

Determination

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

Applicant	Mr Daniel Wills
Agency	Essential Services Commission of South Australia
Ombudsman reference	2014/05988
Agency reference	ESCOSA09/0148
Determination	The determination of the agency is varied.

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 all correspondence relating to the resignation of former Chief Executive of the agency, Dr Paul Kerin.
2. By agreement with the applicant, the scope of the application was limited to one document, being Dr Kerin's resignation letter from the agency (**the document; the resignation letter**).
3. The agency determined to release a redacted version of the resignation letter.

Background

4. For ease of reference, procedural steps relating to the application and the external review are set out in the appendix.

Jurisdiction

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

Provisional determination

6. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 28 August 2014. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
7. The applicant and the interested party advised that they did not have further submissions to make in response to the provisional determination. The agency provided a further submission in response and I have considered that submission in this determination.

Relevant law

8. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
9. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
10. In this matter the agency has claimed that the document is partially exempt pursuant to clause 16(1)(a)(iii) and (iv) and (b). These sub-clauses provide 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-

....

(iii) to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or

(iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions; and

...

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

11. I note that I am not limited in an external review to considering only those exemptions relied upon by an agency.² In my view clause 6(1) may also be relevant as to whether the document is exempt. Clause 6(1) provides as follows:

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).

12. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
13. A document is an exempt document if contains any information that is exempt. Pursuant to section 20(4) of the FOI Act, if it is practicable to give access to a copy of a document from which the exempt matter has been deleted, and it appears 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 extent.
14. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Consideration

Clause 6(1)

15. For a document to be exempt under clause 6(1), I must be satisfied that disclosure would be of information concerning the 'personal affairs' of any person, and that such disclosure would be unreasonable. There is a non-exhaustive definition in section 4 of the Act of the term 'personal affairs'. That definition includes 'employment records'.

¹ *Freedom of Information Act 1991*, section 12.

² *Department of the Premier and Cabinet v Redford* [2005] SADC 58

16. I agree with the agency that a resignation letter is an employment record of an employee. I am therefore satisfied that the resignation letter forms a part of the employment records of Dr Kerin, and as such, is information concerning the personal affairs of Dr Kerin.
17. On 13 August 2014, my legal officer consulted with Dr Kerin in relation to his opinion about release of the document. Dr Kerin indicated that he considered that his 'letter of resignation should be provided in full to the FoI applicant'.
18. Given Dr Kerin's expressed view, I am of the provisional opinion it would not be unreasonable to release the information. It follows therefore that the resignation letter is not exempt pursuant to clause 6(1).

Clause 16(1)

19. Clauses 16(1)(a)(iii) and (iv) and (b) require that disclosure of the document:
 - could reasonably be expected
 - to have a substantial adverse effect
 on either the agency's personnel management or the agency's performance of its functions; and on balance would be contrary to the public interest.
20. For the predicted effect to be reasonably expected to occur, there must be more than merely an assumption or bare allegation that damage may occur if the document was to be released. The phrase 'could reasonably be expected' in the context of the *Freedom of Information Act 1982* (Cth) has been considered by the Full Federal Court to 'require a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous'; the enquiry is to be confined to 'whether the expectation claimed was reasonably based'.³
21. The SA District Court has also said in relation to the term 'substantial':

due weight ought be given to the word '*substantial*' and it should be interpreted as indicating a '*degree of gravity*'... or an effect '*that is sufficiently serious or significant to cause concern to a properly informed reasonable person*'.⁴
22. I have adopted these views when determining whether the resignation letter is exempt pursuant to clause 16(1) (a)(iii),(iv) and (b).

Management of personnel - clause 16(1)(a)(iii)

23. The agency submits as follows:
 - a resignation letter is an employment record of an employee
 - in such a record, employees give frank and fearless advice about the operations of the agency and the reasons for leaving the agency employment
 - should employees fail to do this, the agency could not improve areas of concern or address issues affecting staffing and the retention of staff
 - release would therefore be detrimental to the agency's open and frank relationship with its employees
 - resignation letters are provided in confidence to management for the purposes of agency feedback only
 - the fear of the release of such documents would lead to work issues going unreported, and the agency unable to properly rectify any work related issues

³ *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, 190 as endorsed by *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111, 123

⁴ *Treglown v SA Police* [2011]SADC 139 at paragraph 203 following *Konieczka v South Australian Police* [2006] SADC 134, at paragraph 17.

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- release would be likely to seriously and negatively affect employment relationships
 - the on-going existence of an open and frank relationship between staff and the agency on issues relating to contracts of employment is a matter which materially and substantially goes to the ability of the agency to manage its personnel
 - if reasons for resignations were not given, the agency would not be able to properly understand resignation decisions. Hence it could not modify its approach as an employer, seek to change its behaviour, or otherwise address concerns.
24. In response to the provisional determination, the agency submits that the consent of Dr Kerin to the release of his resignation letter cannot be relied on:
- as evidence of an indication of the likely views of other staff as to their concerns about the future release of resignation letters or other material provided to the agency as part of management and feedback processes
 - as a statement of fact going to, or substituting for, the assessment of relevant statutory criteria under the FOI Act
 - as evidence of the views of any person other than Dr Kerin.
25. In response to the provisional determination, the agency submits:
- The author's agreement to release in a specific case is not an answer to the possibility that the on-going confidence of its entire staff in the operational integrity and effectiveness of the Commission's management arrangements may be adversely impacted by that release.
- Any loss of confidence in the operation integrity and effectiveness of on-going public sector management arrangements will necessarily have a chilling effect on open and frank communication between the Commission and its staff (particularly in the collective sense on a longer-term basis).
26. Clause 16(1)(a)(iii) requires a predictive opinion. An assertion as to a reasonable expectation of adverse effect is incapable of proof in the ordinary way. The agency must establish a foundation for a finding that there is an expectation of adverse effect that is reasonably based.
27. It appears that the agency's submission is based on the following premises:
- resignation letters are provided in confidence to management for the purposes of agency feedback only
 - the fear of the release of such documents would lead to work issues going unreported, and the agency being unable to properly rectify any work related issues.
28. I accept that resignation letters provide a good opportunity for a public sector agency to learn about an employee's reasons for leaving the agency, and that this may lead to improvement in future practices. I accept that this relates to the management of personnel. I agree that if a resignation letter provided in confidence to management for the purposes of agency feedback only, was to be released against the wishes of the author of the letter, it may lead to other employees tempering their views expressed in such documents.
29. However, that is not the factual situation under consideration in this matter. In this matter, the author of the document consents to the release of the document. In his communication to this office, Dr Kerin made it clear that at all times he considered that his resignation letter could be released under the FOI Act. He has not indicated that he considered that the document was confidential.

30. In response to the provisional determination, the agency further submits:

The practical outcome of the provisional determination will be to introduce substantial uncertainty and complexity into those arrangements. For example, staff will need to be advised that there is the potential for the later release of information considered confidential at the time it was provided.

31. I consider this submission is misconceived. Pursuant to the FOI Act a member of the public has a legally enforceable right to be given access to an agency's documents in accordance with the Act. The FOI Act has been in operation in South Australia for over two decades. The public service and its employees can be taken to be aware of its operation: all communications and transactions are considered within the context of the operation of the FOI Act. Resignation letters are not in a class of documents that are automatically exempt under the Act. Indeed the agency has already released a part of the resignation letter, indicating the agency's opinion that it did not hold a reasonable expectation that release of at least a part of the resignation letter would have a substantial adverse effect on the management or assessment by an agency of the agency's personnel.

32. In my provisional determination, I advised of my opinion that given Dr Kerin's agreement to release his resignation letter, I was not persuaded that the agency's argument held weight. In its response, the agency submits that the provisional determination:

reaches the provisional conclusion that the Commission's position has no weight in this determination process.

The Commission submits that this is an error and that its argument must be given some weight.

33. To clarify, I did not consider the agency's argument was sufficiently forceful. I have given full consideration to the agency's argument, however I am not persuaded by it. I do not accept that the release of Dr Kerin's resignation letter could reasonably be expected to have an adverse effect on the management by the agency of its personnel. Even if release could reasonably be expected to have an adverse effect, I am not persuaded that the effect would be substantial.

34. I am of the opinion that the document is not exempt pursuant to clause 16(1)(a)(iii).

Performance of the agency's functions - clause 16(1)(a)(iv)

35. The agency submits as follows:

- the agency's statutory functions, include licensing, price regulation, performance monitoring and public performance reporting
- a key element of successful performance of its statutory functions is the nature and on-going effectiveness of its relationships with a broad range of stakeholders and institutions, which ensure that the agency can obtain the information (including confidential information) necessary to perform those functions
- the resignation letter contains personal reflections on stakeholders and institutions which are not held or shared by the agency; and release of the document could result in Dr Kerin's personal reflections being imputed to the agency
- while the agency could deny that it shared those personal reflections, such denials would be too late; and in any event, they could reasonably be considered unlikely to address the harm which would be caused
- this is likely to cause a substantial adverse effect on the agency's ability to interact with stakeholders and institutions and hence perform its statutory functions

- without effective relationships the agency could be significantly constrained in its ability:
 - to understand views, positions and arguments relevant to decisions and statutory actions made or taken by it
 - to meaningfully contribute to debates about the nature or scope of legislative or regulatory arrangements affecting its statutory functions (past or future)
- the agency could, in part, address those constraints through use of its coercive information gathering powers under the *Essential Services Act 2002*. Regular reliance on those formal powers could lengthen and increase the costs of regulatory processes, reducing the effectiveness and efficiency of the agency
- the confidence of the general public in the credibility and robustness of the agency's statutory decisions may be called into doubt were its actions and decisions to be made without a full understanding of all views, positions and arguments.

36. The applicant submits:

- the agency was established with the explicit legislative role of protecting the long-term interests of South Australian consumers with respect to the price, quality and reliability of essential services
- from information in the document that has been released, it is clear that Dr Kerin believed that in his role as CEO, he could deliver considerable reform, be independent from government and serve consumers
- if the letter contains personal reflections on the state government then that information should be released
- the agency is meant to be independent from the state government; and the public interest is served by the maintenance of that independence, rather than protecting the state government from negative comment
- any advice on matters affecting the operations of a watchdog on the pricing, quality and reliability is of high importance to all household who consume and fund utility services.

37. The agency is an authority established under the *Essential Services Commission Act 2002* (the **ESC Act**) as the independent economic regulator of the electricity, gas, ports, rail and water industries in South Australia. Section 5 of the ESC Act sets out the agency's functions:

The Commission has the following functions:

- (a) to regulate prices and perform licensing and other functions under relevant industry regulation Acts;
- (b) to monitor and enforce compliance with and promote improvement in standards and conditions of service and supply under relevant industry regulation Acts;
- (c) to make, monitor the operation of, and review from time to time, codes and rules relating to the conduct or operations of a regulated industry or regulated entities;
- (d) to provide and require consumer consultation processes in regulated industries and to assist consumers and others with information and other services;
- (e) to advise the Minister on matters relating to the economic regulation of regulated industries, including reliability issues and service standards;
- (f) to advise the Minister on any matter referred by the Minister;
- (g) to administer this Act;
- (h) to perform functions assigned to the Commission under this or any other Act;
- (i) in appropriate cases, to prosecute offences against this Act or a relevant industry regulation Act.

38. The agency argues that disclosure of the document is likely to cause a substantial adverse effect on the agency's ability to interact with stakeholders and institutions, and hence perform its statutory functions.
39. I accept that the effective performance of the agency's functions requires that it have sound stakeholder relations, as a result of which the agency is able to receive timely and meaningful information. The agency's Strategic Plan explains how it aims to achieve the effective performance of its functions. The Strategic Plan highlights the importance of stakeholder trust in the agency:
- We will continue to develop relationships with members of the community including consumer groups, regulated industries, peak bodies, Government and other regulators, to ensure we are best placed to understand community members' changing interests. We will regularly consult with consumer representatives on the Consumer Advisory Committee to ensure consumer groups are informed about Commission activities and their interest are represented in Commission decisions.
- We will regularly engage with Government, to enable us to understand and influence statutory and policy settings that may affect our decisions and to provide feedback on the impacts of our decisions where the Government, rather than the Commission, has policy responsibility ..⁵
40. The agency's primary objective is protection of the long term interests of South Australian consumers with respect to the price, quality and reliability of essential services.⁶ Except as provided under the ESC Act the agency is independent and is not subject to Ministerial direction in the performance of its functions.⁷
41. In response to the provisional determination, the agency submits that:
- it is just as, or even more, likely that a reasonable person might impute the views in the document to the agency or Commissioners (the resignation letter does not draw a distinction between the author's views and the views of the agency)
 - the fact that the views concern only one stakeholder does not necessarily mean that the impacts of those views will not have a substantial adverse effect on the effective performance of its functions
 - it is equally reasonable to assume that a breakdown in relations with one key stakeholder could have just that effect. It is the nature of a relationship and the potential impact of that relationship on the agency's on-going effectiveness which is the relevant consideration in this case; the number of relationships or stakeholders concerned is not.
42. I am mindful of my obligations not to disclose in my reasons for a determination, any matter that the agency has claimed as exempt, regardless of whether I agree with that claim.⁸ Having read the resignation letter, I make the following observations:
- it is clear that the views expressed in the resignation letter are solely those of Dr Kerin, and I consider it highly unlikely they will be imputed to the agency
 - the views expressed in the resignation letter concern only one stakeholder
 - maintenance of the independence of the agency from the Minister is an integral part of the performance of its functions
 - the letter is not critical of the functioning of the agency.
43. I have fully considered the submission of the agency and am of the opinion that it is unlikely that release of the resignation letter would have any adverse effect on the

⁵ Essential Services Commission Strategic Plan 2014/15 -2016/17, April 2014.

⁶ Section 6(a) Essential Services Commission Act 2002.

⁷ Section 7 Essential Services Commission Act 2002.

⁸ Section 39(15) Freedom of Information Act 1991.

effective performance by the agency of its functions. Even if I am wrong, I consider that any adverse effect that may result from disclosure could reasonably be expected to be minimal and transitory. It could not reasonably be expected to be 'substantial'. Resignation letters of this type are not uncommon, and I am not aware that their disclosure in the public domain has had any substantial deleterious effect on the operations of the relevant agency.

44. I am therefore of the opinion that the document is not exempt pursuant to clause 16(1)(a)(iv).

Public interest

45. Given my views that the document does not meet the criteria of 16(1)(a)(iii) and (iv), it is not strictly necessary for me to consider whether release would, on balance, be contrary to the public interest. However, for completeness, I provide the following thoughts.
46. Although not expressly argued by the agency, I make the following observations about the factors that I consider are irrelevant in assessing the public interest for the purposes of clause 16(1)(b):
- disclosure of the document could reasonably be expected to cause embarrassment to the government or the agency
 - disclosure of the document could reasonably be expected to cause a loss of confidence in the government or the agency
 - disclosure of the document could reasonably be expected to result in the information being misinterpreted or misunderstood
 - the person who created the document containing the information was, or is, of high seniority.
47. The agency in its determination provided that the public interest factors which favour disclosure of the document are that disclosure would:
- allow or assist enquiry into the operations of the agency
 - promote the democratic objectives of the FOI Act.
48. The agency's determination provided that the public interest factors against disclosure are that disclosure could reasonably be expected to:
- impede the agency's ability to maintain an open and frank relationship with its employees
 - impede the agency's ability to obtain constructive feedback and information from its employees on its operations in the future
 - prejudice the management of the agency's personnel
 - impede the agency's performance of its functions
 - prejudice the agency's external relationships and therefore the flow information to the agency (including confidential information); and
 - prejudice the management of the agency.
49. I consider the following public interest factors favour disclosure of the document:
- meeting the objectives of the FOI Act
 - I note that the agency's primary objective is the 'protection of the long-term interests of South Australian consumers with respect to the price, quality and reliability of essential services'. The efficiency of the agency in carrying out these functions is a matter of importance to all South Australians. In this context, I consider release of the document would:
 - enhance the agency's accountability
 - promote informed debate about the functioning of the agency.

50. Given Dr Kerin's permission to release the document, and my opinion that the views expressed by him in the document would be attributable to him only and not the agency, I find it difficult to conclude that there are any public interest factors that would weigh against disclosure of the document.
51. Thus, on balance, I am not persuaded that release of the document would, on balance, be contrary to the public interest.

Determination

52. In light of my views above, I vary the agency's determination. The document is not exempt.



Megan Philpot
ACTING SA OMBUDSMAN

23 September 2014

APPENDIX

Procedural steps

Date	Event
16 May 2014	The agency received the FOI application.
16 June 2014	The agency determined the application.
23 June 2014	The agency received the internal review application dated 16 June 2014.
4 July 2014	The agency confirmed the determination.
21 July 2014	The Ombudsman received the applicant's request for external review dated 21 July 2014.
24 July 2014	The Ombudsman advised the agency of the external review and requested submissions and documentation.
6 August 2014	The agency provided the Ombudsman with its submissions and documentation.