

## Determination

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

Applicant	Mr David Pisoni MP
Agency	TAFE SA
Ombudsman reference	2015/02832
Agency reference	BRIEFCTAFE/15/55
Applicant reference	DP150069
Determination	The determination of the agency is reversed.

## 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 the contract for the current Chief Executive of the agency (the **contract**).

### 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 and Revised Provisional Determination

4. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 17 June 2015. 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. As the agency's submission to that provisional determination raised new issues, including a possible new exemption, by letter dated 8 December 2015 I provided the parties with my revised provisional determination in order to afford them with an opportunity to respond to those new matters.

6. The agency and Mr Murt, as an interested party, provided submissions to my revised provisional determination and I have considered those submissions below. The applicant did not provide a submission.

### **Relevant law**

7. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.<sup>1</sup>
8. 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.
9. Clause 6(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).
10. Clause 13(1)(a) provides that a document is an exempt document if it contains matter the disclosure of which would found an action for breach of confidence.
11. However, clause 13(2) relevantly provides that a document that is a contract entered into by an agency after 1 January 2005 is not an exempt document by virtue of 13(1)(a) unless:
  - (a) it contains matter the disclosure of which would, under a term of the contract, constitute a breach of the contract or found an action for breach of confidence; and
  - (b) the term of the contract has been approved by-
    - (ii) in the case of a contract entered into by a State Government agency-the responsible Minister for the agency.
12. Clause 16(2) provides that a document is an exempt document if it relates to an agency engaged in commercial activities and it contains matter the disclosure of which could prejudice the competitiveness of the agency in carrying on those commercial activities.
13. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
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.

### **Information in issue**

15. The agency determined to partially release the contract. It determined that the private address of the Chief Executive and Schedule 2 were exempt and would not be released.
16. On 18 May 2015 my legal officer confirmed with the applicant that he was not seeking the private address of the Chief Executive.
17. The information in issue therefore is Schedule 2 to the contract which contains the Total Remuneration Package Value (TRPV).

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<sup>1</sup> *Freedom of Information Act 1991*, section 12.

## TAFE SA

18. The agency is a statutory corporation established by the *TAFE SA Act 2012* and to which the provisions of the *Public Corporations Act 1993* (other than section 35) apply.
19. On 29 January 2015 the Treasurer signed the TAFE SA Ministerial Charter (**the Charter**) which 'sets out the Government's strategic objectives, priorities and requirements for the Corporation'.<sup>2</sup>
20. The Charter provides that in fulfilling its statutory function the agency shall 'aspire to be a leading Government-owned provider of Technical and Further Education and assist the Government in meeting its strategic objectives for Technical and Further Education ...'.
21. Section 13 of the Charter provides:
 

The Corporation's non-commercial operations are those operations that are the subject of an agreement and funded through a purchasing agreement with the Minister or the Treasurer, and pursuant to requirements of clause 6 of the Charter.
22. Clause 6 of the Charter provides, *inter alia*:
 

In pursuing the strategic directions and undertaking its functions and exercising its powers under the *TAFE SA Act 2012*, the Corporation shall:

  - 6.1.1 Contribute to the achievement of State Government policy and service priorities consistent with TAFE SA's role as a public provider and as advised by the Minister.
23. The agency's 2014/15 Annual Report provides that it received VET funding through the Department of State Development in the amount of \$161,188,000 in the financial year ending 30 June 2015.<sup>3</sup>

## Consideration

### *Clause 15 of the Contract and DPC Circular 27*

24. The agency relies on clause 15 of the contract to support its determination that the TRPV is exempt.
25. Clause 15 of the contract provides as follows:
 

**15. Disclosure of Contract**

It is acknowledged and agreed that the policy of the South Australian Government requires a copy of this Contract (with Schedule 2 and the private address of the Executive having been deleted) to be provided for inspection to any person who makes a written request.
26. Clause 15 of the contract refers to the policy of the South Australian Government. The relevant policy of the South Australian Government is contained in the *Department of Premier and Cabinet Circular PC027 - Disclosure of Government Contracts (the Circular)* which contains the following clauses:

<sup>2</sup> TAFE SA Ministerial Charter, clause 1.1, Appendix 1 to TAFE SA Annual Report 2014-15 at [http://www.tafesa.edu.au/docs/default-source/about\\_tafesa/tafesa\\_annualreport.pdf](http://www.tafesa.edu.au/docs/default-source/about_tafesa/tafesa_annualreport.pdf) (at 10 March 2016).

<sup>3</sup> TAFE SA Annual Report 2014-15, page 49.

### Scope

4. This Circular describes the obligations on Chief Executives in relation to the Disclosure of Eligible and Significant Contracts, executive contracts and the management of contract information. It does not derogate from any other obligations of the public authority to disclose information.

### Executive Contracts

21. Copies of executive contracts will be made available for inspection on receipt of a written request to the Chief Executive of the public authority in which the executive is employed. In the case of contracts with Chief Executives, the written request must be made to the Commissioner for Public Employment and the contract provided will include the Total Remuneration Package Value (TRPV) and the schedule in which the TRPV appears, though this information will not be included in the case of other executive contracts. In all cases, the address of the executive will be excluded for privacy reasons.

27. The agency's determination states:

In respect of Schedule 2, the disclosure statement [of the contract] specifically states it is to be deleted prior to any release consequent to a written request for its inspection. That the contract has been signed by the Chief Executive confirms in my mind his agreement with the terms of the contract and the implied intention that Schedule 2 is confidential.

While the Department of Premier and Cabinet Circular PC027 - Disclosure of Government contracts provides for the disclosure of Schedule 2 for chief executive contracts, ... this is an administrative instruction and carries considerably less weight than the signed contract.

28. I turn then to consider whether the TRPV is exempt pursuant to clause 13(1)(a) and having regard to 13(2).

### *Clause 13(1)(a) and 13(2)(a)*

29. The effect of clause 13(2)(a) is that it is not enough that disclosure of a contract contains matter the disclosure of which would found an action for breach of confidence (clause 13(1)(a)). A contract will only be exempt if it contains matter the disclosure of which under a term of the contract would:
- constitute a breach of the contract, or
  - found an action for breach of confidence.
30. The agency submits that disclosure of the TRPV would, under clause 15 of the contract, constitute 'a clear breach of the contractual obligations between TAFE SA and Mr Murt'. While it may be that disclosure of the TRPV is inconsistent with the terms of clause 15 (which contemplates secrecy of the TRPV) this does not satisfy the test in clause 13(2)(a).
31. In the revised provisional determination I stated that clause 15 of the contract does not amount to a 'term' under which disclosure of the TRPV would constitute a breach of contract.
32. The agency submitted that it does not agree with my interpretation of clause 15.
33. I maintain my view. I consider it was open to the parties in negotiating the contract to state in unequivocal and robust language that disclosure of the remuneration details would constitute a breach of contract, or could found an action for breach of confidence. However this did not occur. I do not accept that release of the TRPV would amount to a breach of contract under clause 15 of the contract.

34. I turn then to consider whether an action for breach of confidence would be available under clause 15 for disclosure of the TRPV.
35. To establish an action for equitable breach of confidence a number of elements must be satisfied:
- the confider ‘must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question’
  - the confider must be able to show that the ‘the information has the necessary quality of confidence (and is not for example, common or public knowledge)’
  - the confider must be able to show that ‘the information was received ... in such circumstances as to import an obligation of confidence’
  - ‘there is actual or threatened misuse of this information’.<sup>4</sup>
36. The requirement that the information 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.<sup>5</sup> In this matter, the information is contained within Schedule 2 and I am satisfied that it meets this criteria.
37. In my revised provisional determination I stated that I was not convinced that the information has the necessary quality of confidence. The Circular provides that if a written request is made to the Commissioner for Public Sector Employment (**the Commissioner**) for the contract of a Chief Executive the Commissioner will provide a copy of the contract provided, which will include the TRPV.
38. On 17 September 2015 the Commissioner wrote to Mr Murt and advised that a request had been made for a copy of the contract. That letter provides:
- As you may be aware, the circular prescribes that executive contracts are to be made available upon written request. In the case of Chief Executive contracts, the disclosure will also include the schedule in which the total remuneration package value (TRPV) appears.
- Within the context of Clause 12 of the Circular, the Commissioner for Public Sector Employment is essentially a conduit for the request and production of the information.
- A discussion has taken place between the Director, Policy and strategy, TAFE SA and an officer from the Office for the Public Sector, and I understand that TAFE SA’s position is to provide a copy of the contract, but not the schedule in which the TRPV appears.
- In order that I may respond to Mr Pisoni, could you please confirm that your position on releasing the contract with the relevant schedule remains unchanged?
39. In response Mr Peter Vaughan, Chair TAFE SA Board wrote to the Commissioner by letter dated 1 October 2015. That correspondence provides:
- I can advise that the Chief Executive’s contract was structured to provide for the confidentiality of the appointee’s TRPV, explicitly stating that schedule of the document containing this information would not be released. This contract and the terms therein was approved by the Minister for Employment, Higher Education and skills, the Hon Gail Gago MLC, in accordance with TAFE SA practice and relevant legislative requirements.
- As outlined in the letter from the Member requesting the document, the Chief Executive’s contract has already been sought through a request pursuant the *Freedom of Information Act, 1991*. In the context of this request, TAFE SA has received legal advice that states,

<sup>4</sup> *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 74 ALR 428, at 437 as adopted by the District Court in *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150.

<sup>5</sup> *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150, at paragraph 39.

on balance, that the contract should not be released. While this particular FOI request still remains the subject of the Ombudsman's deliberations, TAFE SA remains of the view that while the contract can be released, the schedule in which the TRPV appears should not be released.

40. In response to the revised provisional determination the agency submitted that it:

[D]oes not agree that the [Commissioner] could disregard the existence of clause 15 in the Chief Executive's contract and provide an applicant with a copy of the TRPV. This is not reflective of the course of action taken by the Commissioner. In correspondence to TAFE SA (17 September 2015) the Commissioner has stated that "within the context of Clause 21 of the Circular ... the Commissioner for Public Sector Employment is essentially a conduit for the request (by Mr Pisoni of the Chief Executive's employment contract) and production of the information". It is for this reason that the Commissioner sought TAFE SA's view on whether the Chief Executive's contract could be provided in full to Mr Pisoni. Consistent with advice previously received, TAFE SA determined that, on balance, the case for not providing the contract outweighed the case for providing the contract. Accordingly, TAFE SA indicated that it would not release the TRPV due to the existence of clause 15 in the Chief Executive's contract.

TAFE SA infers from the Commissioner's correspondence that the Commissioner did not intend to disregard the existence of clause 15 and provide any applicant with a copy of the TRPV. Although not expressly acknowledged in the exchange between the Commissioner and TAFE SA, it is submitted that the Commissioner would not produce information in order to comply with Government policy if to do so would be directly inconsistent with a contractual confidentiality clause, even if she were not a party to the contract. Arguably, the equitable obligation to maintain confidentiality would extend to the Commissioner if she had been provided with a copy of the contract.

41. I note that the agency refused to provide the TRPV to the Commissioner.
42. I note the agency's view that the Circular is an 'administrative instruction' only however I am not satisfied that the Commissioner's responsibility under the Circular should have been affected by clause 15 of the Contract. Clause 15 of the Contract does not accurately reflect the policy of the South Australian government in relation to the provision of the contract of a Chief Executive and is not drafted in a way that reflects an intention to oust it. On the face of it, clause 15 is a statement of acknowledgement and acceptance of the policy but then misstates what the policy is in regard to the disclosure of the TRPV. A term of contract that accepts a policy but misstates its terms cannot by that misstatement circumvent the agency's obligations under the policy.
43. In the circumstances, I am of the view that the TRPV does not have the required 'quality of confidence' to enable a successful claim for equitable breach of confidence.
44. Given my view that the TRPV does not meet the requirements of clause 13(2)(a) and therefore clause 13(1)(a), I do not consider it necessary to consider clause 13(2)(b).
45. It is my opinion that the TRPV is not exempt pursuant to clause 13.

#### *Clause 6(1)*

46. I turn then to consider whether the TRPV is exempt pursuant to clause 6(1).
47. The personal affairs of a person is defined in section 4 of the Act to include, amongst other things, that person's employment records. It is well settled law that a person's remuneration is information concerning their personal affairs.<sup>6</sup> I turn then to consider

<sup>6</sup> See for example: *Lower Burdekin Newspaper Company Pty Ltd and Lower Burdekin Shire Council* [2004] QICmr 2, *Asher v Department of State & Regional Development* [2002] VCAT 609,

whether disclosure of the TRPV would involve the 'unreasonable disclosure' of that information.

48. The Australian Information Commissioner has recently considered the process for determining whether disclosure of personal affairs information would be unreasonable in the context of the personal affairs exemption. He points out that the guiding principles on unreasonable disclosure have been endorsed and applied consistently since the emergence of Freedom of Information laws in Australia, with four points standing out.<sup>7</sup>
49. The first is that a range of matters may require consideration. Justice Muscat of the District Court provided the following summary of some of the factors that may be relevant when considering if disclosure of a document containing personal information would be reasonable:<sup>8</sup>
- the nature of the personal information
  - the sensitivity (past and present) of the personal information
  - any view about disclosure expressed by any person to whom the personal information relates
  - the relationship between the personal information and any other information in the document
  - 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-
    - the information in the document other than the personal information; or
    - the personal information.
50. The second factor referred to by the Australian Information Commissioner is that the matters to be considered are generally characterised as public interest considerations. This is demonstrated by the frequently quoted statement of Justice Lockhart in *Colakovski v Australian Telecommunications Corporation*:
- What is "unreasonable" disclosure of information ... must have as its core public interest considerations. The exemptions necessary for the protection of "personal affairs" ..and "business or professional affairs" .. are themselves, in my opinion, public interest considerations. That is to say, it is not in the public interest that the personal or business or professional affairs of persons are necessarily to be disclosed on applications for access to documents. The exemption from disclosure of such information is not to protect private rights, rather it is in furtherance of the public interest that information of this kind is excepted from the general right of public access.<sup>9</sup>
51. Thirdly, it is generally recognised that the factors to be considered will be competing and the decision of whether disclosure would be unreasonable involves a balancing process. The Full Federal Court in *Wiseman v Commonwealth* stated that :
- [w]hether or not disclosure would be "unreasonable" is a question of fact and degree which calls for a balancing of all the legitimate interests involved'.<sup>10</sup>
52. The fourth recurring principle noted by the Australian Information Commissioner is that the personal affairs exemption is to be applied on the basis that the personal information released is to be treated as a release 'to the world at large'.

<sup>7</sup> 'BA' and Merit Protection Commissioner [2014] AICmr 9 at para 60.

<sup>8</sup> *Bradshaw v SA Police* [2012] SADC 184 [63] citing *Victoria Police v Marke* (2008) 23 VR 223 [19].

<sup>9</sup> *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429 at [34].

<sup>10</sup> *Re Gordon Peter Wiseman v Commonwealth* [1989] FCA 434 at para 5.

53. I have considered each of these principles in determining whether it is unreasonable to release the TRPV.
54. In considering these factors I have had regard to the views of the Chief Executive, Mr Robin Murt. Mr Murt submitted:
- 'I believe my remuneration arrangements to be personal information and I would have significant concerns if the details were released'
  - 'I signed the contract in good faith and with full reliance on the intent of the contract disclosure statement. I specifically sought the inclusion of a disclosure statement and I would not have signed the contract, or may have negotiated different conditions, had there been any doubt about its legally binding nature. I have been informally advised by a qualified lawyer that the document is in fact legally binding and has reinforced my assumption that the document would remain confidential (sic)'
  - '[o]ne of my concerns if the requested details are released, is that the structure of Schedule 2 makes it very clear that there is an 'Eligible Annual Performance Payment' element. This element is subject to consideration of my performance by the TAFE SA Board. It is highly likely that the applicant, given their role, will use such information in a less than positive manner in commentary and presentations to the South Australian community. It is reasonable to expect that this could lead to a situation where the level of final payment is debated, commented upon and possibly even ultimately influenced by, ad hoc public commentary. I consider this to be completely inappropriate and unreasonable in terms of both potential payment outcome, public embarrassment and reputational damage'
  - '[m]y main concern is the risk to my ability, as the leader of TAFE SA, to effectively do my job. I need to get TAFE SA to operate sustainably in a commercially competitive environment by 2018/19. I am passionate about realising this obligation for the betterment of the South Australian community and economy. I hold a strong view that my salary details are, at least, highly commercially sensitive. Given the clear potential for use in a negative manner in the public arena, my ability to maintain TAFE SA's reputation, brand and to lead it effectively to a sustainable future would be put at risk. Release of salary information is clearly not a requirement of many of TAFE SA's competitors and therefore, the release of my information, would put me and TAFE SA at a competitive disadvantage.'
55. The agency acknowledges that there is 'strong interest in members of the public having access to how public money is spent'. However, the agency considers that having weighed the public interest against the preservation of personal privacy, it is unreasonable to release the TRPV.
56. In *Lower Burdekin Newspaper Company Pty Ltd and Lower Burdekin Shire Council* the Queensland Information Commissioner noted the public interest factors favouring disclosure of remuneration information of senior government employees:

Information about the gross salary paid to an employee of a government agency has a dual character. It is both information about the income of an identifiable individual (and hence information concerning that individual's personal affairs) and information about the cost of having the duties of the relevant position performed for the benefit of the public. Governments fund their operations by imposts on the public of one kind or another. In a representative democracy, elected representatives are accountable to the electors for decisions made in respect of raising and spending public funds. The public has a strong, legitimate and abiding interest in having access to sufficient information to enable scrutiny of whether funds raised by government are expended efficiently and effectively in furtherance of the wider public interest. This extends to scrutiny of whether the public is obtaining value for money from performance of the duties of particular positions for which

a government has decided to allocate funding. This public interest is even stronger in the case of senior officers who have responsibility for devising and/or implementing strategic and operational plans, and delivering key performance outcomes.<sup>11</sup>

57. The promotion of informed debate on expenditure of public funds and value obtained for that expenditure is a strong consideration in the favour of disclosure.. I consider this will enhance accountability and transparency of the agency.
58. In considering whether disclosure of the TRPV would improve the ability of the public to scrutinise the expenditure of the agency I have taken into account the agency's financial reporting obligations arising under sections 32 and 33 of the *Public Corporations Act 1993 (SA)* which require the agency to comply with any applicable instructions of the Treasurer issued under the *Public Finance and Audit Act 1987*.
59. The *Accounting Policy Framework* issued by the Department of Treasury and Finance pursuant to section 41 of the Public Finance and Audit Act requires the agency, in relation to employees whose normal remuneration is equal to or greater than the base executive remuneration level (\$141, 500), to publish - in relation to the \$10 000 band of remuneration that commences at the base executive remuneration level and each successive \$10 000 band - the number of employees whose total remuneration, falls within that band.<sup>12</sup> Considering that the Chief Executive's remuneration level is likely to be the highest of all the agency's executives, it should be easy to discern which remuneration band refers to him.<sup>13</sup>
60. Given that these reporting obligations require the disclosure of the remuneration details of senior executives within a \$10,000 band width, albeit without identifying them individually, I consider this weighs against finding the disclosure of the Chief Executive's precise remuneration figures set out in the TRPV as unreasonable. If the agency is required pursuant to the Public Finance and Audit Act to disclose his remuneration within such a restricted range, it could hardly be unreasonable to release the TRPV.
61. When these reporting obligations are linked with the government's transparency policy, reflected in the Circular, that Chief Executives are expected to reveal their remuneration details, I am of the opinion there is a strong public interest consideration favouring disclosure.
62. I have weighed the interests of the public in knowing the details of the Chief Executive's remuneration against the effects of disclosure on the Chief Executive. On balance, and for the reasons outlined, I consider it would not be unreasonable to release the TRPV of the Chief Executive.
63. I am therefore of the opinion that the TRPV details are not exempt pursuant to clause 6(1).

#### *Clause 16(2)*

64. Although not explicitly stated it appears that the agency is claiming that the TRPV is exempt pursuant to clause 16(2). In order for clause 16(2) to apply it must be established that the document:
  - (a) relates to an agency engaged in commercial activities; and
  - (b) contains matter the disclosure of which could prejudice the competitiveness of the agency in carrying on those commercial activities.

<sup>11</sup> *Lower Burdekin Newspaper Company Pty Ltd and Lower Burdekin Shire Council* [2004] QICmr 2 [27]

<sup>12</sup> Department of Treasury and Finance, *Accounting Policy Framework* APS 4.8

<sup>13</sup> Provided the CE has completed a full financial year of service.

65. The term 'commercial activities' is not defined in the FOI Act. I consider the FOI Act and the *Freedom of Information Act (Cth)* are to be regarded as materially similar, and as such I consider the definition of 'commercial activities' in the *Freedom of Information Act (Cth)* to be relevant:

Commercial activities ..means activities carried on by an agency on a commercial basis in competition with persons other than government or authorities of governments.<sup>14</sup>

66. I consider it clear that the agency is engaged in commercial activities.

67. The issue to be determined therefore is whether disclosure of the Chief Executive's TRPV would prejudice the agency's competitiveness in carrying out those commercial activities.

68. In response to the revised provisional determination the agency submitted:

- by 2018-2019 TAFE SA has been publicly advised by the Minister for Higher Education and Skills of a need to be at dollar-for-dollar parity with competing Registered Training Organisations (RTO's). This requirement is a consequence of the transition of WorkReady funding through to an open, contestable marketplace. In response to this loss of subsidy and increased contestability, TAFE SA is attempting to grow revenue through the development of major commercial opportunities in Australia and overseas in countries such as India, Malaysia, China and United Arab Emirates
- in the event that the TRPV is disclosed and Mr Murt commences legal action for breach of confidence TAFE SA is likely to suffer reputational harm. As these impacts are based on public perception and the high profile nature of media reports on confidentiality breaches, the harm caused is independent of success of any legal action. Even if Mr Murt elects not to bring action against TAFE SA there remains likely reputational harm to the organisation. The harm may take the form of diminished success in winning contracts, particularly overseas, due to TAFE SA being perceived as unable to honour the terms of its contracts. TAFE SA's commercial partners may also perceive that any confidential information they share with TAFE SA would be at risk of disclosure through Freedom of Information requests
- in addition, the disclosure of the TRPV may render TAFE SA more vulnerable to competitors' activities, including the potential for a competing entity to use Mr Murt's salary information to gain advantage in approaching him for employment with their organisation
- the impact of publishing leadership salaries on TAFE SA, due to its commercial income and expectations of commercial operation, is very different compared to other government agencies that are fully publicly funded or that are not subject to competition. The more that TAFE SA is able to operate like a private RTO (which would not disclose their leadership salary) in international and unsubsidised markets, the more TAFE SA's competitiveness against private RTOs will be enhanced.

69. I am not satisfied that the disclosure of Mr Murt's remuneration details could prejudice the competitiveness of the agency in carrying out its commercial activities. In particular:

- I appreciate that the agency would like to be able to operate like a private RTO, however it is not a private RTO, it is subject to statutory obligations as well as government policy considerations
- the agency is not submitting that the release of the TRPV would, *per se*, prejudice its competitiveness in carrying out its commercial activities. It is saying that if Mr

<sup>14</sup> *Freedom of Information Act 1982 (Cth)* section 7(3)(a).

- Murt were to commence legal action for breach of confidence, this may lead to reputational harm for the agency which may prejudice its competitiveness

    - whilst it is possible that if Mr Murt's remuneration details are disclosed that a competing entity would gain advantage in approaching Mr Murt for employment, I do not understand the agency to be suggesting that Mr Murt would be likely to breach his contract of employment if an alternative, more lucrative offer were to be made during the course of his contract. At the end of his contract Mr Murt is of course free to secure further employment as he sees fit.
70. I appreciate the agency's concerns in relation to its operations in the face of a future loss of subsidy, and that it is making efforts to develop commercial opportunities throughout Australia and overseas. However, any commercial operations engaged in by the agency must be conducted in accordance with its obligations under its current statutory and public policy context. This context currently includes obligations under the FOI Act. The agency is not an exempt agency and any contracts it enters into will be subject to the FOI Act.
71. I do not consider the TRPV is exempt pursuant to clause 16(2).

### Comment

72. I note with approval the recent publication on the agency's website of a 'Message from the Chair' in relation to disclosure:

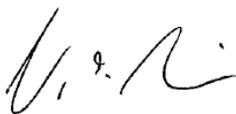
With the Board members' recent re-appointment for a three-year term, it has been determined that there will be disclosure of activities undertaken by those who represent the organisation and the consequent expenses they incur.

This step enables greater transparency around TAFE SA. Such transparency is a fundamental part of good governance and is consistent with an organisation that is ultimately accountable to a Minister and the South Australian taxpayer.

This level of disclosure must begin with the Chair and chief executive of TAFE SA.<sup>15</sup>

### Determination

73. In light of my views above, I reverse the agency's determination. This means that the TRPV is to be released to the applicant.



Wayne Lines  
SA OMBUDSMAN

5 April 2016

<sup>15</sup> <https://www.tafesa.edu.au/about-tafesa/disclosure> (at 10 March 2016).

## APPENDIX

### Procedural steps

Date	Event
3 February 2015	The agency received the FOI application dated 30 January 2015.
4 March 2015	The agency failed to determine the application within the 30 day period required by the FOI Act, <sup>1</sup> and is deemed to have refused access to the documents. <sup>2</sup>
11 March 2015	The agency received the internal review application dated 10 March 2015.
1 April 2015	The agency varied the determination.
16 April 2015	The Ombudsman received the applicant's request for external review dated 15 April 2015.
22 April 2015	The Ombudsman advised the agency of the external review and requested submissions and documentation.
4 May 2015	The agency provided the Ombudsman with its submissions and documentation.
17 June 2015	Ombudsman SA provided the provisional determination to the parties.
3 July 2015	The agency provided its submissions on the provisional determination.
24 July 2015	Ombudsman SA requested the agency to provide further submissions and evidence to support those submissions.
6 August 2015	Ombudsman SA advised the applicant of the request for further information and invited a further submission.
13 August 2015	The applicant requested an extension of time in which to provide a further submission. An extension was granted to 28 August 2015.
19 August 2015	The agency requested an extension of time to provide its further submissions and evidence.
20 August 2015	An extension of time to 28 August 2015 was granted to the agency.
28 August 2015	The agency provided to Ombudsman SA its further submission and evidence.

<sup>1</sup> *Freedom of Information Act 1991*, section 14(2).

<sup>2</sup> *Freedom of Information Act 1991*, section 19(2).

2 September 2015	The applicant advised Ombudsman SA that he had requested a copy of Mr Murt's contract including remuneration details from the Commissioner for Public Sector Employment ( <b>Commissioner</b> ).
16 October 2015	On request of Ombudsman SA the Office for the Commissioner provided a copy of the letter received from the agency dated 1 October 2015.
22 October 2015	The applicant provided a copy of correspondence received from the Commissioner dated 21 October 2015.
3 December 2015	At the request of Ombudsman SA State Records of SA provided a copy of its report on all contracts reported by the agency as having an approved confidentiality clause.
8 December 2015	Ombudsman SA provided a copy of the revised provisional determination to the parties.
16 December 2015	The agency requested an extension of time to respond to the revised provisional determination.
18 December 2015	An extension of time to 29 January 2016 was granted to the agency.
12 January 2016	Mr Murt provided his submission to the revised provisional determination.
29 January 2016	The agency provided its submissions to the revised provisional determination.
4 February 2016	Ombudsman SA requested a copy of the Minister's clause 13(6) notification to the Attorney-General as referred to in the agency's submission.
12 February 2016	Ombudsman SA requested from the Commissioner, and received, a copy of her correspondence to the agency dated 17 September 2015.
16 February 2015	The agency provided a copy of the Minister's letter to the Attorney-General dated 14 September 2015.