Care service at [a named] school

<sup>3</sup> At paragraph 57.

<sup>4</sup> At paragraph 57

- against a child in his care
  - in 2010.
30. I proceed on the basis that the disclosure of this information in the Government Gazette does not constitute a breach of section 58(1) of the CP Act.
31. I am of the opinion that information that does not go beyond the information provided in the Gazette would not result in a 'divulgence' of personal information of a child, and as such would not offend section 58(1) of the CP Act.
32. I turn now to consider whether there is matter contained in the documents that is exempt pursuant to clause 12(1) on the basis that it would be an offence against section 58(1) to release that information.
33. In considering the documents identified by the agency, I consider that it would be an offence to release information identifying the child's name, the child's gender and any details relating to the nature of the assault as this has not been officially and publicly disclosed. This information, set out in the highlighted documents attached, is exempt pursuant to clause 12(1) and should be deleted from the documents before release, in accordance with section 20(4) of the FOI Act.
34. I am of the opinion that to release the highlighted information in document 56 attached would be to divulge personal information of a child, and as such would be an offence against section 58(1). It is therefore exempt pursuant to clause 12(1). That information should be deleted from the document prior to release, in accordance with section 20(4) of the FOI Act.
35. I consider document 97 is wholly exempt pursuant to clause 12(1) on the basis that to release them would be an offence under section 58(1).
36. I consider it would be an offence against section 58 (1) to release the name of a school at which an offence against a child has, or may have, been committed. This information, as highlighted in the attached documents, should be deleted from the documents prior to release, in accordance with section 20 (4) of the FOI Act.
37. Documents 32 and 17 are copies of the same document. It is an email from a member of the public providing details of allegations of child sexual abuse. I consider it would be an offence to reveal the information, and as such it is exempt pursuant to clause 12(1).
38. Document 80 contains the name of a person who is alleged to have abused a child and the truth of that allegation has not been tested in a court. I consider that information is protected by section 58(1) and exempt under clause 12(1), and as such should be deleted from the document prior to release.
39. Section 13 of the CP Act provides:

**13 Confidentiality of notification of abuse or neglect**

- (1) For the purposes of this section, a notifier is a person who notifies the Department that he or she suspects that a child has been or is being abused or neglected.
- (2) Subject to this section, a person who receives a notification of child abuse or neglect from a notifier, or who otherwise becomes aware of the identity of a notifier, must not disclose the identity of the notifier to any other person unless the disclosure-
- (a) is made in the course of official duties to another person acting in the course of official duties; or
  - (b) is made with the consent of the notifier; or

(c) ...not applicable

Maximum penalty: \$5 000

40. Document 35 contains information which reveals the identity of a notifier and I consider it would be an offence against section 13(2) to release that information. I consider that document is wholly exempt pursuant to clause 12(1).

### **Clause 6(1)**

41. Clause 6(1) of Schedule 1 provides that a document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).
42. I am of the opinion that the names and contact details of parents whose children attend the school is information concerning those people's personal affairs and it would be unreasonable to disclose this information. I therefore consider this information should be deleted from the documents before release, in accordance with section 20(4) of the FOI Act.
43. Document 57 contains the details of a parent's concerns regarding her children. I consider this document contains information concerning these people's personal affairs, and it would be unreasonable to release that information. I consider it to be wholly exempt pursuant to clause 6(1).
44. Documents 38 and 83 contain details of the bail conditions given to a person who was alleged (at that time) to have committed an offence against a child. I consider this is information concerning that person's personal affairs and it would be unreasonable to disclose that information. I therefore consider this information should be deleted from the documents before release, in accordance with section 20(4) of the FOI Act.
45. I am of the opinion that the address of a person who has committed an offence against a child is information concerning that person's personal affairs and it would be unreasonable to disclose this information. I therefore consider this information should be deleted from the documents before release, in accordance with section 20(4) of the FOI Act.

### **Clause 6(3a)**

46. Clause 6(3a) of Schedule 1 provides, *inter alia*, that a document is an exempt document if it contains matter consisting of information concerning a person who is presently under the age of 18 years, and the disclosure of which would be unreasonable, having regard to the need to protect that person's welfare.
47. Clause 6(3a) applies to broader information than clause 6(1) insofar as the information need only 'concern a person who is presently under the age of 18 years'. It is not necessary that the information be characterised as 'information concerning the personal affairs' for the exemption to apply. I am of the opinion that each of the documents contains information which concerns a child (**the child**).
48. Section 39(10) provides that I must not make a determination that access is to be given to a document to which, *inter alia*, clause 6 applies unless I take steps as are reasonably practicable to obtain the views of any interested persons as to whether or not the document is an exempt document.
49. In order to fulfill my obligations under section 39(10), I contacted the representatives of the child and sought their views on whether any of the information in the documents was exempt. By letter dated 29 May 2013, the representatives of the child advised that

it was their view that it would be unreasonable to release any information which tended to reveal the identity of the child. Having regard to the need to protect the child's welfare, I agree with this submission.

50. In considering the documents identified within the scope of this application, I consider that releasing the name and any details of the child's school, the name of the principal and teachers of that school, as well as the names of governing council members, may lead to the identification of the child and as such the disclosure of this information would be unreasonable, having regard to the need to protect the child's welfare.
51. I consider this information, to be exempt pursuant to clause 6(3a) and as such should be deleted from the documents before release, in accordance with section 20(4) of the FOI Act.

***Clause 1(b)***

52. Clause 1(b) of Schedule 1 provides that a document is an exempt document if it is a preliminary draft of a document that has been specifically prepared for submission to Cabinet (whether or not it has been submitted). I am satisfied that documents 85 and 90 are exempt pursuant to this clause.

***Clause 10(1)***

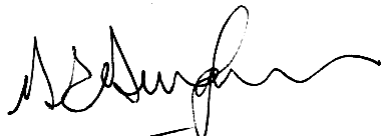
53. Clause 10(1) of Schedule 1 provides that a document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege. Document 34 is a letter of legal advice from the Crown Solicitor's Office to the Department for Education and Child Development and I am satisfied that it is exempt pursuant to clause 10(1).

***Clause 17(c)***

54. Clause 17(c) of Schedule 1 provides that a document is an exempt document if it contains matter the public disclosure of which would, but for any immunity of the Crown, infringe the privilege of Parliament. Documents 58, 59, 63 and 98 are Parliamentary Briefing Notes. Documents 93 and 115 are documents titled 'Information for Parliament'. I am satisfied that each of these documents has a significant nexus to Parliament to be fully exempt pursuant to clause 17(c).

**Determination**

55. In light of the above, I vary the agency's determination pursuant to section 39(11) of the FOI Act.
56. I have provided the agency with a copy of the relevant documents, with the parts I consider are exempt highlighted in blue. In my view, the remainder of the information within the documents should be released to the applicant.



Richard Bingham  
**SA OMBUDSMAN**

27 June 2013  
Att