

## Determination

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

Applicant	The Hon Clare Scriven MLC
Agency	Department for Industry and Skills
Ombudsman reference	2019/01255
Agency reference	FOI2018/00032
Determination	The determination of the agency 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:

Mr Nicholas Handley's [the interested party] Curriculum Vitae.

### Background

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

### Jurisdiction

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

### Provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 5 June 2019. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
5. On the same day, my Office provided a copy of my proposed redactions to the document in issue.
6. The applicant and agency indicated that they did not oppose my proposed determination.
7. The interested party did not make further submissions in response to the provisional determination. The interested party did make earlier submissions. He indicated that he

agreed with the agency's initial determination to refuse access to the document. The interested party further stated:

The CV which I provided for Cabinet contains personal information above and beyond that which I disclose publicly.

To reiterate, I consider my CV is a personal document which is distributed purposely to trusted entities when requested. In contrast, my LinkedIn profile and the Handley Accounting Staff Profiles are public and are available to all.

## 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.<sup>1</sup>
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. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
11. 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.
12. Clause 1(1) of Schedule 1 of the FOI Act states:

### 1–Cabinet documents

- (1) A document is an exempt document–
  - (a) if it is a document that has been specifically prepared for submission to Cabinet (whether or not it has been so submitted); or
  - (b) if it is a preliminary draft of a document referred to in paragraph (a); or
  - (c) if it is a document that is a copy of or part of, or contains an extract from, a document referred to in paragraph (a) or (b); or
  - (e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet; or
  - (f) if it is a briefing paper specifically prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet.
- (2) A document is not an exempt document by virtue of this clause–
  - (a) if it merely consists of factual or statistical material (including public opinion polling) that does not–
    - (i) disclose information concerning any deliberation or decision of Cabinet; or
    - (ii) relate directly to a contract or other commercial transaction that is still being negotiated; or
  - (ab) merely because it was attached to a document described in subclause (1); or
  - (b) if 20 years have passed since the end of the calendar year in which the document came into existence.

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

- (2a) A document is not an exempt document by virtue of this clause if–
- (a) the document has been submitted to Cabinet by a Minister; and
  - (b) a Minister has certified that Cabinet have approved the document as a document to which access may be given under this Act.
- (3) In this clause, a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee of Cabinet.

13. Clause 6(1) of Schedule 1 of the FOI Act states:

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).

14. Clause 13(1)(a) of Schedule 1 of the FOI Act states:

A document is an exempt document ... if it contains matter the disclosure of which would found an action for breach of confidence...

### Documents in issue

15. The document at issue is the *curriculum vitae* of the interested party (**the document**).

### Issues in this review

16. The issues in this review are:
- whether the agency has justified its determination to refuse access to the document on the basis of clause 1 of Schedule 1 of the FOI Act
  - whether the agency has justified its determination to refuse access to the document on the basis of clause 6(1) of Schedule 1 to the FOI Act
  - if not, whether access should be refused on the basis of other clauses set out in Schedule 1.

### Consideration

17. At first instance, the agency refused the application for access on the basis that it was an exempt document under clause 1 of Schedule 1 of the FOI Act.
18. On internal review, the agency varied its decision and refused access pursuant to both clause 1(1) and clause 6(1) of Schedule 1 of the FOI Act.
19. I will consider each clause in turn.

#### *Clause 1(1)*

20. In its determinations, both at first instance and on internal review, the agency did not indicate under which subclause of clause 1 of Schedule 1 of the FOI Act the agency considered the document to be exempt. The agency submitted to my Office on 16 May 2019 that the document, if disclosed, would disclose a deliberation or decision of Cabinet. It claimed that the document was exempt pursuant to clause 1(1)(c) and (e) of Schedule 1 of the FOI Act.
21. Transmission of a document for the purpose of it being provided to Cabinet is not the same as preparing a document specifically for Cabinet. Further, merely labelling the document attached to Cabinet submissions as a 'Cabinet document' also does not attract to the document the quality that would make it exempt.

22. There is no indication this document was in whole or part prepared specifically for submission to Cabinet nor does it appear to be an extract from or preliminary draft of a document of that nature. In fact, the document has the character of an ordinary generic *curriculum vitae*. Therefore I consider that paragraphs 1(1)(a),(b) and (c) of Schedule 1 do not apply.
23. As noted, the agency claimed that clause 1(1)(e) applies. However, nothing in the document indicates what deliberation existed in Cabinet. Rather, as I already noted, the document is of a generic nature. The document simply reveals the employment credentials and past and present vocations of the interested party as well as his own assessments of his personal traits. The document does not contain any reference to the position, to which he eventually was appointed. No reference is made in the document that would disclose that any particular subject matter was considered by Cabinet.
24. Further clause 1(2)(ab) indicates that a document is not exempt simply because it is attached to a document that is exempt pursuant to clause 1(1). Clause 1(2)(ab) presupposes that though something may be attached to a submission to Cabinet, it will not necessarily be considered to disclose deliberation of Cabinet. Therefore, clause 1(e) should not be read so broadly as to include mere attachments, without regard to their contents.
25. Consequently, it cannot be that merely because the document was attached to a submission to Cabinet, that it is exempt. Nothing in this document goes beyond the task of a *curriculum vitae* to state anything about what might be discussed by Cabinet. The document is merely an attachment to a submission to Cabinet.
26. I therefore do not consider that any part of clause 1(1) of Schedule 1 of the FOI Act applies to the document.

*Clause 6(1)*

27. The agency has claimed that the document is exempt under clause 6(1) of Schedule 1 of the FOI Act. This clause requires two elements to enliven the exemption. First, the document must contain matter that discloses information concerning the personal affairs of any person. Second, that disclosure of the matter would be unreasonable.
28. Section 4(1) of the FOI Act states:

*personal affairs* of a person includes that person's-

  - (a) financial affairs;
  - (b) criminal records;
  - (c) marital or other personal relationships;
  - (d) employment records;
  - (e) personal qualities or attributes,

but does not include the personal affairs of a body corporate;
29. I have viewed the document. It is clear that the information within the document relates to the interested party's 'employment records' and his own assessment of his 'personal qualities or attributes'. This meets the definition of personal affairs for the purpose of clause 6(1).
30. The applicant made submissions intended to cast doubt on whether the document related to the personal affairs of a person, which she did by referring to my previous determinations regarding public sector or council employees. I however do not accept that these apply. Not one of these cases concerned the application of clause 6(1) to a *curriculum vitae*.

31. The matter of *Houlahan and Environmental Protection Authority*<sup>2</sup> dealt only with the alleged personal affairs of persons in their capacity as employees of councils. Employment in the public sector and the local government sector is distinct from the employment records of persons employed in the private sector. In this case, the interested party's employment records relate to his private sector employment experience.
32. In the matter of *Central Adelaide Local Health Network*,<sup>3</sup> I considered the application of clause 6(1) to the names of 'agency staff members' mentioned in a staff survey and found that their names were exempt. I said:
- 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.  
[emphasis added]
33. An example of 'information about a person in a work context' may include a mere reference to that person carrying out their functions for which they were employed.
34. A *curriculum vitae* of a successful candidate for employment ordinarily forms a part of the agency's file on that employee. It goes beyond a mere outline of that person's employment as it is a submission by the applicant to place themselves in a positive light. There is a competitive element to this, as successful candidates are ordinarily selected against unsuccessful candidates. In a *curriculum vitae* submitted for a given employment application, it is likely that there are similarities or identical portions that have or will be submitted in other employment applications during that candidate's career. It has, therefore, a personal quality, quite unlike a mere reference to a person in their work context.
35. In light of the above, I consider that the document contains matter that concerns the personal affairs of the interested party.
36. I turn to consider whether disclosure of the document containing the personal affairs would be unreasonable.
37. I note that the applicant made significant reference to the objects of the FOI Act in her submissions as to why the exemption should not be applied. I understand these submissions to address the question of reasonableness of disclosure. The FOI Act sets out to achieve its objects by balancing the public interest of disclosure with 'restrictions... consistent with the public interest... and the preservation of personal privacy'<sup>4</sup> (emphasis added). Clause 6 of Schedule 1 of the FOI Act is one of the means by which the FOI Act achieves this balance between those interests in favour of disclosure and those interests in privacy that are against it.
38. The exemption is made out where disclosure of the information would be unreasonable. Unreasonable disclosure nevertheless involves public interest considerations,<sup>5</sup> such as protection of personal privacy (the FOI Act generally does not restrict the use of information once it is released), the objects of the legislation being satisfied, and ensuring transparency and accountability within representative government.

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<sup>2</sup> [2017] SAOmbFOI 1.

<sup>3</sup> [2016] SAOmbFOI 7, at para 58 to 61.

<sup>4</sup> *Freedom of Information Act 1991* s 3(2)(b).

<sup>5</sup> *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 249 at 438 per Lockhart J.

39. In considering unreasonableness, the South Australian District Court has held that a decision maker should consider:

...not merely the content of the information which is sought to be disclosed, although in some circumstances that may be sufficient, but, as well, its relationship with other material known to the applicant, its level of sensitivity, the attitude of the person affected by the disclosure, the circumstances in which the information was originally obtained, whether it was already known to the applicant, the nature of the applicant's interest in it and any disclosed intentions with respect to its use.<sup>6</sup>

40. Therefore, deciding whether the disclosure of 'personal affairs' information would be unreasonable requires consideration of all the circumstances, including:

- the nature of the information that would be disclosed
- the circumstances in which the information was obtained
- the likelihood of the information being information that the person concerned would not wish to have disclosed without consent
- whether the information has any current relevance.<sup>7</sup>

41. I have considered these principles in assessing the reasonableness of disclosure of the information claimed as exempt. Having regard to the nature of the information and the circumstances in which it came to be held by the agency, I consider that partial disclosure of the document is reasonable.

42. The agency was provided the documents by the Office of Minister Pisoni, who presumably received the same for the interested party's application to be placed on the Construction Industry Training Board. Employment applications are usually treated confidentially, however the document contains information which does not appear to have been considered by the interested party to be sensitive, private or confidential and takes into account that this employment application is for a public office, one which may attract scrutiny.

43. The information is of current relevance in the community. My Officer has located three newspaper articles on the subject. The subject matter directly relates to the employment details and qualifications of the interested party who was appointed to the Construction Industry Training Board. Nevertheless, I do not consider that the matter is of sufficient value to the public so as to overcome the FOI Act's intention to protect personal affairs.

44. While the matter relates to personal affairs, the nature of the employment information is of a limited personal nature. My Office has identified publicly available information of the same nature, which appears to have been uploaded into a publicly available professional profile by the interested party himself.

45. When this publically available information was put to the interested party by my Office, he submitted:

The CV which I provided for Cabinet contains personal information above and beyond that which I disclose publicly.

To reiterate, I consider my CV is a personal document which is distributed purposely to trusted entities when requested. In contrast, my LinkedIn profile and the Handley Accounting Staff Profiles are public and are available to all.

<sup>6</sup> *Treglown v SA Police* [2011] SADC 139, paragraph [133] quoting *Re Chandra and Minister for Ethnic Affairs* (1984) 6 ALD 257 at 259.

<sup>7</sup> *Treglown v SA Police* [2011] SADC 139, paragraph [133] referring to *Re Chandra and Minister for Ethnic Affairs* (1984) 6 ALD 257 at 259.

46. The document contains the heading 'private and confidential'.
47. I consider the notion that releasing information into the public domain in one context but contending that it would be unreasonable to disclose that same information into the public domain in another context to be inconsistent. I consider that if information is in the public domain, in particular where information is placed there by the person it concerns, the information will not remain exempt. I therefore consider that the document should be released in part to disclose those parts of the *curriculum vitae* that contain information available in the public domain.
48. For the above reasons, I consider that clause 6(1) of the FOI Act does exempt the information from disclosure that has not been released into the public domain.
49. I consider that the document should be partially released with redaction of information not in the public domain.

### *Clause 13*

50. I have also considered whether clause 13 applies. I do not accept that clause 13 applies to the portions that I have considered to be not exempt, namely the portions already available in the public domain. This is because information available in the public domain cannot have a quality of confidentiality.
51. Had I not considered the balance of the document to be exempt pursuant to clause 6(1) of Schedule 1 of the FOI, I would nonetheless have concluded that clause 13(1)(a) applied, as I consider that the information was received in a situation of confidence.
52. To succeed in claiming clause 13(1)(a) as the basis for refusing access to a document it is necessary to demonstrate that the relevant document contains matter 'the disclosure of which would found an action for breach of confidence'. The term 'would' should be read as 'could'.<sup>8</sup>
53. The Administrative Appeals Tribunal (AAT) has had cause to consider section 45 of the Freedom of Information Act 1982 (Cth),<sup>9</sup> which is in substantially the same terms as clause 13(1)(a) of the FOI Act (SA). After consideration of the authorities, Deputy President Forgie of the AAT determined that an action for breach of confidence can only mean an action for equitable breach of confidence.<sup>10</sup> In my view, the AAT decision has persuasive value.
54. An equitable obligation of confidence is a duty not to disclose information because the information was given and received in circumstances which would make it unconscionable for the confidant to disclose the information in a way the confider has not authorised. A number of criteria must be satisfied:<sup>11</sup>
- the information must be capable of being identified with specificity
  - the information must have the necessary quality of confidence
  - the information must have been received in circumstances which import an obligation of confidence
  - there must be actual or threatened misuse of the information.

<sup>8</sup> *Bray and Smith v Workcover* (1994) 62 SASR 218,226 to 227.

<sup>9</sup> *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244.

<sup>10</sup> *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244, [163].

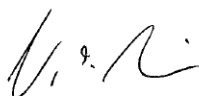
<sup>11</sup> *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150 (Unreported, Judge Brebner, 9 December 2010), [38], affirming the test from *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 443. The test was also endorsed in *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244, [165].



55. I will therefore consider whether the criteria for founding an equitable breach of confidence can be established.
56. The contents of the documents are not common knowledge. The information has not entered the public domain, aside from the publically available information I have already identified as not being confidential. For this reason, I am of the view that the information contained in the document has the quality of confidence.
57. I am satisfied that the circumstances in which the agency received the documents imported an obligation of confidence. The agency received those documents from the Office of the Minister for Industry and Skill, the Honourable Minister Pisoni, for the purpose of attachment to the submissions to Cabinet. I also have regard to the fact that the Honourable Minister received the documents in circumstances that imported an obligation of confidence.
58. I am satisfied that where the other grounds for confidentiality established, release under the FOI Act would constitute a misuse.
59. I accept that disclosure of the document would cause detriment to the interested party. I note that the Deputy President Forgie of the AAT commented that detriment:
- ... may be that disclosure of information relating to his affairs will expose his actions to public discussion and criticism ... [or] the disclosure itself in circumstances in which the disclosure is neither consented to nor otherwise justified.<sup>12</sup>
60. I also have regard to the desire of the applicant to criticise the appointment of the interested party to the Construction Industry Training Board. A member of this board is entitled to 'allowances and expenses' as determined by the Minister after consultation with the Commissioner for Public Sector Employment.<sup>13</sup> This satisfies the requirement that the disclosure would cause detriment to the confider.
61. I therefore consider that disclosure of the portions of the document that are not in the public domain 'would found an action for breach of confidence' and those portions not in the public domain are therefore exempt pursuant to clause 13(1)(a) of Schedule 1 of the FOI Act.

### Determination

62. In light of my views and consideration of submissions from the parties, I vary the agency's determination.
63. Access is to be given to the document in the same manner as the example my Legal Officer sent to the agency and interested party with my provisional determination.



Wayne Lines  
SA OMBUDSMAN

5 July 2019

<sup>12</sup> *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244 [174].

<sup>13</sup> *Construction Industry Training Fund Act 1993* (SA) section 10.



## APPENDIX 1

### Procedural steps

Date	Event
7 December 2018	The agency received the FOI application.
13 December 2018	The agency determined the application.
7 January 2019	The agency received the internal review application.
23 January 2019	The agency confirmed the determination.
5 February 2019	The Ombudsman received the applicant's request for external review.
6 February 2019	The Ombudsman advised the agency of the external review and requested submissions and documentation.
11 April 2019	An Officer of the Ombudsman contacted the agency to ascertain the status of the agency's required response. The Officer of the Ombudsman resent the request for submissions and documentation dated 6 February 2019.
26 April 2019	The agency provided the Ombudsman with its submissions and documentation.
5 June 2019	The Ombudsman issued his provisional determination and invited submissions from the parties.