

Determination

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

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| Applicant | Mr Chris Picton MP |
| Agency | Yorke and Northern Local Health Network |
| Ombudsman reference | 2019/07524 |
| Agency reference | CHSACORP173471 |
| Provisional 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:

Any and all Commonwealth or State reports regarding the accreditation safety and/or quality of State Government-managed aged care facilities.

2. The applicant subsequently narrowed the scope of his request to:

Any and all State reports regarding the accreditation, safety and/or quality of State Government-managed aged care facilities. From 18 March 2018

Background

3. For ease of reference, the procedural steps relating to the application are set out in the appendix.

Jurisdiction

4. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.
5. The applicant lodged his application for external review beyond the 30 day statutory period. In my provisional determination, I proposed exercising my discretion under section 39(4) to extend the time for making the application.
6. In proposing to exercise my discretion to extend the time for making an application, I had regard to the applicant's explanation for the delay which was based on communications with the agency assuring him that an internal review determination would be made even though the statutory time frame had passed, and that I do not consider the agency would be prejudiced if the extension was granted. As the agency did not object to this proposed extension, I now confirm it.

Provisional determination

7. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 24 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.
8. As I have not received any further submissions my substantive views are the same as those expressed in my provisional determination.

Relevant law

9. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
10. 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 clauses are of relevance to this review:

6–Documents affecting personal affairs

- (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

16–Documents concerning operations of agencies

- (1) A document is an exempt document if it contains matter the disclosure of which -
 - (a) could reasonably be expected -
 - (i) to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency; or
 - (ii) to prejudice on the attainment of the objects of any test, examination or audit conducted by an agency; or
 - (iii) to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or
 - (iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions; or
 - (v) to have a substantial adverse effect on the conduct of industrial relations by an agency; and
 - (b) would, on balance, be contrary to the public interest.

11. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
12. 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.

¹ *Freedom of Information Act 1991*, section 12.

Documents in issue

13. The agency originally did not identify any documents within the scope of the application prior to the applicant commencing this external review.
14. Subsequently and separate to this external review process, SA Health published 44 audit reports on its website. The published reports featured numerous redactions.
15. The applicant agreed to treat the 44 audit reports as documents found within scope of his application, and for the external review to consider the exempt information within those documents.
16. The redactions were initially purported to be made pursuant to clause 6(1) as the information related to personal affairs.
17. The agency made submissions to me in respect of the redactions to the audit reports. Through agreement with the applicant and agency on an issue of scope, the agency has revised its submissions with respect to ten of the audit reports. Those ten audit reports now form the basis of this external review.
18. The agency has submitted that the ten documents contain information related to personal affairs and that information is exempt pursuant to clause 6(1).
19. The agency has further submitted that four documents contain information concerning the operation of its functions as an agency, and that information is exempt pursuant to clauses 16(1)(a)(i) and 16(1)(a)(ii).

Issues in this review

20. The issue for me to determine is whether the agency has justified the exemptions it has claimed in redacting information from the ten audit reports.

Consideration

21. As a preliminary matter, all the documents in this review have numerous redactions spread across multiple pages with each instance raising differing considerations.
22. For ease of reference and to preserve the current status of information claimed to be exempt, I will not be discussing my tentative views with regard to each specific individual exemption. Rather I have prepared a marked up version of the documents for the agency to consider which specific exemptions I have proposed to vary.
23. For the purpose of providing my view as to whether the agency has justified the exemptions it has claimed I will discuss my approach to each exemption clause generally.

Clause 6 - Information concerning personal affairs

Documents 1 - 10

24. The agency has claimed ten documents contain information concerning the personal affairs of any person, and that in those instances the information is exempt pursuant to clause 6(1).
25. For a document to be exempt pursuant to clause 6(1):
 - it must contain information concerning the personal affairs of any person (not including the applicant); and
 - the disclosure of that information would be unreasonable.

26. The term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act. Among other things, it provides that 'personal qualities or attributes' are a person's personal affairs. The term has also been held to involve 'matters of private concern to an individual'² and the 'composite collection of activities personal to the individual concerned'.³
27. For the majority of the information marked as exempt under clause 6(1) I would consider that it attracts the definition of a person's 'personal affairs' and on that basis I am satisfied that information concerning aged care recipients is information that falls under clause 6(1).
28. However there are several instances where I disagree that the information falls under the definition of 'personal affairs'. Such instances are where redactions are of an anonymous person's profession and similar circumstances.
29. In some instances I agree that a direct reference to a person's position title along with their remuneration level and a statement about that person may attract the status of personal affairs. The combination of the information provides the potential identification of a specific person and that person's attributes such as what level of qualifications and experience they have and some descriptor of their behaviour.
30. However in instances where an anonymous person's job is mentioned merely as a profession title, for example if a statement were made about a carpenter, I would not consider that information to be correctly classified as someone's 'personal affairs'. To identify an anonymous person as a carpenter does nothing that would reveal the personal qualities or attributes of that person, other than to acknowledge that a person exists, and that they work as a carpenter.
31. There are further instances where I am not convinced that information concerning staff members attracts the quality of personal affairs. I will discuss those instances in further detail when specifically discussing information concerning the personal affairs of staff later in this review.
32. Where the majority of the information does fall under the definition of personal affairs, the second step in ascertaining whether clause 6(1) applies is whether disclosure would be unreasonable.
33. In the matter of *Hall v SA Police*⁴ the District Court considered the following factors as relevant in determining whether disclosure of information concerning the personal affairs of any person would be unreasonable:⁵
 - the sensitivity (past or present) of the personal information;
 - any view about the disclosure expressed by the person to whom the personal information relates;
 - the relationship between the personal information and any other information in the documents;
 - 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
 - i. the information in the document other than the personal information; or

² *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625 citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1986) 13 FCR 85 at 88-89.

³ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

⁴ *Hall v SA Police* [2019] SADC 5.

⁵ *Hall v SA Police* [2019] SADC 5 [166].

ii. the personal information.

34. The following dicta from *Page v Metropolitan Transit Authority*⁶ was referred to by the District Court in support of the above factors:⁷

... a balancing of interests: the right to personal privacy of an individual whose personal affairs may be unreasonably disclosed by granting access to the information and the object of the Act to extend as far as possible the right of the community to have access to information in the possession of the Government or Agencies. More particularly, this balancing exercise requires a consideration of all the circumstances, including the interest that the applicant has in the information in question, 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, and whether the information has any current relevance.

35. From the above factors it is clear that a number of considerations need to be taken into account when determining whether disclosure would be unreasonable. Due to the number of factors involved, and the circumstances involved in this external review, I do not consider the question before me to be one of a neat balancing of interests. Rather the issue in this review turns on a question of how the above factors apply to the unique circumstances of individual pieces of information throughout the documents in issue.
36. However one factor that I consider attaches significant weight to this external review is whether the information has any current relevance. Given that the documents concern the audits of residential aged care clinical facilities, I believe the information is of significant relevance to contemporaneous issues. In the wake of the ongoing Royal Commission into Aged Care Quality and Safety following revelations about the quality of care at the Oakden nursing home, the release of any information that would shed light on the conditions of aged care facilities has significant relevance.
37. This is not to say that there is a public interest in the release of information concerning the personal affairs of any person due to the above reasoning. Rather, the above reasoning forms a single yet substantial factor in considering all of the circumstances in this review.
38. Another factor that I consider relevant to this external review in particular is a statement made by Pagone AJA in *Victoria Police v Marke* where consideration was given to the equivalent clause in the Victorian *Freedom of Information Act 1982*.⁸ Pagone AJA's view was endorsed in *Hall v SA Police* and he stated:⁹

A decision-maker is required by the section to predict about the disclosure of a document that its disclosure would involve the unreasonable disclosure of information relating to the personal affairs of a person. That requires the decision-maker to identify all of the facts and matters relevant to the question to be determined and make an evaluative judgment based upon them. The use in the section of the word 'would' indicates that the decision-maker must have a high degree of confidence about the conclusion: it is not enough for the decision-maker to conclude that disclosure of the document might or could result in the unreasonable disclosure of the personal information in question. The need for that degree of confidence reflects the primary objective of the Act to provide public access 'as far as possible'.

39. I draw particular emphasis on the view that determining whether disclosure 'would' be unreasonable is different to determining whether disclosure 'could' or 'might be' unreasonable. There are many instances throughout the documents where it is evident

⁶ *Page v Metropolitan Transit Authority* (1988) 2 VAR 243.

⁷ *Page v Metropolitan Transit Authority* (1988) 2 VAR 243 [246] quoted in *Hall v SA Police* [2019] SADC 5 [167].

⁸ *Victoria Police v Marke* [2008] VSCA 218.

⁹ *Victoria Police v Marke* [2008] VSCA 218 [97] quoted in *Hall v SA Police* [2019] SADC 5 [164].

that disclosure of information could be unreasonable. The issue to determine however is whether disclosure would be unreasonable, and that determination relies on the unique circumstances of each piece of information and all the circumstances surrounding it.

40. I note that the information relating to the personal affairs in the documents in issue relate to aged care recipients and their families, and also to staff and personnel working in the aged care facilities. My consideration for unreasonable disclosure of information concerning aged care recipients and their families differ from my consideration of unreasonable disclosure of information about staff and employees. As such I will discuss my views separately.

Aged care recipients and their families

41. The issues with information concerning aged care recipients within the documents are difficult to summarise neatly. The agency has submitted that as these documents are audit reports related to small country town aged health care facilities, due to the small size of the populations involved, that many patients would be readily identifiable by their communities by the release of information pertaining to their health conditions, personal opinions and feelings.
42. I agree that the small size of the communities would make patients easier to identify than if the audits concerned a larger population. However I disagree that the level of redactions claimed by the agency is necessary in all instances to ensure that patients are not readily identifiable and to prevent disclosure of their personal affairs.
43. An issue arises that the documents have already been published with redactions made that were not in line with FOI considerations. As a result, certain pieces of information that would have been preferable to exempt under clause 6(1) have already been released, which makes the further release of related information more likely to make patients identifiable and to increase the level of sensitivity involved. As it is not possible to redact information that has already been released to the world at large, this issue is one that must be taken into account.
44. In considering the factors referred to in paragraph 33, I do not consider that it would be practicable to obtain the views of the individuals whose information is discussed in the audits as to their thoughts on disclosure. Whilst it may be possible to identify some of the patients by analysing the entirety of the information contained in the documents, as the audit is anonymised and documents discuss information from across ten different locations, I would not consider it feasible to track down and discuss the information with each patient without requiring an excessively unreasonable amount of time and resources.
45. I have considered that the information regarding patients was not disclosed by the patients themselves to the audit, but rather comprise case notes made by staff. I have also taken into account that the information concerns patients who continue to receive care in a facility that by circumstance they must reside in on a permanent basis. Due to this I would be of the view that any information regarding a patient's personal affairs which is unique to them is information that they would not wish to be disclosed.
46. As such, for the purpose of this review I consider that circumstances where the release of information would identify a patient and reveal something specific about that patient, either through circumstantial descriptions or revealing a peculiarity or personal attribute, then disclosure would be unreasonable.
47. In circumstances however where it is not clear, then I consider that a discretionary judgment needs to be made.

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48. If I consider that disclosure of information could identify a patient and that it may reveal something about a specific person's personal attributes, I would then weigh that probability of it being unreasonable against the other circumstances of the document. If I consider that there is even a small potential that information could be related to a person's personal affairs and there is no competing argument why the information should be released, I would consider it unreasonable to release the information. However if the potential is unlikely, and there would be a substantive benefit to disclosing the information, then I would make a judgment on the reasonableness of disclosure depending on the circumstances of that unique situation.
 49. To summarise my view on the exemptions claimed by the agency I will explain the rationale that I have adopted in approaching the exemptions through hypothetical scenarios.
 50. Where information would reveal any chronic peculiarity of an unnamed patient, if that information does not reveal anything other than the peculiarity of the patient, I would consider that disclosure would be unreasonable. Out of an abundance of caution I would consider this to be the case regardless of how expected it may be for an aged care patient to have that peculiarity, for example if the information would disclose that a patient has arthritis or that they are obese.
 51. If however the peculiarity were one of a temporary nature, I would be less inclined to consider there is potential for unreasonable disclosure. For instance, consider a scenario which described a patient who, whilst eating lunch on 31 July 2018, fell and hit her head and later developed a concussion. I would consider that redacting the circumstances, which is that a female patient was eating lunch on a particular day, would be enough to remove any potential that it could reveal a person's identity or their personal affairs. Without any other circumstances, and as it is not a permanent condition, it could be expected to have occurred to any patient at any given time.
 52. In instances where a chronic peculiarity of a patient were to provide context to other information, I would then consider the potential that the information may reveal a patient's personal affairs against other circumstances involved.
 53. Consider an unnamed patient who has who has high cholesterol. If all the information would reveal is that an anonymous patient has high cholesterol, I would consider disclosure unreasonable as there is nothing to be gained from releasing information that could potentially be sensitive.
 54. However if as an example, the information concerned an anonymous patient with high cholesterol, and then the information goes on to say that the patient has no dietary needs listed in their file, I would not be of the mind that disclosure would be unreasonable.
 55. The above scenario provides context to the surrounding information in the document that alters its substance. A statement that 'Patient Y has high cholesterol. Patient Y does not have any dietary needs listed' is substantially different to a statement 'Patient Y has [redacted]. Patient Y does not have any dietary needs listed' where [redacted] could potentially be anything from poor eyesight to a broken ankle which would have no bearing on the patient's dietary needs.
 56. To further expand on this, if in another area of the document there were a statement 'A patient who has high cholesterol was found stealing crisps from another patient's room', my judgement on the unreasonableness of disclosure would again differ.

57. The above statement no longer merely discloses a peculiarity of a patient who is not having their medical needs properly addressed by the care facility, but reveals something specific about the personal affairs of a person who is potentially identifiable.
58. Any release of the above information would reveal that this patient, who has high cholesterol, and is likely Patient Y referred to in a previous instance, would steal from another patient. In this instance, even if the fact that the patient has high cholesterol might be relevant to the fact that they are obtaining foods with high fat contents without supervision, it does not to my mind provide a justifiable reason for disclosure. In such an instance there is a far greater potential that the information can identify a person, that information is specific to that person, and says something about that person's personal attributes. I would consider that disclosure in such an instance would be unreasonable.
59. I have used the above rationale in determining what information I consider exempt under clause 6(1) in relation to aged care recipients. I have provided a marked up version of documents for the agency to view which highlights the information that I agree is exempt. Any information that is not highlighted should be released.

Staff and employees

60. Where information may concern the personal affairs of staff and other workers related to the aged care facilities I consider that generally there is a decreased likelihood that the release of information is unreasonable.
61. My reasoning is twofold. First, as with the aged care residents, the information concerning employees is anonymised. For staff members performing their work duties, who have no described peculiarities or medical issues, located in a work place they do not permanently reside in, I am less convinced that they are potentially identifiable based on the information contained in the documents.
62. Secondly the information concerning staff generally relates to performing their duties in the course of employment. I consider that information is less sensitive and is less likely to have been obtained involuntarily. As staff members, whilst there was an obligation to comply with audit procedures and provide responses, the collection of information was related to their employment which would have been assumed to have been a prospect of being employed in an aged care facility. This expectation that their work performance may be commented on and recorded for evaluation purposes differs significantly from patients who reside in the facilities receiving required care.
63. To further expand on this point, having regard to information concerning the performance of staff members in their line of work, I am not convinced that the information would properly be classified as information relating to their personal affairs.
64. In the matter of *Priebe v SA Police*¹⁰ the District Court drew particular attention to the definition of personal affairs under the FOI Act. A distinction was made that the Act includes in its definition 'employment records' but not 'employment record', which the District Court considered to be significant.¹¹ The District Court provided the following statement:¹²

Employment records will include, for example, such details as name, age and date of birth, address, next of kin, records of leave taken, of leave accrued, applications for promotion and, perhaps, opinions of other officers about the constable's performance of duties. Employment records may well include, if a constable has acted improperly and

¹⁰ *Priebe v SA Police* [2007] SADC 119.

¹¹ *Priebe v SA Police* [2007] SADC 119 [19].

¹² *Priebe v SA Police* [2007] SADC 119 [19].

has been cautioned or reprimanded, a record of that fact. But, in my view, employment records do not include accounts of a constable's performance of his or her public duty in documents prepared in the normal course of a police investigation or prosecution.

65. To my mind, I would consider that an audit report containing anonymised accounts of statements made by staff in the course of an audit would be analogous to the situation referred to above. The statements contained in the documents are not statements that have been collated for the purpose of informing a reader of the staff members specific work history or records, but rather they are statements taken to create a report documenting the overall performance of specific work sites in line with specific standards.
66. Given that the documents are anonymised and that they are not employment records, in the majority of instances within review I do not consider the information is appropriately captured by clause 6(1), and in the event that it was properly considered to be information related to a worker's personal affairs, I am not persuaded that release would be unreasonable.
67. In situations where the information reveals something specific about the attributes or quality of staff members in the personal capacity I would be more inclined to treat the information as personal affairs, but only where it reaches a threshold where that information is identifiable and could apply to a specific individual.
68. Accordingly I vary the agency's determination with respect to information concerning staff and employees in accordance with the marked up versions of documents that I have prepared for the agency's viewing.

Clause 16 - Documents concerning operations of agencies

Documents 1, 3, 5 and 7

69. That agency has submitted that documents 1, 3, 5 and 7 contain information concerning its operations as an agency, and consequently that information is exempt pursuant to clause 16(1)(a)(i) and 16(1)(a)(ii).
70. There are numerous instances of redactions throughout the documents claiming clause 16 and at times information has been claimed exempt as a combination of clause 16 and clause 6.
71. A document is validly exempt under clause 16(1)(a)(i) and (ii) if disclosure:
 - could reasonably be expected to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency
 - could reasonably be expected to prejudice on the attainment of the objects of any test, examination or audit conducted by an agency
 - would, on balance, be contrary to the public interest.
72. Based on the case law available and construction of the wording in the provisions, I do not consider that any limb of clause 16 applies to the documents under review.
73. The agency has submitted the exempt information, if released, could heavily reduce staff participation in future audits.
74. The agency has conceded that staff members are obligated to participate in audit processes, however the prospect that the disclosures they make during the audit process may be made readily available would reduce their willingness to participate and provide free and frank disclosure.

75. Whilst acknowledging the agency's point of view, the concern raised by the agency is not one that is captured by clause 16(1)(a)(i) or 16(1)(a)(ii).
76. The application of clauses concerned with documents concerning the operation of agencies is discussed in the Australian Information Commissioner's FOI Guidelines.¹³ Whilst the guidelines discuss the equivalent provisions in the Commonwealth *Freedom of Information Act*, the wording used in the provisions remains the same.
77. In discussing whether a document's release could reasonably be expected to prejudice the effectiveness of any method or procedure of tests, examinations or audits, the Information Commissioner considered the following as examples of the types of circumstances where prejudice would occur:
- providing forewarning of the usual manner of audits
 - facilitating cheating, fraudulent or deceptive conduct by those being tested or audited¹⁴
 - permitting pre-prepared responses which could compromise the integrity of the testing process.¹⁵
78. With regard to whether a document's release could reasonably be expected to prejudice the attainment of the objects of any test, examination or audit, the guidelines provide the following examples where the AAT has accepted that disclosure would be prejudicial:
- allow for plagiarism or circulation of questions or examination papers that would lead to a breach of the integrity of the examination system¹⁶
 - allow for examiners to be inhibited in future marking by the threat of challenge to their marking¹⁷
 - allow scrutiny of past test results or questions for the pre-preparation of expected/acceptable responses, rather than honest or true responses, for example in psychometric testing to ascertain an applicant's eligibility for a certain pension¹⁸ or patent examiner examinations.¹⁹
79. Based on the above examples I consider that the ambit of clauses 16(1)(a)(i) and 16(1)(a)(ii) are focused on whether the release of information could have a detrimental effect on the specific methodology of an examination process by revealing how it operates. This would then have to lead to an outcome where subjects of an examination could potentially possess knowledge which would lead them to alter their answers in a way which would be counter to the overall operation and objects of the examination.
80. In light of the above reasons I do not consider that a risk that employees would be less willing to provide free and frank responses to an audit is captured under the scope of clauses 16(1)(a)(i) and 16(1)(a)(ii).
81. I am also mindful that the issue claimed by the agency, that release of information could reduce participation in its audit functions by staff, could potentially fall under clauses 16(1)(a)(iii) and (iv) which provide that a document is an exempt document if its disclosure:
- could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel

¹³ *FOI Guidelines* (Office of the Australian Information Commissioner) available at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>.

¹⁴ *Ascic and Australian Federal Police* [1986] AATA 108.

¹⁵ *Re Crawley and Centrelink* [2006] AATA 572.

¹⁶ *Ascic and Australian Federal Police* [1986] AATA 108.

¹⁷ *Ascic and Australian Federal Police* [1986] AATA 108.

¹⁸ *Re Crawley and Centrelink* [2006] AATA 572.

¹⁹ *Re Watermark and Australian Industrial Property Organisation* (1995) 70 FOIR 61.

- could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel
 - would, on balance, be contrary to the public interest.
82. In considering the above clauses, I am not of the view that either would apply under the circumstances put forward by the agency. Both clause 16(1)(a)(iii) and (iv) require that a 'substantial adverse effect' could be reasonably expected to occur. The phrase 'substantial adverse effect' is not defined in the FOI Act, however the District Court has held that it relates to an effect that is sufficiently serious or significant to cause concern to a properly informed, reasonable person.²⁰ The test was stated to be 'a high one'.²¹
83. To my mind, the argument presented by the agency does not meet the required threshold to enliven either clause.
84. Accordingly I do not consider any provision of clause 16(1) to apply to the documents in question.

The public interest

85. For the sake of argument I will address whether, on balance, disclosure would be contrary to the public interest.
86. In its submissions, the agency referred to the following public interest factors favouring non-disclosure:
- release of information may have a substantial impact on the conduct of future activities of the same nature
 - level of staff participation during future audits could be heavily reduced
 - disclosure would create prejudice against the effectiveness of the interview process and attainment of detailed and accurate audit results.
87. The agency acknowledged two public interest factors in favour of disclosure which are:
- fulfilling the objects of the FOI Act
 - promoting transparency in the audit process of government activities.
88. A significant public interest factor that was not addressed by the agency is providing the public with information related to issues of contemporaneous concern.
89. At present there is an overwhelming public interest in disclosure of any information that would shed light on the quality of care that aged care recipients receive from government institutions. As discussed earlier this interest is in the wake of the ongoing Royal Commission into Aged Care Quality and Safety following revelations concerning the quality of care provided at the Oakden nursing home.
90. The fact that the agency did not acknowledge this factor, let alone address it in any meaningful way, evinces a substantial deficiency in conducting a balancing test in considering whether the public interest favours non-disclosure as required by the FOI Act.
91. The contemporaneous public interest in overseeing the quality of care given to vulnerable members of society in South Australia has only become greater following the death of Ann-Marie Smith in April this year. Whilst acknowledging that Ann-Marie Smith received care under the National Disability Insurance Scheme and was not an aged care resident, I still consider it a relevant factor in addressing public concern over

²⁰ *Konieczka v South Australian Police* [2006] SADC 134 [15], referring to *Re Thiess and The Department of Aviation* (1986) 9 ALD 454.

²¹ *Konieczka v South Australian Police* [2006] SADC 134 [18].

the care received by vulnerable people in general. I note that at the time of the agency's most recent submissions this incident had already occurred and was highly publicised.

92. In considering the above factor favouring disclosure, I note that it is weighed against the agency's concerns that release of information 'may' or 'could' have negative impacts on its operations.
93. Whilst acknowledging that the prospect of staff being less willing to provide free and frank feedback during an audit process would be contrary to the public interest, I am not convinced by the agency's submissions that this is a likely prospect to occur or that even if it were to occur, that the inhibition would be to such an extent that it would outweigh the other public interest factors favouring disclosure.
94. To my mind, the agency has not provided a sufficient argument as to why the public interest would favour non-disclosure when it failed to address a significant factor in addressing public concerns over ongoing issues within the aged care sector and the care provided to vulnerable people in general.
95. Accordingly, even if I were to be of the view that any provision of clause 16(1) applies to the documents in question, I would not be satisfied that disclosure would, on balance, be contrary to the public interest.

Determination

96. In light of my views above, I vary the agency's determination in accordance with my marked up version of documents prepared for the agency's viewing. The documents highlight the information that I agree is exempt.



Wayne Lines
SA OMBUDSMAN

19 August 2020

APPENDIX

Procedural steps

| Date | Event |
|------------------|---|
| 18 April 2019 | The agency received the FOI application dated 16 April 2019. |
| 18 May 2019 | 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 |
| 14 June 2019 | The agency received the internal review application dated 14 June 2019. |
| 28 June 2019 | The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³ |
| 15 August 2019 | The Ombudsman received the applicant's request for external review dated 15 August 2019. |
| 26 August 2019 | The Ombudsman advised the agency of the external review and requested submissions and documentation. |
| 28 February 2020 | The agency provided the Ombudsman with its submissions and documentation. |
| 10 March 2020 | The Ombudsman advised the agency that fresh submissions may be required due to apparent issues in its submissions and documentation. |
| 20 May 2020 | The agency provided the Ombudsman with fresh submissions and documentation. |
| 30 July 2020 | The Ombudsman issued his provisional determination and invited submissions from the parties. |

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

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

³ *Freedom of Information Act 1991*, section 29(5).