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Determination

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

Applicant:	Ms Bernadette Mulholland
Agency:	Central Adelaide Local Health Network
Ombudsman reference:	2021/00492
Agency reference:	CALHN/FOI/2021/033
Determination:	The determination of the agency is reversed.
Date of Ombudsman's determination:	1 June 2021
Issues considered:	Definition of personal affairs Unreasonableness (personal affairs)
Exemption clauses relied upon:	6(1)
Legislation considered:	<i>Freedom of Information Act 1991</i>

Terms of the original application:

All employment contracts between Dr Cindy Molloy and Central Adelaide Local Health Network

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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 employment contracts between Dr Cindy Molloy and Central Adelaide Local Health Network

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. On 4 February 2021 my Legal Officer requested that the agency provide my Office with relevant documents and submissions by 19 February 2021. On 12 February 2021, the agency advised my Manager of Information and Audit (**the Manager**) that the internal review application was received by the agency on 1 February 2021, and that the agency was therefore still within time to issue an internal review determination.
5. Noting that the internal review application and associated cheque to cover the application fee are both dated 18 January 2021, it seems unlikely that the application was not received by the agency for a further two weeks. I am also concerned that the only evidence of the agency not receiving the internal review application until 1 February 2021 is a handwritten note on the application.
6. That said, I have nevertheless accepted 1 February 2021 as being the relevant date for the internal review application being received and, on this basis, treated the applicant's application for external review as becoming valid on 15 February 2021 when the agency failed to issue an internal review determination.
7. The Manager subsequently followed up on this matter with the agency on multiple occasions. On 10 March 2021 the agency was requested to provide the relevant documents and submissions by 25 March 2021. Having not received a response by that date, the Manager offered an extension of time until 30 March 2021 and advised that, if the relevant documents and submissions were not provided by that date, I would proceed to issue a provisional determination in the absence of same. On 30 March 2021 the agency requested a further brief extension until close of business 1 April 2021, which was granted.
8. On 8 April 2021, having not received the requested documents and submissions, I issued my provisional determination proposing to release any documents within the scope of the access application.
9. On 23 April 2021 the agency provided the requested documents and submissions. In light of the agency's substantially revised position, I considered it appropriate to issue a revised provisional determination.

10. On 12 May 2021 I provided my revised tentative view about the agency's determination to the parties. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to reverse the agency's determination.
11. By emails dated 26 May 2021, the agency and interested party (IP) separately provided submissions in response to my revised provisional determination.
12. The agency submitted that although the 2019 version of the SA Health Visiting Medical Specialists Enterprise Agreement is available online, the interested party's contract was entered into pursuant to the SA Health Senior Visiting Neurosurgeons (unregistered) Agreement 2013 which is not publicly available.
13. Whilst I accept that the 2013 agreement may not be available to the public, having reviewed the remuneration amount in the documents and Schedule 4 of the 2019 agreement, it appears that there is very little difference between the two agreements. The remuneration amount appears to coincide almost exactly with the 2019 agreement.
14. The agency has also provided a separate submission about the IP's employment conditions; my obligation to avoid disclosing information claimed to be exempt prevents me from discussing this condition in any further detail.
15. That said, in my view the employment condition referred to in the agency's submissions is not evident from the contents of the document. I therefore do not consider it to be a relevant consideration in this matter.
16. In response to my provisional determination the IP objected to disclosure of her remuneration as it appears in the documents in issue, however the IP has not identified any error in my revised provisional determination or provided any other reason why disclosure would be unreasonable.
17. In light of the above, I am not persuaded to alter the views expressed in my revised provisional determination.

Relevant law

18. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
19. 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.
20. The following clause of Schedule 1 of the FOI Act is relevant to my external 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).
21. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.

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

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22. 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

23. Although the agency provided a response to the applicant's FOI application within 30 days, it did not specify the number of documents identified as being within scope. The agency did not determine the applicant's internal review application within the statutory time frame and was therefore deemed to have confirmed its original determination to refuse access to any documents within scope.²
24. In response to my provisional determination proposing to release any documents within scope, the agency provided copies of the documents in issue, together with the agency's revised position as to the exemption status of the documents. I accept the agency's revised position as communicated in its submissions to this Office. Accordingly, where the agency has proposed to release information, I have not considered whether that information may be exempt.
25. The agency identified three documents within the scope of the application. The agency's revised position is that all three documents are partially exempt.

Issues in this review

26. Having regard to the agency's submissions and the exemption clauses provided in Schedule 1 of the FOI Act, it is for me to determine whether to confirm, vary or reverse the agency's determination in relation to the three documents in issue.

Consideration

27. The agency's revised position is that the three documents in issue are partially exempt pursuant to clause 6(1), in particular:
- ...Dr Molloy's address, her remuneration and her employment level as it is considered to be an unreasonable disclosure of her personal affairs.
28. The address included in each of the three documents is in fact a business address rather than a residential address. In light of this, and noting that the agency has provided no submissions as to why the address should constitute personal affairs, I am not satisfied that clause 6(1) is applicable to the address.
29. In relation to the remuneration and employment level, although the agency has again failed to explain why these details constitute personal affairs, I note that the definition of personal affairs includes 'employment records' and 'financial affairs'.³ I am also mindful that it is generally accepted that a person's salary is information concerning their personal affairs.⁴
30. As to whether disclosure would be unreasonable, the agency has stated that the information is sensitive and is not publicly available. It is unclear why the agency has concluded that this alone would make disclosure unreasonable.
31. I note that all three documents specify the nature of the position being offered to Dr Molloy and that the agency has not claimed this information to be exempt. In my view,

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

³ *Freedom of Information Act 1991*, section 4

⁴ See for example: *Lower Burdekin Newspaper Company Pty Ltd and Lower Shire Council* [2004] QI Cmr2, *Asherv Department of State & Regional Development* [2002] VCAT 609.

this information, in conjunction with the SA Health Visiting Medical Specialists Enterprise Agreement 2019, which is available online, is sufficient to determine the associated remuneration.

32. Additionally, I am mindful that SA Health Job Packs can be found online, advertising similar positions and specifying the employment level.
33. I have also had regard to comments made by my Queensland counterpart:

Information about the gross salary paid to an employee of a government agency has a dual character. It is both information about the income of an identifiable individual (and hence information concerning that individual's personal affairs) and information about the cost of having the duties of the relevant position performed for the benefit of the public.

...
The public has a strong, legitimate and abiding interest in having access to sufficient information to enable scrutiny of whether funds raised by government are expended efficiently and effectively in furtherance of the wider public interest. This extends to scrutiny of whether the public is obtaining value for money from performance of the duties of particular positions for which a government has decided to allocate funding.⁵

34. I agree with the views expressed above and, in conjunction with the amount of information publicly available, I am not satisfied that disclosure of the remuneration and employment level would be unreasonable.

Comment

35. In light of the circumstances of this external review, I consider it appropriate to comment on the conduct of the agency.⁶ I emphasise that my view of the agency's conduct is not part of the reasoning for my determination.
36. I first note the agency's conduct leading up to this external review, in particular the agency's handling of the initial FOI application. On 15 December 2020 the agency acknowledged the FOI application and made the following request of the applicant:

As the information you are seeking is considered to be personal information relating to Dr Molloy we require Dr Molloy's consent to provide the requested information to you. Can you please arrange for written consent from Dr Molly [sic] to be provided to the FOI Office so we can validate and process your application. [sic]

37. This response is concerning to me for a number of reasons. First and foremost, the wording indicates that the agency would not consider the FOI application to be valid unless the applicant provided the requested consent. Provided that an applicant has complied with section 13 of the FOI Act in making an access application, in my view the agency has no discretion to conclude that the application is not valid.
38. Additionally, the requirement to consult with an interested party rests with the agency.⁷ I consider that it was unreasonable for the agency to attempt to shift this obligation to the applicant.
39. I also note that the agency's subsequent notice of determination fell far short of meeting the requirements of section 23 of the FOI Act. The agency's determination was to refuse access to the documents sought, stating only:

I am unable to provide a copy of any contracts between Dr Cindy Molloy and CALHN without Dr Molloy's consent as it would be considered a breach of Dr Molly's [sic] privacy.

⁵ *Lower Burdekin Newspaper Company Pty Ltd and Lower Shire Council* [2004] QICmr 2 at [27].

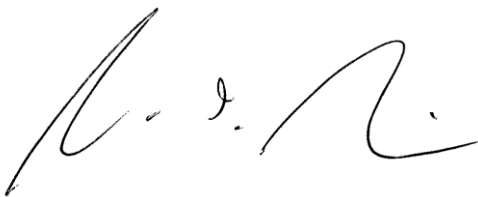
⁶ *Freedom of Information Act 1991*, section 39(16).

⁷ *Freedom of Information Act 1991*, section 26.

40. It appears that, despite acknowledging that the applicant had requested access to documents pursuant to the FOI Act, the agency then treated the FOI application as an informal request for information. The agency did not rely upon any exemption clause in refusing access to the document, nor does it appear that the agency took any steps to identify documents within the scope of the application.
41. Furthermore, the agency failed to advise the applicant of the rights of review conferred by the FOI Act, or the procedures to be followed for the purpose of exercising those rights.⁸
42. Given that the agency regularly deals with FOI applications and has acknowledged that the present application was lodged pursuant to the FOI Act, it is entirely unclear to me why the agency's apparent handling of the FOI application deviates so far from the requirements of the FOI Act.
43. Finally, I consider the agency's submissions in support of its revised position to be lacking to an unreasonable degree. As outlined above, the agency has provided no explanation as to why the information claimed to be exempt constitutes personal affairs, nor has it explained why the fact that information is not publicly available would amount to disclosure being unreasonable.
44. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process. It is concerning to me that the agency did not fulfil this obligation even though there was a lapse of more than four months between when it received the initial FOI application and providing documents and submissions to this Office.
45. When viewed in its entirety, I consider that the agency's conduct in regard to the initial FOI application and in the course of this external review to be unreasonable.

Determination

46. In light of my views above, I reverse the agency's determination such that the documents in issue be released in full.



Wayne Lines
SA OMBUDSMAN

1 June 2021

⁸ *Freedom of Information Act 1991*, section 23(2)(b).

APPENDIX 1

Procedural steps

Date	Event
15 December 2020	The agency received the FOI application dated 15 December 2020.
8 January 2021	The agency determined the application.
1 February 2021	The agency received the internal review application dated 18 January 2021.
3 February 2021	The Ombudsman received the applicant's request for external review dated 3 February 2021
4 February 2021	The Ombudsman advised the agency of the external review and requested submissions and documentation.
12 February 2021	The agency advised that, as the application for internal review was not received until 1 February 2021, the agency was still within time to issue an internal review determination.
15 February 2021	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ¹
15 February 2021	The application for external review became valid.
23 February 2021	The Ombudsman followed up the request for documents and submissions previously made to the agency.
10 March 2021	The Ombudsman made a further request that documents and submissions be provided by 25 March 2021.
29 March 2021	The Ombudsman granted a final extension of time to provide the requested documents and submissions until 30 March 2021.
30 March 2021	The agency requested a further extension until 1 April 2021. The extension was granted.
8 April 2021	The Ombudsman issued a provisional determination in the absence of the requested documents and submissions.
23 April 2021	The agency provided the requested documents and submissions.
12 May 2021	The Ombudsman issued his provisional determination and invited submissions from the parties.
26 May 2021	The agency provided submissions in response to the revised provisional determination.
26 May 2021	The interested party provided submissions in response to the revised provisional determination.

¹ *Freedom of Information Act 1991*, section 29(5).