

## Determination

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

Applicant	Mr Blair Boyer MP
Agency	Central Adelaide Local Health Network
Ombudsman reference	2020/00077
Agency reference	CALHN/FOI/1819/061
Determination	The determination of the agency is varied.

## REASONS

### Application for access

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

All files, reports, notes, emails, investigations and documents held by CALHN relating to Mr Claus Hartmuth BURG (DOB: 13/02/1949). Date 01 November 2018 to date (inclusive).

### Background

2. For ease of reference, the procedural steps relating to the application 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 30 July 2020. 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. As both the applicant and agency stated that they had no submissions to make, my views are the same as those expressed in my provisional 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.<sup>1</sup>

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

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. The following provision is of relevance to this external review:

#### **9—Internal working documents**

- (1) A document is an exempt document if it contains matter—
  - (a) that relates to—
    - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
    - (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and
  - (b) the disclosure of which would, on balance, be contrary to the public interest.
- (2) A document is not an exempt document by virtue of this clause if it merely consists of—
  - (a) matter that appears in an agency's policy document; or
  - (b) factual or statistical material.

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 that 138 documents (1080 pages) were discovered. The agency stated that information out of scope was removed.
11. In the determination issued to the applicant and in its submissions to my Office, the agency did not identify the number of documents that exemptions were applied to.
12. Rather the agency specified that 430 pages were released in full, 477 pages were released in part, and 88 pages were exempt in full. This would also mean that 85 pages were considered out of scope.
13. The schedule of documents referring to the 138 documents is itself 86 pages and has not been presented in such a way that makes it easily apparent which documents are in issue.
14. In its determination and submissions the agency stated that 313 pages were partially exempt pursuant to clause 6(1) as they contained information concerning the personal affairs of a person.
15. 88 pages in full and 364 pages in part were considered exempt as they contained matter related to the internal working of the agency and were exempt pursuant to clause 9(1).
16. The applicant has identified that he is seeking external review specifically of the clause 9(1) exemptions.

## Issues in this review

17. The issue for me to determine is whether the agency has justified its determination that the documents contain information exempt pursuant to clause 9(1).

## Consideration

18. From the outset it is necessary to address the background details of this external review.
19. The applicant, Mr Blair Boyer, made his FOI application acting as an agent on behalf of Mr Claus Burg.
20. The application for the documents under review were to assist Mr Burg through his misdiagnosis of cancer at the Queen Elizabeth Hospital. The application was made on 12 June 2019 and unfortunately Mr Burg passed away on 27 September 2019.
21. Mr Burg was survived by his wife Ms Lynda Burg. Both the applicant and Ms Lynda Burg maintain an interest in accessing the documents under review.
22. As noted above the agency's schedule of documents, due to its size, was unhelpful in identifying specific documents. This was exacerbated by the fact that parts of documents and certain pieces of information were duplicated frequently.
23. There are also numerous inconsistencies in how the agency has applied exemptions. For instance at page 65 a single paragraph has been redacted. In other instances throughout the documents where the same information has appeared, the preceding two paragraphs have also been redacted.
24. Additionally a document starting from page 290 was deemed out of scope, however the same document was considered in scope elsewhere in the determination.
25. The overall outcome is that the submissions by the agency have not been helpful in assisting my Office in conducting this external review.
26. However the sole clause under consideration for this review is clause 9(1). Accordingly I have formed a view as to the exempt status of the information based on the submissions before me.

### *Clause 9(1)(a)*

27. The scope of clause 9(1)(a) is wide, particularly given the words 'that relates to'.
28. The 'opinion, advice or recommendation', or 'consultation or deliberation' must nevertheless have been obtained, prepared or recorded in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency.
29. The 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.<sup>2</sup> 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.<sup>3</sup>

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<sup>2</sup> Freedom of Information Act 1991, section 23(2)(f).

<sup>3</sup> 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>.

30. In its submissions, both in the determination released to the applicant and to my Office, the agency did not necessarily identify how the redacted information relates to the decision making functions of the agency.
31. There are instances where it is not clear how the redacted information was either an opinion, advice, recommendation, consultation or deliberation that was obtained, prepared or recorded for the purpose of the decision making functions of the agency. An example of such an instance occurs on page 286.
32. However as the majority of the redacted information relates to internal discussions in response to Mr Burg's misdiagnosis, and that those discussions relate to how the agency should handle the issue moving forward, I am satisfied that the majority of exempted information relates to the agency's decision-making functions.

*Clause 9(1)(b)*

33. In order for an internal working document to be an exempt document, the disclosure of the document must, on balance, be contrary to the public interest.
34. I remind the agency that it must engage in a 'public interest balancing process' in applying the public interest test.<sup>4</sup> Merely satisfying the initial criteria in an exemption clause with a public interest test under the Act, is not enough to satisfy the test that disclosure would, on balance, be contrary to the public interest. Agencies should always turn their mind to the objects of the Act, to extend as far as possible, the rights of the public to obtain access to information held by the government. This issue was also discussed in the Ombudsman's 2014 FOI audit.<sup>5</sup>
35. In the internal review determination released to the applicant, the agency provided the following as its consideration as to whether disclosure would, on balance, be contrary to the public interest:

Whilst I agree that the *exempt information* may be of some interest to the public, I do not consider the release would seriously benefit to the public [sic]. Providing information about possible shortcomings within government can help bring about improvement and change however in this matter I consider the release of *the information* could impair the integrity and viability of the decision making process.

[Emphasis by agency]

36. I do not consider that this statement indicates that a satisfactory balancing of interests took place. In the circumstances of the application, it is disingenuous to suggest that there *may be some* interest to the public in the information sought. To my mind there is a substantial public interest involved in this matter. There is a general public interest in a member of the public being granted access to information of significance to them, and this is especially so when that information relates to the circumstances behind a serious medical issue.
37. I also draw attention to the requirement that a decision maker needs to come to the conclusion that disclosure would, on balance, be contrary to the public interest. To suggest that release of information *could* impair an agency's decision making process and that factor alone is enough to conclude that release *would* be contrary to the public interest is an unsatisfactory conclusion.

<sup>4</sup> Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA (1997) 192 LSJS 54, 70.

<sup>5</sup> See 'An audit of state government departments' implementation of the *Freedom of Information Act 1991* (SA), May 2014, Part 7B, 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>.

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38. In the agency's submission to my Office in response to this review, it identified the following public interest factors in favour of disclosure:
- fulfilling the objects of the FOI Act, including the public interest in promoting openness and accountability of government agencies.
  - the public interest in a patient being able to gain access to information pertaining to themselves
  - the public interest in decisions of government being fair and transparent.
39. Factors identified in favour of non-disclosure included:
- the impact draft documents could have on a patient and/or their family that were considerations, deliberations and personal opinions not necessarily the final outcome
  - the agency's objection to disclosure
  - the need for some confidentiality to allow the agency to operate openly and honestly to enable it to get to the truth and learn from mistakes
  - the agency had engaged in open disclosure with the patient and had informed him of all aspects of the events that had led to the mistaken diagnosis.
40. Whilst this is an improvement over the scarce balancing of interests provided to the applicant in the agency's determination, I still consider this submission indicates an inadequate consideration of the public interest.
41. In the circumstances of this review the agency also failed to identify what I consider to be two major factors in favour of disclosure which are:
- providing an individual with information of special interest to them
  - providing documents of community interest in that they contain information of relevance to public confidence in the public health system
42. Whilst the agency identified that there is an interest in a patient being able to gain access to information pertaining to themselves, it vastly understates the special interest the applicant had in the circumstances of this application.
43. The applicant sought any documents that relate to a missed diagnosis of cancer which ultimately led to him passing away. There was a substantial special interest in the information in the documents which would have been relevant to him.
44. The documents in question would still be released to Mr Boyer and Ms Burg, and I consider that Ms Burg would share a similar substantial interest in the information contained in the documents.
45. There is also a substantial community interest in the information in the documents. Generally any information that may shed light on how a member of the public was potentially failed in his treatment by a public agency would be of great interest to the public in general. That is especially so when the potential failure had such a serious outcome.
46. The factors against disclosure identified by the agency do not have strong weight. In particular 'the agency's objection to disclosure' is an arbitrary factor. This factor has no relevance to whether disclosure would, on balance, be contrary to the public interest. The statement 'the agency objects to disclosure' immediately invites the question 'on what basis?' That an agency simply objects to disclosure should not in and of itself inform any consideration of whether a document's release would be contrary to the public interest.

47. Another issue with the agency's identified factors is the suggestion that open disclosure had occurred with the patient and he had been informed of 'all aspects of the events' that had led to the unfortunate diagnosis, and that the draft documents could have an impact on a patient and/or their family when the documents reveal information that was not necessarily a final outcome.
48. On my reading of the documents the information which has been redacted by the agency predominantly pertains to a singular issue. If the patient had been made aware of all aspects of the events involved in the diagnosis he received, it is difficult to agree that the release of the redacted information would now mislead the patient's surviving family members.
49. With regard to the prospect that release of the redacted information may have an impact on the agency's ability to operate openly and honestly during its own internal deliberative processes, I have had regard to the decision of the District Court in the matter of *Treglown v SA Police*.<sup>6</sup> In that case Herriman J referred to the matter of *Pemberton and The University of Queensland*<sup>7</sup> and cited the following statement:<sup>8</sup>

... that the public interest would be injured by the disclosure of particular documents because candour and frankness would be inhibited in future communications of a similar kind ... should be disregarded **unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind, and that tangible harm to the public interest will result from that inhibition.**

Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest.

[Emphasis by Herriman J]

50. Herriman J went on to state:<sup>9</sup>
- It appears to me that whilst it may be presumed that the prospect of disclosure will not ordinarily inhibit candour such as to be contrary to the public interest, that presumption is rebuttable ... It would be idle to speculate as to the range of circumstances which might fall outside of that presumption: each case must be considered on its merits.
51. Taking the above view of the District Court into consideration, I do not consider that the agency has sufficiently made out that disclosure of the redacted information would inhibit the agency's candour in its internal communications to the extent that it would be contrary to the public interest. Whilst accepting that there may be some sensitivity behind the discussion of complicated medical issues, the information under discussion appears to be policy related rather than medical in nature.
52. The agency has not laid a factual basis for rebutting the presumption that the prospect of disclosure would not inhibit candour.
53. On my reading of the documents, the issues that have been redacted are of substantial public interest. I do not consider that an argument has been clearly made that disclosure would be contrary to the public interest.

<sup>6</sup> *Treglown v SA Police* [2011] SADC 139.

<sup>7</sup> *Pemberton and the University of Queensland* [1984] QICmr32.

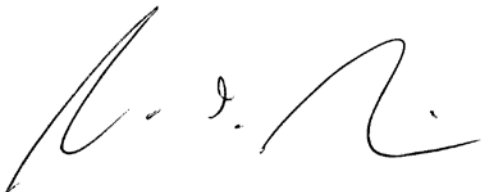
<sup>8</sup> *Treglown v SA Police* [2011] SADC 139 [157].

<sup>9</sup> *Treglown v SA Police* [2011] SADC 139 [159].

54. I am not satisfied that the agency has justified that the information contained within the documents is exempt pursuant to clause 9(1), and my view is that all information claimed by the agency to be exempt under clause 9(1) should be released in full.

**Determination**

55. In light of my views above, I vary the agency's determination to the extent that all information claimed by the agency to be exempt under clause 9(1) should be released in full.

A handwritten signature in black ink, appearing to read 'W. J. Lines', written in a cursive style.

Wayne Lines  
**SA OMBUDSMAN**

14 August 2020

## APPENDIX

### Procedural steps

Date	Event
12 June 2019	The agency received the FOI application dated 12 June 2019.
12 July 2019	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>
18 November 2019	The agency received the internal review application dated 18 November 2019.
24 December 2019	The agency varied the determination.
7 January 2020	The Ombudsman received the applicant's request for external review dated 7 January 2020.
9 January 2020	The Ombudsman advised the agency of the external review and requested submissions and documentation.
24 January 2020	The agency provided the Ombudsman with its submissions and documentation.
30 July 2020	The Ombudsman issued his provisional determination and invited submissions from the parties.

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

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