

Determination

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

Applicant	Ms Sowaibah Hanifie
Agency	Department of Human Services
Ombudsman reference	2019/02090
Agency reference	DHS/18/08472
Determination	The determination of the agency is confirmed.

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (the **FOI Act**) the applicant requested access from the agency in the following terms:

In 2015 the federal government funded living safe together programs which are run by each state. They are aimed to counter violence [sic] extremism in potential offenders. I'm looking to find out the number of people in SA who have been referred to these programs, and if possible whether 2 teenagers accused of plotting a Riverland massacre, and a 22 year old university student charged with terrorism offences were referred to these programs.

Background

2. For ease of reference, the procedural steps relating to the application are set out in the appendix.
3. The Living Safe Together Intervention Program (the **LSTIP**) is one of several national programs aimed at countering radicalisation and violent extremism. The LSTIP website states that:

The Living Safe Together Intervention Program ensures that Australian State and Territory agencies have the capacity to identify, assess and deliver individualised plans for people who are at risk of becoming involved with violent extremism, to reconnect them with their family, friends and local community.¹

4. In the South Australian context, the LSTIP is managed by the agency, with funding from the Commonwealth Department of Home Affairs (**DHA**).
5. In the course of this review, I have had regard to the purpose of the documents in issue in the context of the LSTIP. However, as the agency claims that revealing that purpose

¹ Australian Government, *Programs*, (17 June 2019) Living Safe Together: Building community resilience to violent extremism <<https://www.livingsafetogether.gov.au/about/Pages/programs.aspx>> (accessed 17 June 2019).

would reveal information that it claims is exempt,² I am mindful of my obligations under the FOI Act³ and do not intend to describe or discuss that specific purpose.

Jurisdiction

6. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.
7. While the application for internal review was made beyond the 30 day statutory time frame, the agency accepted and acknowledged the application. The application for external review was made within the statutory time frame following the deemed refusal of the internal review application.

Provisional determination

8. I provided my tentative view to the parties, by my provisional determination dated 23 October 2019. I informed the parties that subject to my receipt and consideration of submissions from the parties, I proposed to confirm the agency's determination.
9. The agency responded to my provisional determination, stating that it had no further submissions.⁴ The applicant did not respond to my provisional determination.

Relevant law

10. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.⁵
11. 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.
12. The agency did not determine the original application or the internal review application within the periods of time required by the FOI Act. As a result, the FOI Act deems that the agency refused access to the documents in issue.⁶ My external review therefore considers the applicability of the exemption clauses that were claimed by the agency in the course of this external review.
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.

Documents in issue

15. The agency identified eight documents within the scope of the application but considered that a large portion of each is not within scope. I am unable to consider issues of scope in the course of an external review⁷ and my determination is confined to the information that the agency has considered to be within the scope of the application.

² Letter from the agency to my Office dated 10 September 2019.

³ *Freedom of Information Act 1991*, section 39(15).

⁴ Email from the agency's accredited FOI officer to my officer, 11 November 2019.

⁵ *Freedom of Information Act 1991*, section 12.

⁶ *Freedom of Information Act 1991*, section 19(2) and section 29(5).

⁷ *El Shafei and Central Adelaide Local Health Network* [2017] SACAT 5 (13 April 2017).

Issues in this review

16. The issue to be determined in this external review is whether the agency has, by way of its submissions to my Office, justified its deemed refusal to provide access to the documents in issue.

Consideration

Clause 5 – Intergovernmental or local government relations

17. In its submissions to my Office, the agency claimed that the documents are exempt by virtue of clause 5(1)(a)(i) and 5(1)(a)(ii). Clause 5 provides:
- (1) A document is an exempt document if it contains matter–
 - (a) the disclosure of which–
 - (i) could reasonably be expected to cause damage to intergovernmental relations; or
 - (ii) would divulge information from a confidential intergovernmental communication; and
 - (b) the disclosure of which would, on balance, be contrary to the public interest.
18. The agency’s submissions considered the two clauses together as, in its opinion, damage to intergovernmental relations was reasonably expected to result from the disclosure of confidential communication. I consider that the same approach is appropriate in my external review to avoid repetitive reasoning, but I have nevertheless considered whether the clauses may be individually satisfied.

Damage to intergovernmental affairs

19. Damage to intergovernmental relationships was considered by the Full Federal Court in *Arnold v Queensland*⁸ and I find the Court’s reasoning to be persuasive in this matter. Therein, Wilcox J considered that:

...the words “relations between the Commonwealth and a State” refer to the total relationship between the Commonwealth and the relevant State. As is essential in a federation, there exists a close working relationship, over a wide spectrum of matters and at a multitude of levels, between representatives of the Commonwealth and representatives of each State. The word ‘relations’ includes all of those contacts.⁹

20. Justice Wilcox also commented on the requirements of a ‘reasonable expectation’:

...the words “could reasonably be expected” do not require the demonstration of probability of damage. In *Attorney-General’s Department v Cockcroft* (1986) 64 ALR 97 a Full Court considered the meaning of the words “could reasonably be expected to prejudice the future supply of information”... Bowen CJ and Beaumont J said that those words “require a judgement to be made by the decision maker as to whether it is reasonable, as distinct from something that it is irrational, absurd or ridiculous...”¹⁰

⁸ *Arnold on behalf of Australians for Animals v The State of Queensland; The Australian National Parks and Wildlife* [1987] FCA 148

⁹ *Arnold on behalf of Australians for Animals v The State of Queensland; The Australian National Parks and Wildlife* [1987] FCA 148, per Wilcox J at [32].

¹⁰ *Arnold on behalf of Australians for Animals v The State of Queensland; The Australian National Parks and Wildlife* [1987] FCA 148, per Wilcox J at [33].

21. I am satisfied that the agency's involvement in the LSTIP requires ongoing relationships with federal agencies, as well as agencies of other States and other agencies in South Australia.
22. The phrase 'damage' is not qualified by phrases such as 'substantial', and has been held by the Administrative Appeals Tribunal to extend to non-monetary damage, such as a loss of confidence or trust between governments.¹¹ Loss of trust might result in prejudice to the flow of information or the impairment of proper administration of joint projects.¹² However, damage to relations has also been considered not to include, on its own, the modification of services provided by one department to another¹³ and should extend beyond an 'upset in relations in the short term'.¹⁴
23. In the context of a relationship between the Commonwealth and the state of Queensland, the then Deputy President of the AAT observed in *Guy v the Department of Transport* that:

It would not, in my view, be an exaggeration to say that the relationship between the units of a Federation can be quite as complex and difficult as that between nation states, and that trust and confidence are vital to the nourishment of bodies... which are examples of Federal/State relationships based on mutual cooperation and not merely an assertion of legislative power.

It follows that I consider that a disclosure of the [document] against the wishes of the Government of Queensland could reasonably be expected to cause damage to relations between the Commonwealth and the State of Queensland.¹⁵

24. In regard to the objections of agencies, the Western Australian Information Commissioner in *Ravlich v Department of Productivity and Labour Relations* concurred with the conclusion of the AAT and observed that the reasonableness of the objections to disclosure were not relevant in assessing the likely impact of disclosure.¹⁶ That is, an agency's strong objection to disclosure, however irrational the views underpinning those objections, must be considered in assessing whether disclosure could reasonably be expected to damage intergovernmental relations.
25. In my view, the objection of an agency cannot alone be determinative of whether disclosure could reasonably be expected to damage the relations between the parties. In reaching this conclusion, I have had regard to division two of the FOI Act, which does not cast objections in a determinative light when an agency or review body consults with an interested party. While interstate and Federal agencies are not necessarily consulted in accordance with division two when clause five is claimed, I consider that this approach to external party objections is consistent with the intentions of the FOI Act.

Confidential intergovernmental communications

26. When determining whether communications between governments occur on a confidential basis, the following factors may be relevant:
- the nature of the information and its sensitivity¹⁷
 - the body from which it emanates and the relationship between the parties

¹¹ *Re Maher and Attorney General's Department* [1985] AATA 180 (17 July 1985).

¹² Moira Paterson, *Freedom of Information and Privacy in Australia: Information Access 2.0*, (Lexis Nexis Buttersworth, 2nd ed, 2009), 469.

¹³ *Re Cosco Holdings Pty Ltd and Department of Treasury* (1988) 51 ALD 140, 151.

¹⁴ *Haneef and Department of Police* (210751, 24 August 2010), at [47], available at <https://www.oic.qld.gov.au/decisions/haneef-and-department-of-police-210751>.

¹⁵ *Guy v Department of Transport* (1987) 12 ALD 358 at [14].

¹⁶ *Ravlich v Department of Productivity and Labour Relations* [2000] WAICmr 58 at [22].

¹⁷ *Smith, Kline and French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 at 303.

- the circumstances in which the communication took place.¹⁸
27. In the context of an international governmental relationship, President Davies in *Re Maher and Attorney-General's Department* observed that:
- Moreover, as I have said, communications may be made not under any express agreement or even any necessarily implied agreement as to confidentiality but pursuant to a general understanding that communications of that nature will be treated in confidence.¹⁹
28. The approach in *Maher* appears to have been recently adopted by the South Australian District Court in *Hall v SA Police*²⁰ though, again, that matter concerned an international relationship. Nevertheless, I consider that the approach in *Maher* is relevant and useful in this instance. As such, it is necessary, in my view, to consider the full circumstances surrounding the exchange of the information, and whether the information in particular was provided and received under such circumstances.

Consideration

29. In its submissions to my Office, the agency provided a copy of guidelines used by agencies involved in the LSTIP. Those guidelines prescribe an approach for sharing information about the LSTIP in the public domain.
30. The agency argued that, in accordance with the guidelines, there was an expectation that the agencies involved in the LSTIP would not release information about the number of referrals, and that this expectation had been reiterated throughout the life of the program. As such, the agency expected that releasing the information sought by the applicant would damage its relationships with its Federal and interstate counterparts.
31. Having regard:
- to the guidelines
 - the submissions of the agency
 - the agency's consultation with its counterparts
 - the sensitivity of the information
 - the purpose of the LSTIP
 - and the purpose of the documents in issue,
- I am satisfied that the information arose in the course of confidential intergovernmental communication and that releasing the documents would divulge that information.
32. With this in mind, I turn to consider whether disclosure of the documents could be reasonably be expected to cause damage to intergovernmental relations. In this respect, I have had regard to the following:
- the LSTIP's preventative approach to youth radicalisation in the context of counter-terrorism and de-radicalisation efforts
 - the aim of the LSTIP to provide a consistent, national approach for State enactment and operation
 - the sensitivity of the circumstances surrounding the program and the information itself
 - the expectations of confidentiality between the agencies involved in the LSTIP.

¹⁸ *Re Maher and Attorney-General's Department* [1985] AATA 180 (17 July 1985) at [20]. The approach in *Re Maher* has recently been applied by the South Australian District Court in *Hall v SA Police* [2019] SADC 5 at [255].

¹⁹ *Re Maher and Attorney-General's Department* [1985] AATA 180 (17 July 1985) at [25].

²⁰ *Hall v SA Police* [2019] SADC 5 at [255].

33. I am satisfied that release of the documents could result in a loss of trust or confidence between the agency and its interstate counterparts given the expectation of confidence between the parties in the conduct of the LSTIP. I am also satisfied that disclosure could reasonably be expected to cause damage to intergovernmental relations beyond a short term upset.
34. For a document to be properly exempt by virtue of clause 5, the FOI Act also requires that disclosure of the information would, on balance be contrary to the public interest. I consider that public interest factors in favour of disclosure are as follows:
- contributing to public awareness and informing debate on an issue of significant and ongoing public interest
 - that expectations of confidentiality are 'always subject to the provisions of the FOIA and cannot be affected by any representation ... that greater confidentiality might be accorded to material than properly reflects the effect of the FOIA'²¹
 - public confidence in anti-radicalisation measures in the context of countering violent extremism.
35. In *Haneef and Department of Police*, former Queensland Information Commissioner Kinross considered public interest factors in the context of law enforcement and anti-terrorism efforts and observed:
- In favour of disclosure are significant issues of public interest including transparency, accountability, the proper enforcement of the criminal law and the maintenance of public confidence in the police services.
- The significance of these considerations in this matter is relevantly captured by Moira Paterson when she stated:
- Freedom of information laws have an important role to play in ensuring that security organisations do not exceed their extensive powers in an era which had been notable for the enactment of wide-ranging anti-terrorism laws...*²²
36. The Commissioner's summary, and Moira Paterson's comments, are relevant in this matter and I have had regard to them when considering public confidence in anti-radicalisation measures.
37. I have also considered the following factors against disclosure:
- the agency's submission that 'counter-terrorism measures rely on a joint effort between federal and state governments and any damage caused to those relationships may affect the success of such measures'
 - the potential identification of individuals involved in or referred to the program, or who have no connection to the program, contrary to the protection of their personal privacy²³
 - the agency's submissions that potential identification of community organisations involved with the program could foster a sense of distrust for the vulnerable young people that the program seeks to assist and hinder the effectiveness of the program
 - the disclosure of the information, given its limited nature, may result in confusion or unnecessary speculation that would be contrary to the public interest given the sensitive circumstances of the program
 - the particular sensitivity of measures aimed at countering violent extremism.

²¹ *Ipex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, 80.

²² *Haneef and Department of Police* (210751, 24 August 2010), at [47], available at <https://www.oic.qld.gov.au/decisions/haneef-and-department-of-police-210751>, citing Moira Paterson, *Freedom of Information and Privacy in Australia* (2005) 325.

²³ *Freedom of Information Act 1991*, section 3(2)(b).

38. The balancing of public interest factors in this matter is finely balanced. Public interest and confidence in the preventative and anti-radicalisation measures, including public interest in potential excess by law enforcement, are particularly strong factors in favour of disclosure. Nevertheless, while I recognise the value of public confidence and awareness, I consider that the factors against disclosure outweigh those in favour in this instance. In forming this conclusion, I have had particular regard to the vulnerability of the young people who are the intended beneficiaries of the LSTIP, and the risk of distrust and isolation, thereby hindering the program's effectiveness.
39. As such, I am satisfied that the documents in issue are properly exempt by virtue of clauses 5(1)(a)(i) and 5(1)(a)(ii). I do not consider it necessary to consider the remaining clauses claimed by the agency in its submissions to my Office. I advised the parties of this intention in my provisional determination and did not receive any submissions to suggest a different approach.

Determination

40. In light of my views above, I confirm the agency's deemed refusal to release the documents in issue, on the basis that they are exempt by virtue of clauses 5(1)(a)(i) and (ii).



Wayne Lines
SA OMBUDSMAN

28 November 2019

APPENDIX 1

Procedural steps

Date	Event
20 July 2018	The agency received the FOI application dated 20 July 2018.
21 August 2018	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
18 September 2018 ³	The agency informally requested an extension from the applicant to provide a determination after its deemed refusal. The request was granted by the applicant on 19 September 2018.
4 February 2019 ⁴	The agency received and accepted the internal review application dated 25 January 2019.
18 February 2019 ⁵	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ⁶
25 February 2019	The Ombudsman received the applicant's request for external review.
25 February 2019	The Ombudsman advised the agency of the external review and requested submissions and documentation.
9 April 2019	The agency provided the Ombudsman with its submissions and documentation.
23 October 2019	The Ombudsman issued his provisional determination and invited submissions from the parties.
11 November 2019	The agency responded to the Ombudsman's provisional determination.

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

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

³ In my provisional determination, the date was incorrectly listed as 28 September 2018.

⁴ In my provisional determination, the date was incorrectly listed as 8 February 2019.

⁵ In my provisional determination, the date was incorrectly listed as 22 February 2019.

⁶ *Freedom of Information Act 1991*, section 29(5).