

Determination

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

Applicant	██████████
Agency	Central Adelaide Local Health Network
Ombudsman reference	2015/06345
Agency reference	CALHN/FOI/1415/0036
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:

A complete digital unmodified copy of all information from all submissions to the online staff anonymous survey for the management of the Cardiology Unit at RAH: titled CRAP/<https://surveymonkey.com/s/RNVWVMP>. This data includes all fields and free text comments: closed March/April 2015: All information available and permanently stored in original form.

Background

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

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 17 February 2016. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to reverse the agency's determination.
5. The applicant and the agency provided submissions in response. I have considered these submissions in this determination.

Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
7. 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. In this matter, the Central Adelaide Health Network (**the agency**) has determined to refuse access to the document sought pursuant to clause 16(1)(a)(iii) and 16(1)(b) and 13(1)(a)² of the FOI Act. I have also considered the application of clause 6(1). The sections provide 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).

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;
 - ...
 - [and]
 - (b) would, on balance, be contrary to the public interest.

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.

8. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
9. 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.

Documents in issue

10. The agency identified one (1) document within the scope of the application, entitled 'Central Adelaide Local Health Network Cardiology Team Climate Survey' (undated) (**the document**). The document consists of raw data from a survey intended to 'assess team culture, working environment, well-being and perceptions about work roles and

¹ *Freedom of Information Act 1991* (SA), section 12.

² The agency claimed an exemption pursuant to clause 13(1)(a) in submissions to Ombudsman SA as part of this external review, by email dated 24 November 2015.

issues specific to [the Cardiology Unit].³

11. According to the agency, the document arose following a decision to approach the Organisational Psychology Unit, Central Adelaide Local Health Network in late 2014, to assist leaders within Cardiology to commence conversations with staff regarding managing uncertainty and change. A learning and development plan and timeline was created and part of the plan included an online Cardiology Team Climate Survey.⁴
12. The agency has refused access to the document in its entirety.

Issues in this review

13. It is for me to consider whether the agency has justified its determination to refuse access to the document.

Consideration

Agency submissions

14. At internal review, the agency claimed that the document was exempt on the basis that:
 - following consultation undertaken with the Organisational Psychology Unit, the agency has formed the opinion that release of 'all information from all submissions' provided by the Cardiology Unit staff to the online survey, would have a substantial adverse effect on the management and the assessment of the Cardiology Unit's personnel
 - the staff completing the survey believed their responses would remain confidential and any views expressed would be collated into general feedback and therefore it would be a breach of confidence if the document was released
 - releasing the views and personal opinions of the participants would be detrimental to management and staff and undermine the current work being undertaken to create a respectful and healthy workplace culture.⁵
15. Documents submitted by the agency indicated that [REDACTED] from the Organisational Psychology Unit, Central Adelaide Local Health Network, was extremely concerned about the possibility of the confidential information being released to any applicant as this would undermine the work within the Unit towards developing a respectful and healthy workplace culture that has been ongoing since October 2014.⁶
16. [REDACTED] sought input from the Ethics Committee of [REDACTED] professional body, the Australian Psychological Society (APS).⁷ The Ethics Committee made the following submissions:
 - the APS believe it is unethical and inappropriate to provide the responses to individuals
 - the survey instructions do not indicate that any raw data will be provided to any individual
 - the instructions clearly state that the survey responses will be collated and presented back to the team in collated form
 - completion of the survey implies consent to participate, and enables the responses to be utilised only as described
 - in their view, there is no obligation, in fact it would be unethical, to act contrary to what was stated, even pursuant to an FOI request

³ Cardiology Team Climate Survey Introduction, Page 1.

⁴ Memo, dated 4 August 2015.

⁵ Letter from Ms Maree Geraghty to [REDACTED], 4 August 2015.

⁶ Memo, dated 4 August 2015.

⁷ Email from [REDACTED] to Ms Karen Collins, 31 July 2015.

- it is unethical and inappropriate to provide responses to individuals given there is no expectation in the instructions that they are entitled to access any raw results, including their own
 - the survey was designed, and it is stated, that as a confidential survey, responses (or emails) cannot be tracked, hence it is impossible to provide the requester their own data because it is impossible to identify the person unless they choose to do so.
17. In [redacted] personal submissions, [redacted] expressed concern that, given that people are named in the raw data, the people attached to the situations described could be readily identified.⁸ [redacted] provided other submissions to my Office in confidence.⁹ I have duly taken these submissions into account.
18. I note that the method of raw data collection employed by this survey means that it is impracticable for the consent for release of each participant to be obtained. The agency has submitted that:
- The survey was voluntary, anonymous and comprised of around 30% of the cardiology workforce. Responses to the survey cannot be matched to individuals or email addresses as this information is not retained, therefore the individuals could only be identified if they identified themselves when they undertook the survey. As such we are unable to identify the respondents and in turn cannot email them to seek their views on the release of the data.¹⁰
19. The agency has provided my Office with copies of the following documents which I have had the opportunity to consider as part of this external review:
- 'Team Development to support change: Looking to the Future - An overview and evaluation of a program intended to implement the Respectful Behaviour policy and develop a Team Agreement in Cardiology, RAH', dated 31 July 2015
 - PowerPoint presentation entitled 'Climate Survey Results Cardiology' dated 30 July 2015 (collectively, **the presentations**)
20. The agency has advised that:
- All of the ... information has been made available via presentation sessions/forums with invites to all staff (not just those who participated as this is unknown) of the cardiology unit. Those who attended the session/forums were also given the opportunity to discuss and respond to the findings and come up with team agreements as a result of these sessions. More sessions will be offered in the near future.
21. Additional submissions have been provided to my Office by the agency.¹¹ I have considered these submissions in forming my view. I note that pursuant to section 39(15) of the FOI Act, I must avoid disclosing in my reasons for a determination any matter that the agency claims is exempt matter (whether or not I agree with that claim). Therefore, I will not repeat the agency's submissions in full as part of this report.

The applicant

22. The applicant provided submissions to my Office as part of this external review. I considered those submissions in preparing my determination.

⁸ Email from [redacted] dated 31 July 2015.

⁹ Email from Ms Karen Collins, dated 12 January 2015.

¹⁰ Email from agency, dated 24 November 2015

¹¹ Memo, dated 4 August 2015; email from [redacted] to Ms Karen Collins, 31 July 2015; response to provisional determination dated 17 March 2016.

Clause 16(1)(a)(iii)

23. Clause 16(1)(a)(iii) provides that a document is an exempt document if it contains matter the disclosure of which could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel.
24. The agency has made submissions to my office which argue that the disclosure of the document could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel because:

The agency believes the release of the document would have an adverse effect on the personnel of the cardiology unit as the document contains allegations and staff complaints about other staff that may not be factual and would damage the personal and professional reputations of the staff of the cardiology unit.

Allegations of improper workplace behaviour by senior management, staff and the head of the unit have also been made in the document some of which is believed to have been deliberately entered by a disgruntled staff member in order to undermine the work that is being undertaken with the Organisational Psychologist.

25. While the words 'could reasonably be expected' do not, in and of themselves, impose a large burden, there needs to be a sound evidentiary basis for the anticipated substantial adverse effect. In order for the clause to be satisfied, the agency must be able to demonstrate, by reference to the actual context of a specific disclosure, that acceptable reasons exist as a basis on which to reasonably expect that the given detriment will indeed eventuate. Mere concerns of the agency about the potential release of such information will not normally be sufficient to satisfy an agency's onus of establishing that an exemption is justified.
26. The phrase 'substantial adverse effect' is important when considering the clause 16(1)(a)(iii). It is not defined in the FOI Act. In *Sheppard v SA Minister for Health* the phrase 'substantial adverse effect as employed in clause 16(1)(a)(iii) was held to require more than an adverse effect.¹² In other jurisdictions, a 'substantial adverse effect' has been held to indicate a degree of gravity, the onus to be a heavy one and equivalent to grave or serious, to be significant, not trivial or minimal.¹³ Ordinarily, clause 16(1)(a)(iii) poses a very high test for an agency to satisfy. It envisages a *substantial adverse effect* on, in this case, the management of the agency's personnel. I note the remarks of Judge Boylan regarding these words in *Konieczka v South Australian Police*¹⁴:

I have treated this phrase as referring to an effect that is "sufficiently serious or significant to cause concern to a properly informed reasonable person". See *Re Thiess and The Department of Aviation* (1986) 9 ALD 454, at paragraph 24.

Ms Hughes [counsel for the South Australian Police] frankly conceded that the "substantial adverse effect" test is a high one, significantly higher than the test set out in Clause 4. I agree with her.

¹² (1997) SADC (8 December 1997) per Trenorden J.

¹³ See *Harris v ABC* (1984) 50 ALR 551; *Re Williams and Federal Court* (1985) 8 ALD 219; *Re Dyki and Commissioner of Taxation* (1990) 22 ALD 124 and *Re Bayliss and Department of Health* (1997) 48 ALD 433.

¹⁴ [2006] SADC 134 (Unreported, Judge Boylan, 8 December 2006) at [18]-[19]

27. In the decision of *Treglown v SA Police*, the South Australian District Court said that the phrase:

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"' (references omitted).¹⁵

28. I acknowledge the agency's concern that 'the document contains allegations and staff complaints about other staff that may not be factual and would damage the personal and professional reputations of the staff of the cardiology unit.' I acknowledge that there are aspects of the document which may cause embarrassment to certain individuals or groups. In *Re Wilson and Australian Postal Corporation*¹⁶ it was held that disclosure of statements of fellow employees as to the applicant's misbehaviour would create a reluctance in staff to provide statements in future and impact detrimentally on staff morale with a loss of trust in management to protect their safety and welfare. I have balanced the submissions of the agency which favour non-disclosure of the material, against the reporting obligations on public servants generally pursuant to the Code of Ethics for the South Australian Public Sector (**Code of Ethics**).¹⁷

29. In this case, I consider that the agency's submissions above do not establish on any factual basis that the disclosure of the document will result in a loss of trust in management in the agency, or a future reluctance to provide statements in future survey exercises. In other words, it is not evident *how* a substantial adverse effect on the management or assessment by an agency of the agency's personnel can be reasonably expected as a result of the release of the raw survey data. I cannot accept submissions which are reliant on speculation of adverse effects as grounds for refusing access to this document. This is not consistent with the objects of the FOI Act or principles of sound administrative process.

30. I have compared the raw survey data contained in the document with the presentations. My impression is that, while the presentations provide a broad overview of the "free text" survey responses, certainly the themes of discontent and dysfunction across the staff cohort are reflected in both documents. In the circumstances, I consider that to expose the findings of the survey does not represent a degree of risk which is sufficiently serious or significant to cause concern to a properly informed reasonable person.¹⁸ This is especially so where there are clearly overt organisational issues already at play, and where the general sentiments of the survey responses have already been shared with the staff cohort.

31. Therefore, I consider that clause 16(1)(a)(iii) has not been satisfied.

Public interest test - Clause 16(1)(b)

32. Despite the fact that, in my view, clause 16(1)(a)(iii) has not been satisfied, I will nonetheless consider whether or not the public interest test has been met.

33. Public interest considerations relevant to this matter are:

- fulfilling the objects of the FOI Act
- ensuring transparency of the agency's processes
- ensuring accountability of the agency and its staff.

¹⁵ *Treglown v SA Police* [2011] SADC 139 (Unreported, South Australian District Court, Judge Herriman, 20 December 2011), [203], considering *Harris v ABC* (1983) 50 ALR 551 and *Konieczka v South Australian Police* [2006] SADC 134 (unreported, Judge Boylan, 8 December 2006), following *Thless and the Department of Aviation* (1986) 9 ALD 454. [1994] AATA 189(11 July 1994).

¹⁷ See <http://publicsector.sa.gov.au/policies-standards/code-of-ethics/> accessed 26 April 2016.

¹⁸ *Treglown v SA Police* [2011] SADC 139 (Unreported, South Australian District Court, Judge Herriman, 20 December 2011), [203],

34. The agency has provided the following submissions, which I paraphrase below, to support their position that disclosure of the document would, on balance, be contrary to the public interest:
- disclosure could reasonably be expected to create a reluctance of personnel to provide information to the agency in the future
 - the document concerns the personal views of staff within the cardiology unit which may not be factual, some of which is believed to have been entered for personal gain and to undermine the integrity of the unit
 - the disclosure of this information would impact on personnel morale and could be detrimental to the staff their personal and professional reputations and the unit, and create a loss of trust in the unit and ultimately the agency.¹⁹
35. In considering the public interest, I have had regard to the factors referred to in the paragraph above. I have also considered:
- the fact that the applicant is an employee of the agency
 - the responsibilities on employees of the agency under the Code of Ethics
 - the agency's stated purpose of the preparation of the document
 - the importance of the agency being able to manage its staff
 - the importance of the agency being able to identify and investigate workplace issues concerning its staff, and its reliance on frank and fearless information from staff in order to do so.
36. I now turn to consider the agency's submissions in respect of the public interest test. The agency has provided lengthy submissions in response to the provisional determination which I will not address in detail here as the submissions do not raise relevant new issues. I am also mindful of the provisions of 39(15) of the FOI Act. Suffice to say, I remain unpersuaded that the release of the document could be expected to create a reluctance of personnel to provide information to the agency in the future or create a loss of trust in the agency and the Cardiology unit.
37. I note the agency's concern that the survey data has been interfered with in order to 'undermine the work that is being undertaken with the Organisational Psychologist.'²⁰ However, the agency has not supported these allegations with facts. I cannot accept unsubstantiated allegations, nor investigate their merits as part of this external review. In any event, if the agency was concerned, and could establish that any or all of the responses were vexatious or malicious in nature, the agency could address these concerns by making a statement to that effect.
38. The agency has said that 'the disclosure of this information could be detrimental to the staff [sic] their personal and professional reputations and the unit, and create a loss of trust in the unit and ultimately the agency.'²¹ Again, I consider that the agency has provided insufficient evidence to substantiate this assertion. I do not consider that speculation can satisfy me that release of the document could produce results so dire as to be contrary to the public interest.
39. On balance, my view is that the public interest factors favouring disclosure outweigh the arguments against. In particular, I have given weight to the importance in ensuring transparency of the agency's processes and accountability of the agency and its staff in line with the objects of the FOI Act. I consider that the agency has provided insufficient submissions to persuade me that, on balance, the consequences of disclosure would be contrary to the public interest. Therefore, I consider that it would not be contrary to the public interest to disclose the information contained in the document, and hence, clauses 16(1)(a)(iii) and 16(1)(b) have not been made out.

¹⁹ Email from agency, 24 November 2015

²⁰ Email from agency, 24 November 2015.

²¹ Email from agency, 24 November 2015

Clause 13(1)(a)

40. I must consider whether the document is exempt under clause 13(1)(a). To succeed in claiming clause 13(1)(a) as grounds for refusing access to a document, it is necessary to demonstrate that the relevant documents contain matter 'the disclosure of which would found an action for breach of confidence'. The word 'would' should be read as 'could'.²²
41. The application of clause 13(1)(a) is dependent on the relevant surrounding circumstances. The agency has submitted that:

██████████.is also concerned regarding ██████████ obligations as a ██████████ and that the survey was undertaken with express concerns that the information would be retrieved from the survey monkey by ██████████ in ██████████ capacity of ██████████ and therefore remain confidential [sic]. Confidentiality is the most prominent of the ethical issues which concern psychologists in their day to day practice of psychology.

In general psychologists have an ethical responsibility to maintain confidentiality in all aspects of their work with clients including the collection, recoding, accessing, storage, dissemination and disposal of information. Psychologists are also required to protect the confidentiality of this information after they leave a workplace or cease providing psychological services.²³

42. I am conscious of the ethical responsibilities borne by psychologists in the conduct of research generally. However in this external review, my analysis turns on the question of whether or not disclosure of the document would found an action for breach of confidence.
43. Clause 13(1)(a) does not limit the circumstance in which an action for breach of confidence may be taken (and therefore the exemption is quite broad). In order to succeed in an action for an equitable breach of confidence (and therefore clause 13(1)(a) is to be available), there are four criteria which must be satisfied. These criteria are derived from the judgment of Gummow J, as a member of the Federal Court, in *Coors Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987)²⁴ at 437:

It is now well settled that in order to make out a case for protection in equity of allegedly confidential information, a plaintiff must satisfy certain criteria. The plaintiff: (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must also be able to show that (ii) the information has the necessary quality of confidence (and is not for example, common or public knowledge); (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence; and (iv) there is actual or threatened misuse of this information ...

44. I will address each of the criteria in turn below.
45. The requirement that the information must be capable of being identified with specificity will be satisfied if it can be identified with the certainty which would be necessary for a court to make an order and identification of information in global or general terms is insufficient.²⁵ I consider that the information has been specifically identified and is limited to the information gathered in the survey.
46. I consider that the agency has not provided evidence which establishes that the information is 'inherently confidential' (otherwise referred to as having the 'quality of confidence'²⁶) and known only to limited parties and not more broadly. In *Coulthard v*

²² *Bray and Smith v WorkCover* (1994) 62 SASR 218 at 226 to 228.

²³ Email from agency, 24 November 2015.

²⁴ 74 ALR 428 at 437.

²⁵ *O'Brien v Komesaroff* (1982) 150 CLR 310 at 225.

²⁶ The quality of confidence was considered by Debelle J (with whom Perry J agreed) in *Coulthard v South Australia* (1995) 63 SASR 531 at 547.

South Australia (1995)²⁷, DeBelle J summarised at 547 as follows:

The first question is whether the information conveyed in the statements was confidential. There can be no breach of confidence in revealing to others something which is already common knowledge: *Coco v A N Clark (Engineers) Ltd* (at 47). Confidential information is that which is not public property or public knowledge or otherwise in the public domain: *Saltman Engineering Co v Campbell Engineering Co* (at 215); *Woodward v Hutchins* [1971] 1 WLR 760; [1977] 2 All ER 751. It is a question of degree whether information previously disclosed to a limited public has been made generally available: *Attorney-General v Guardian Newspapers Ltd (No 2)* (at 177) per Simon John Donaldson MR. Equity will intervene only to protect a confidence if the circumstances are of sufficient gravity; it will not intervene merely to protect trivial tittle-tattle, however confidential: *Coco v A N Clark (Engineers) Ltd* (at 48); nor 'pernicious nonsense': *Church of Scientology of California v Kaufman* [1973] RPC 635 at 638. In other words, a duty of confidence will only be imposed where the information is 'a proper subject for protection': *Hubbard v Vosper* [1972] 2 QB 84 at 95.

47. I agree that the information in the document is not 'common knowledge' or in the broad public domain outside of the confines of the agency. However, I do not consider that the information ought to be considered as a 'proper subject for protection'. In forming this view, I have considered the fact that some information from the survey is clearly reproduced in the presentations which were disseminated to all staff of the cardiology unit, not just those who participated in the survey.²⁸ I am also mindful of the accountability of public officers and the accountability of government for the operation of its resourced workplaces, which is reflected in the Code of Ethics. Moreover, in the circumstances I do not consider that the subject matter of the survey is of sufficient gravity to warrant the protection of confidence. With respect, and taking into account the objects of the FOI Act, I consider that the information of the document rests at the less serious end of the scale.
48. The agency has not provided evidence which establishes that, at the time when the information was communicated and received, this was on a basis of a mutual understanding of confidence. In my view, staff members provided their responses *in full knowledge* that their responses would be de-identified and published amongst their colleagues in the form of general feedback. These circumstances are not consistent with confidentiality.
49. ██████████ submissions, without more, do not make it clear what mutual understanding of confidentiality existed between the agency and the prospective survey participants. It cannot be said that a practitioner-patient relationship existed between ██████████ and each survey participant such that an objective observer would reasonably assume that the survey responses would be received in confidence purely by virtue of ██████████ qualifications.
50. In response to my provisional determination, the agency submitted that:

The practice of organisational psychology specialists concerns work with organisations, systems, individuals and teams, each of whom would be defined as 'the client' ... The codes of ethics and principles of practice of psychology and rules regarding confidentiality apply across all psychology specialties, with the crucial difference that 'the team' is frequently 'the client' for this specialty... The release of the data breaches the APS (Australian Psychological Society) Code of Ethics with regards to the management of confidential information ... Potential participants chose to participate on the understanding, clearly conveyed through meetings and during survey feedback from the leadership team and organisational psychologist, that they could participate as the survey was guaranteed to be anonymous and confidential, unless they chose to identify themselves. Releasing

²⁷ 63 SASR 531.

²⁸ Email from agency, 24 November 2015.

the data breaches this understanding.

51. I note that the agency's submissions have focussed largely on the application of the Australian Psychological Society Code of Ethics confidentiality obligations. These are not legislative secrecy provisions, meaning that they cannot oust the operation of the FOI Act pursuant to clause 12(1) of the FOI Act.²⁹ I also note that disclosure under the FOI legislative scheme is not tantamount to ██████ personally disclosing the confidential details of the survey participants as ██████ 'clients'. With respect, I am concerned that the submission above indicates a lack of understanding of the operation and ambit of the FOI Act.
52. Moreover, there is certainly no documentary evidence that the agency provided a guarantee of confidence to all of the survey participants. The agency has relied on general claims that there were meetings in which the survey participants who attended were advised that their responses were to be kept confidential. The agency has said that not all survey participants attended these meetings. I consider that any undertaking of confidentiality must arise from the instructions provided at the time of taking the survey. My reading of the preamble to the survey does not indicate to me that an understanding of confidence was expressly made or implied with respect to the survey data.³⁰ The preamble to the survey is couched in the following terms:
- This survey intends to assess team culture, working environment, wellbeing and perceptions about work roles and issues specific to this area ... Your personal, honest opinions are crucial, so please do not discuss the questions with your colleagues during or after the survey is completed. Ensure your responses are respectful and that individuals are not identified. Please feel free to add comments. These will be themed and form a part of the overall presentation ... you cannot be identified in this survey (unless you choose to do so) ... any views you express are collated into general feedback.
53. In addition, the preamble to question 13 of the survey includes the phrase 'we look forward to sharing the results with you.' I say there is an important distinction between providing a guarantee against identification, and providing a guarantee that the survey responses will be kept in confidence. Indeed, the statements that the survey responses will be reproduced in the form of general feedback and shared with respondents seems to expressly exclude an understanding of confidentiality. I do not interpret the preamble as offering the protection of confidentiality.
54. I am concerned that the agency did not so much as mention the word 'confidential' as part of the survey preamble, and yet claims that a verbal guarantee of confidentiality of some description was given to select participants at various meetings,³¹ and moreover that a practitioner-patient relationship existed between the survey participants and ██████. In my view, the agency has failed to persuade me that the survey was communicated and received on a basis of a mutual understanding of confidence. I consider that the agency has not provided sufficient evidence to satisfy this criterion.
55. In *Ekaton Corporation Pty Ltd v Chapman*³² Brebner J commented that the final element of the test is sometimes expressed as a requirement that there must be an actual or threatened detriment to the confider.³³ However, it was observed that the

²⁹ Clause 12(2) provides that a document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act. In any event, the agency has not formally claimed an exemption pursuant to this clause.

³⁰ See *Ekaton Corporation Pty Ltd v Chapman* [2010] SADC 150 at [44]-[45]: 'The test of whether information has been received in circumstances which import an obligation of confidence was considered by Megarry J (as he then was) in *Coco v A. N. Clark (Engineers) Ltd* (1969) RPC 41 where his Honour said at 48: this element of the test is entirely objective and it focuses on the question of what the recipient of the information ought to have realised and his Honour's formulation has been accepted and applied in South Australia: *Trevorrow v South Australia (No 4)* (2006) 94 SASR 64 at [39], *Coulthard v South Australia* (1995) 63 SASR 531 at 548.'

³¹ The minutes or other evidence of these meetings was not provided to my Office in this external review.

³² [2010] SADC 150 at [46]-[46].

³³ *Coulthard v South Australia* (1995) 63 SASR 531 at 547.

need for this requirement to be satisfied has been doubted in more recent cases.³⁴ If the requirement of actual or threatened detriment does exist, then the question of whether disclosure is likely to cause detriment to the confider if disclosed must be considered in light of the fact that the party who may suffer detriment is a government agency. In *Esso Australia Resources Ltd v Plowman* (1995),³⁵ it was suggested that disclosure must be shown to be detrimental to the public interest. In *Esso*, Mason CJ observed that:

The courts have consistently viewed governmental secrets differently from personal and commercial secrets.³⁶ As I stated in *The Commonwealth v John Fairfax & Sons Ltd* (68), the judiciary must view the disclosure of governmental information "through different spectacles". **This involves a reversal of the onus of proof: the government must prove that the public interest demands nondisclosure.**³⁷ (emphasis added)

56. To avoid duplication, in my analysis of this criterion, I have had reference to the agency's submissions in respect of the public interest test as it applies to clause 16(1)(b), above and will not repeat my comments here. Suffice to say, my view is that it would not be contrary to the public interest to disclose the information contained in the document. Moreover, I do not consider that there is any evidence of actual or threatened misuse of this information.
57. Therefore I consider that the disclosure of the document would not found an action for breach of confidence, and hence clause 13(1)(a) does not apply.

Clause 6(1)

58. I have the power under the FOI Act to vary the determination of an agency.³⁸ It is my view that there is information within the document which concerns personal affairs. The 'free-text' responses to the survey include names and titles of agency staff members.
59. Ordinarily, information about a person in a work context does not constitute that person's 'personal affairs'. However, information about a person within a work context may constitute that person's personal affairs when it relates to their employment records, or goes above and beyond their mere work, for instance when it concerns the comments made about them in the context of a workplace survey. In the circumstances, I am satisfied that the names and titles of persons identified in the survey constitute their personal affairs.
60. The question then becomes whether or not disclosure of that personal information would be unreasonable. I accept that the preamble to the survey requires that 'individuals are not identified'. On that basis, I consider disclosure of personal information is not consistent with the pre-amble of the survey and therefore disclosure would be, in all the circumstances, unreasonable. I am of the view that the redacted names and titles do not detract in any way from the meaning of the original document sought. As such, the primary objects of the FOI Act are satisfied, while preserving the public interest in maintaining the privacy of personal affairs. Therefore, it is my view that in all the circumstances disclosure of that information is unreasonable.
61. Despite my invitation, the agency has provided no evidence that it has consulted with affected third parties in line with the provisions of Division 2 of the FOI Act. I consider it appropriate for the agency to release a copy of the document with the

³⁴ *Coulthard v South Australia* (1995) 63 SASR 531 at 546, *N P Generations v Feneley* (2001) 80 SASR 151 at [21] and *Trevorrow v South Australia (No 4)* (2006) 94 SASR 64 at [160].

³⁵ 183 CLR 10 at 31 (*Esso*).

³⁶ *Attorney-General v Jonathan Cape Ltd* [1976] QB 752; *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39; *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86; *Attorney-General v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109.

³⁷ *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 52.

³⁸ *Freedom of Information Act 1991* (SA), section 39(11).

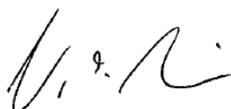
names and titles of the affected persons removed. Appendix II comprises a copy of the document with suggested redactions for the agency's consideration.³⁹

Determination

62. In light of my views above, I vary the agency's determination. At the expiration of the statutory appeal period, I consider it appropriate for the agency to provide the applicant with a copy of the document with the names and identities of third parties removed.

Comment

63. The FOI Act says that on receipt of an access application, if an agency makes a determination to refuse access to the requested documents, it must give reasons in its notice of determination.⁴⁰ Agencies must link the exemptions claimed to the actual contents of the documents, rather than make 'blanket' claims over the documents. This issue was discussed in the Ombudsman's 2014 FOI audit.⁴¹
64. By way of general comment, I consider that the agency's submissions have failed to address the exemption clauses as they apply to the various parts and contents of the document, and in this way, demonstrate a failure to implement the recommendations of the 2014 FOI audit.
65. Further, the substance and tone of the agency's submissions to my Office reflect a lack of understanding of the legal operation and purpose of the FOI Act. It is telling that the agency's response to my provisional determination did not refer to a single specific clause of the FOI Act or to any specific content of the document. The document, comprising some 49 pages, was treated as a whole. I am concerned that much of the agency's submissions focussed on extraneous factors and speculation which did not assist in my external review. This is disappointing given the repeated attempts by my Office to encourage the agency to present their submissions in a manner which is consistent with recommendations made in the audit by directly relating the contents of the documents to the relevant exemption provisions of the FOI Act.



Wayne Lines
SA OMBUDSMAN

13 May 2016

³⁹ The parties have an appeal right pursuant to section 40 of the FOI Act. Therefore, the agency must defer access to the document to the applicant until the expiration of the statutory appeal period, being within 30 days after the notice of the determination.

⁴⁰ *Freedom of Information Act 1991* (SA), section 23(2)(f).

⁴¹ See 'An audit of state government departments' implementation of the *Freedom of Information Act 1991* (SA), May 2014, Part 7A, available at <http://www.ombudsman.sa.gov.au/wp-content/uploads/An-audit-of-state-government-departments-implementation-of-the-Freedom-of-Information-Act-1991-SA1.pdf>.

APPENDIX I

Procedural steps

Date	Event
15 June 2015	The agency received the FOI application dated 12 June 2015.
15 July 2015	The agency failed to determine the application within the 30 day period required by the FOI Act, ¹ and is deemed to have refused access to the documents. ²
22 July 2015	The agency received the internal review application dated 22 July 2015.
4 August 2015	The agency confirmed the determination.
10 August 2015	The Ombudsman received the applicant's request for external review dated 10 August 2015.
13 August 2015	The Ombudsman advised the agency of the external review and requested submissions and documentation.
20 August 2015	The agency provided the Ombudsman with its submissions and documentation.
17 February 2016	The Ombudsman provided the parties with his provisional determination.
23 February 2016	The applicant provided the Ombudsman with submissions.
17 March 2016	The agency provided the Ombudsman with submissions.

¹ Freedom of Information Act 1991, section 14(2).

² Freedom of Information Act 1991, section 19(2).